Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014

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Contents

1. Introduction

1.1 The Minister for Justice and Equality published the General Scheme of the Children and Family Relationships Bill 2014 ("the General Scheme") on 30 January 2014. The stated aim of the proposed legislation 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.

1.2 Section 7 of the Ombudsman for Children Act 2002 provides that the Ombudsman for Children shall advise Ministers of the Government on any matter relating to the rights and welfare of children - including the probable effect of the implementation of proposals for legislation – when requested to do so by a Minister. The Minister for Justice and Equality has sought the observations of the Ombudsman for Children on the General Scheme and on the manner in which it seeks to address children's interests. The following advice has been prepared in response to that request and in accordance with section 7 of the Ombudsman for Children Act 2002.

1.3 In previous advice to Government relating to proposals to reform aspects of child and family law - specifically with respect to the Civil Partnership Bill 2009 and the Adoption Bill 2009 – the Ombudsman for Children's Office stressed the need for legislation to reflect and provide for the reality of children's lives. Those advices highlighted that the need for legal protection does not vary between different family forms; what has varied is the actual level of protection provided by our laws.

1.4 The General Scheme takes as its starting point the need to provide for the diversity of family forms in which children grow up in Ireland today and to place children's best interests at the heart of the legislation. In light of this, the proposals put forward by the Minister for Justice and Equality must be welcomed as a very significant step forward for children and families in Ireland.

1.5 This Office believes that there are a number of areas in which the legislation could be enhanced to better serve the interests of children and conform more fully with Ireland's international human rights obligations, namely with regard to:

- assisted reproduction, including surrogacy;
- guardianship, custody and access;
- safeguarding the interests of children;
- making parenting orders work; and
- child maintenance.

1.6 Any analysis of the General Scheme must also be cognisant of the wider context in which the legislation has been brought forward. This includes:

- the passing of a referendum in November 2012 to strengthen the protection of children's rights in the Constitution;
- the proposals to restructure the courts in order to provide a more specialised forum for family law proceedings; and
- the pending judgment in *M.R. and D.R. and An tÁrd Chláraitheoir Ireland and the Attorney General*[1] (hereafter *M.R. and D.R.*)

1.7 The implications of these developments for the legislation ultimately enacted by the Oireachtas must be borne in mind.

[1] High Court, [2013] I.E.H.C. 91; Supreme Court (judgment pending).

2. International human rights standards

2.1 There is a range of international human rights instruments relevant to children and their familial relationships that have been developed by the United Nations and by the Council of Europe; the principal standards are set out below.

United Nations Convention on the Rights of the Child (UNCRC)

2.2 The UNCRC reflects a broad and flexible approach to the term family, acknowledging in the Preamble that it is the "fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children". This flexible approach has also been endorsed by the UN Committee on the Rights of the Child, the group of independent experts charged with monitoring the implementation of the UNCRC. It has commented that a diverse range of family arrangements may be consistent with providing for a child's care, nurturance, development and well-being, including the nuclear family, the extended family and other community-based arrangements.[2]

2.3 Article 2 of the UNCRC requires States Parties to respect and ensure the rights set out in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Furthermore, Article 2(2) adds protection against "all forms of discrimination or punishment on the basis of the status…of the child's parents, legal guardians or family members." This provision has been interpreted as prohibiting in unequivocal terms the inferior treatment of children based on the relationship status or sexual orientation of their parents or guardians.[3] According to the UN Committee, Article 2 requires States to take appropriate measures which are necessary to ensure the recognition and realisation of all children's rights.[4] This includes a requirement to collect and evaluate disaggregated data in order to identify and monitor discrimination.[5]

[2] UN Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood* (2005) UN doc. CRC/C/GC/7/Rev.1. at pp. 7-9.
[3] U. Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Dublin: Tottel Publishing, 2008) at p. 100.
[4] UN Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (2003) UN doc. CRC/GC/2003/5 at p. 7.
[5] Ibid. p. 12.

2.4 Article 3 of the UNCRC provides that 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. The UN Committee has outlined its understanding of this provision and indicated that it applies, without restriction, to all judicial proceedings and relevant procedures concerning children, including conciliation, mediation and arbitration processes.[6] The Committee has also emphasised that children need to be provided with appropriate legal representation when their best interests are being formally assessed and determined and any decision concerning a child must be motivated, justified and explained.[7] States have been encouraged to draw up a non-exhaustive and non-hierarchical list of elements that could be included in an assessment of a child's best interests by any decision-maker.[8] In addition, the UNCRC imposes an obligation on States to undertake a continuous process of child rights impact assessment to predict the impact of any law on children and the enjoyment of their rights, as well as an obligation to evaluate the relevant law after it has entered into force.[9]

2.5 Under Article 6 of the UNCRC, States are obliged to ensure to the maximum extent possible the survival and development of the child. The term "development" is to be interpreted in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development.[10] Furthermore, States must have regard to the recognition in the Preamble of the UNCRC that the child, "for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."[11] The UN Committee has highlighted that implementation measures should be aimed at achieving the optimal development for all children.[12]

2.6 Article 7 of the UNCRC requires States, as far as possible, to secure the right of all children to know and be cared for by their parents. As far as the child's right to know his or her parents is concerned, the definition of "parents" has been extended to persons who are intimately bound up in the child's identity, including

[6] UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) UN doc. CRC/C/GC/14 at p. 8.
[7] *General Comment No. 14*, pp. 19-20.
[8] *General Comment No. 14,* p. 12.
[9] *General Comment No. 14,* p. 10.
[10] UN Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (2003) UN doc. CRC/GC/2003/5 at p. 4.
[11] UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (United Nations Publications, Geneva, 2007) at p. 93.
[12] UN Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (2003) UN doc. CRC/GC/2003/5) at p. 4.

genetic parents, birth parents and those who cared for the child for significant periods during infancy and childhood.[13] This right is qualified by the phrase "as far as possible" to recognise situations where the child's parent cannot be identified, where the identification of a parent would cause harm to the child's mother or where the State decides that a parent should not be identified.[14] However, despite this qualification, the State has a role to play in creating accessible and expeditious procedures for the assignment of parentage, in order to facilitate and support the full implementation of the child's right to know his or her parents.[15] Moreover, the UN Committee has highlighted that there is a possible contradiction between Article 7 and the policy of certain States to protect the anonymity of donors in cases of assisted reproduction.[16] The Committee has further emphasised that the right of children to know their parents can only be refused on the grounds of best interests in the most extreme and unambiguous circumstances, with children being given the opportunity for this decision to be reviewed at a later date.[17]

2.7 The right of a child to be cared for by both parents implies that children have a right to the active involvement of such persons in their life, beyond contributions of a financial nature.[18] The framing of Article 7 emphasises that this is a right of the child and not a parental right. Furthermore, although this provision is qualified, domestic law must be based on the presumption that it is in the interests of children to be cared for by their parents.[19]

2.8 Article 8 of the UNCRC requires States 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. It has been emphasised that children's best interests and sense of identity can be protected without the need to deny them knowledge of their origins.[20] The concept of identity under Article 8 requires the State to recognise that siblings, grandparents and other family members may be as important to the child's sense of identity as his or her parents are.[21] This Article

[13] UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (United Nations Publications, Geneva, 2007) at pp. 105-106.
[14] Ibid. p. 106.
[15] UN Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties under Article 44 of the Convention: Concluding Observations – Antigua and Barbuda* (2004) UN doc. CRC/C/15/Add.247 at paras 33-34.
[16] UN Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties under Article 44 of the Convention: Concluding Observations – Norway* (2005) UN doc. CRC/C/15/Add.263 at para 10.
[17] UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (United Nations Publications, Geneva, 2007) at p. 107. Therefore, under the terms of Article 7, the State should ensure that information about genetic parents is preserved to be made available to children if possible.
[18] Ibid. p. 108.
[19] Ibid. p. 111.
[20] Ibid. p. 114.
[21] Ibid. p. 114.

also places an obligation on States to enforce detailed record-keeping and the preservation of confidential records relating to the genealogy and birth registration of a child.[22]

2.9 Under Article 9 of the UNCRC, States Parties are required to ensure that a child shall not be separated from his or her parents against their will, except when judged necessary for the child's best interests. The Article recognises that such separation may be necessary where the parents are living separately and a decision must be made as to the child's place of residence. However, such a decision must be dealt with expeditiously and made by an authority which is competent to determine the best interests of the child.[23] Furthermore, under Article 9 all children who are separated from one or both parents have the right to maintain personal relations and direct contact with both parents on a regular basis, except if this will have adverse consequences for a child. Although States often decree that the child's best interests shall be paramount in decisions concerning access, domestic legislation has been criticised for failing to explicitly enshrine that the maintenance of regular contact with both parents is generally in the child's best interest.[24] Article 9 also places an obligation on States to ensure practical assistance to children whose parents are in conflict through the provision of neutral meeting places or the supervision of access.[25]

2.10 Article 12 of the UNCRC obliges States to assure to children who are capable of forming their own views the right to express those views in all matters affecting them, with due weight given to those views in accordance with the age and maturity of the children. The UN Committee has emphasised that this provision applies without limitation to all judicial proceedings and mediation processes affecting children, including those relating to the separation of parents, custody, care and adoption.[26] Indeed, children are unequivocally affected by decisions relating to their care and familial relationships. Therefore, States must ensure that the legislative framework governing family relationships includes appropriate mechanisms to solicit the views of the child in all matters affecting him or her and to give due weight to those views.[27] Expressing views is a choice for each child, not an obligation, but States must provide an appropriate and child-friendly environment that facilitates children to exercise their rights under Article 12.[28]

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[22] Ibid. p. 115.
[23] Ibid. pp. 127-129.
[24] Ibid. p. 130.
[25] Ibid. p. 130.
[26] UN Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* (2009) UN doc. CRC/C/GC/12 at p. 9.
[27] *General Comment No. 12,* at p. 6.
[28] *General Comment No. 12* at pp. 5-7.

Legislative mechanisms should also be introduced to provide children with access to appropriate information and adequate support where necessary.[29] The UN Committee has emphasised that Article 12 imposes no age limit on the right of the child to express his or her views and strongly discourages States from introducing age limits in law which would restrict the child's right to be heard in all matters affecting him or her.[30] It also encourages States to introduce legislative measures which require decision makers in judicial proceedings to explain the extent of the consideration given to the child's views and the consequences for the child.[31]

2.11 Under Article 18 of the UNCRC, States Parties must use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of their child. This places an obligation on States to implement parental education measures, designed to inform parents about their equal responsibilities towards their children.[32] This provision also requires States to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities.[33] The UN Committee has interpreted this reference to "appropriate assistance" as including the provision of parental counselling and other quality services for mothers, fathers, siblings, grandparents and others who may be responsible for promoting the child's best interests.[34] Furthermore, the provision of support by the State to parents and other family members must allow for the development of positive and sensitive relationships between children and their caregivers.[35]

European Convention on Human Rights (ECHR)

2.12 The ECHR has particular relevance in the Irish context because, in addition to being ratified by Ireland in 1953, it was indirectly incorporated into Irish law by the European Convention on Human Rights Act 2003.[36]

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[29] *General Comment No. 12* at p. 9.
[30] *General Comment No. 12* at pp. 6-7.
[31] *General Comment No. 12* at p. 9.
[32] UN Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties under Article 44 of the Convention: Concluding Observations – United Kingdom* (1995) UN doc. CRC/C/15/Add.34 at para 30.
[33] Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood* (2005) UN doc. CRC/C/GC/7/Rev.1 at p. 9.
[34] *General Comment No. 7* at p. 9.
[35] *General Comment No. 7* at p. 9.
[36] Section 2 of the 2003 Act provides that in interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions. Section 4 further provides that judicial notice shall be taken of Convention provisions and of any judgment of the European Court of Human Rights.

2.13 Article 8(1) of the ECHR provides that everyone has the right to respect for his or her private and family life. This is subject to the proviso in Article 8(2) that 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 for the protection of health or morals, or for the protection of the rights and freedoms of others. There is no qualification as to the age of those whose private and family life is protected and therefore children are clearly included within the scope of Article 8's protection.

2.14 A full analysis of the case-law that has developed under Article 8 is beyond the scope of this advice. However, there are a number of principles that have emerged of direct relevance to the General Scheme, which are summarised below:

- Article 8 places a positive obligation on States to take the necessary steps to ensure that it is possible for their citizens to enjoy their right to private and family life.[37]
- Article 8 also places a negative obligation on States to refrain from interfering with the rights afforded by the provision unless such interference can be justified under Article 8(2).
- The European Court of Human Rights (ECtHR) has given a broad interpretation to Article 8 and found that the right to respect for family life includes an inherent procedural right for children to be consulted about their views during private family law proceedings, having due regard to the specific circumstances of the case and the age and maturity of the child concerned.[38]
- The ECtHR has found that family life exists between parents and their children in all but very exceptional cases regardless of the parent's marital

[37] The ECtHR has stated in *Hokkanen v. Finland,* (No. 19823/92), 9 September 1994 at para 53 that "the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities. There may in addition be positive obligations inherent in an effective 'respect' for family life." The ECtHR reiterated this in *X., Y. and Z. v. The United Kingdom,* (No. 21830/93), 22 April 1997 at para 41 and *Kosmopoulou v. Greece,* (No. 60457/00), 5 February 2004 at 43.

[38] In *Sahin v. Germany,* (No. 30943/96), 8 July 2003 at para 73-77 the Grand Chamber established the test that the issue of whether a child should be heard in court during private family law proceedings "depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned." In this case the Grand Chamber held that as the domestic court had obtained an expert report which detailed the views of the applicant's child that its procedural approach was acceptable and therefore there was no violation of Article 8. In *Sommerfeld v Germany,* (No. 1871/96), 8 July 2003 at paras 71-75 the Grand Chamber applied the same test and found that there was no violation of Article 8, despite the lack of an expert report, as the District Court had availed of the ample opportunities to hear the views of the child involved directly. Subsequently, in *C v Finland*, (No. 18249/02), 9 May 2006 at para 57 the Chamber acknowledged the general acceptance that courts should take into account the views of children in private family law proceedings in order for the decision to comply with Article 8.

status [Marckx v Belgium (unmarried mother and her child); Johnston v Ireland (unmarried parents and their child)], the family's living arrangements [Berrehab v Netherlands] or their apparent lack of commitment to their children [C v Belgium, Ahmut v Netherlands & Soderback v Sweden]."[39]

- The ECtHR has also found the existence of family life between children and their grandparents [Marckx v Belgium], between siblings [Olsson v Sweden; Boughanemi v France], between an uncle and his nephew [Boyle v UK] and between parents and children born into second relationships [Jolie & Lebrun v Belgium]
- The ECtHR has also found that the existence or non-existence of family life for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties and a range of factors, of which cohabitation is only one. Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth.[40]
- The Court has held that under Article 8 of the ECHR, individuals have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development.[41] Matters of relevance to one's identity and development for the purposes of Article 8 of the Convention include the identity of one's parents.[42] The Court has also held that birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by the Convention.[43]

[39] U. Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Dublin: Tottel Publishing, 2008) at pp. 101-2.
[40] Lebbink v The Netherlands, (No. 45582/99), 1 June 2004 at para 36.
[41] Gaskin v. United Kingdom (No. 10454/83 07)(1989), para. 49
[42] Mikulić v. Croatia, (No. 53176/99), paras. 54 and 64. See also Jäggi v. Switzerland (No. 58757/00) (2008),and Ebru and Tayfun Engin Colak v. Turkey (No. 60176/00) (2006)
[43] Mikulić v. Croatia (No. 53176/99)

3. Assisted reproduction and surrogacy

3.1 Parts 3, 4 and 5 of the General Scheme provide a detailed framework for determining parentage in cases of assisted reproduction and for surrogacy arrangements.

3.2 The Ombudsman for Children wrote to the Minister for Justice and Equality in April 2012 outlining concerns that had been raised with the Office regarding the manner in which the State provides for children born through surrogacy in other jurisdictions and highlighting the need to find workable solutions to deal with this uncertainty.

3.3 The General Scheme of the Children and Family Relationships Bill addresses some aspects of that legal uncertainty for children and indeed represents the first time that legislative proposals in this area have been brought forward in Ireland; the introduction of legal clarity will therefore be a welcome development.

Information relating to birth and origin

3.4 An aspect of assisted reproduction and surrogacy that is not addressed in the legislation is access to birth information for donor-conceived individuals and those born through surrogacy arrangements.

3.5 A desire to know about one's birth and origins is not a manifestation of simple curiosity; it springs from a need that runs deep enough to be a basic aspect of human dignity. As noted above, there is strong support in the international standards – particularly the UN Convention on the Rights of the Child - for the contention that withholding information of this nature represents a failure to vindicate in full individuals' identity rights.

3.6 In addition, the Courts in this jurisdiction have had occasion to explore principles relevant to a consideration of access to birth information. The importance of "biological truth" was referred to by Abbott J. in the High Court judgment in *M.R. and D.R.*[44] The right to know the identity of one's natural mother was also recognised as an unenumerated constitutional right in the case of *I'O'T. v. B and Ors*.[45] The Supreme Court held in that case that the right of a natural child to know the identity of his or her natural parent was an unenumerated right guaranteed by the Constitution; the right existed by virtue of Article 40.3.1°. However, it was held

[44] High Court, [2013] I.E.H.C. 91 at para. 55.
[45] [1998] 2 I.R. 321.

that while the Applicants enjoyed the constitutional right to know the identity of their respective natural mothers, the exercise of such right might be restricted by the unenumerated constitutional right to privacy of the natural mothers.

3.7 A further consideration is that the Report of the Commission on Assisted Human Reproduction recommended that any child born through the use of donated gametes or embryos should, on maturity, be able to identify the donor(s) involved in his/her conception and that a child born through surrogacy, on reaching maturity, should be entitled to access the identity of the surrogate mother and, where relevant, the genetic parents.[46]

3.8 It may be argued that the General Scheme is not the most appropriate vehicle for tackling the issue of information regarding the birth and origins of people born through assisted reproduction, as it relates primarily to the determination of parentage rather than the wider regulation of assisted reproduction in Ireland. Nonetheless, there are a number of reasons why the Ombudsman for Children's Office strongly recommends that the Minister for Justice and Equality include a provision on the gathering and retention of information on donors and surrogate mothers, including the identity of such donors and surrogates.

3.9 The first is that the Children and Family Relationships Bill 2014 will represent the first time Irish legislation has ever dealt with the question of assisted reproduction or surrogacy. In the nine years since the Commission on Assisted Human Reproduction published its report, no Government has brought forward legislation on the matter.[47] There is also no indication that the Department of Health will bring forward separate legislation in the near future; indeed, proposals for more substantial regulation of assisted reproduction in Ireland do not currently appear on the Government's programme of legislation.[48] It is reasonable to conclude that the chances of this gap in our law being addressed within the term of the current Dáil is remote.

3.10 Ireland has not distinguished itself with respect to vindicating individuals' identity rights; our country has a demonstrably poor history in relation to respecting the rights of adopted people in this domain. It would be deeply unfortunate and disappointing for the Oireachtas to now overlook the identity rights of those born

[46] *Report of the Commission on Assisted Human Reproduction* (2005), p. xvi. The report is available on the website of the Department of Health (www.dohc.ie)
[47] The *Report of the Commission on Assisted Human Reproduction* was published in March 2005
[48] The Government's Programme of Legislation published by the Office of the Government Chief Whip on 15 January 2014 does not include any reference to legislation from the Department of Health on this matter.

through assisted reproduction. The reality is that a failure to act will allow an injustice to continue that the Oireachtas will not be able to remedy in future.

3.11 The second reason for addressing identity rights in this legislation is that while gathering, retaining and providing access to information regarding donors and surrogate mothers is not without difficulty, the Ombudsman for Children's Office believes that it can for practical purposes be treated legislatively as a discrete matter, related to but distinct from other elements of a general statute on assisted reproduction.

3.12 The third and most important reason to address the question of birth information for donor-conceived individuals and those born through surrogacy arrangements now is that any future legislation is unlikely to have retrospective effect. It is not simply that those born by means of assisted reproduction may not be able to access complete birth information before the enactment of the relevant legislation; it is that if they are conceived and born prior to that time, they may never be able to access all of that information.[49]

3.13 There are at least four broad elements that should be included in legislation concerning access to information for those born through assisted reproduction: the nature of the information that centres providing the relevant services must gather on donors and surrogates; where that information is held; how that information is accessed; and how information for those born through assisted reproduction is recorded for the purposes of civil registration (i.e. on birth certificates).

3.14 With respect to the first of these elements, the practice in other jurisdictions is to set out in either primary or secondary legislation the information that those providing assisted reproduction services must gather.[50] The specified information typically covers matter such as the identity and characteristics of the donor, the donor's medical history, and whether the donor has children (whether born through assisted reproduction or not).

[49] In the United Kingdom, for example, the nature of the information that donor-conceived people can access from the Human Fertilisation and Embryology Authority depends on the time of their conception and birth. Specifically, there are differences between those conceived before 1 August 1991 (the establishment day of the Human Fertilisation and Embryology Authority), those conceived between 1 August 1991 and 1 April 2005, and those conceived after 1 April 2005 (the entry into force of all the provisions of the Human Fertilisation and Embryology Authority [Disclosure of Donor Information] Regulations 2004 [No. 1511 of 2004]). Only those conceived after 1 April 2005 are guaranteed access to identifying information regarding their genetic parents. Further details of the framework governing donor-conceived people's access to birth information may be obtained at www.hfea.gov.uk

[50] See, for example, section 31 of the Human Fertilisation and Embryology Act 1990 as amended by section 24 of the Human Fertilisation and Embryology Act 2008 (United Kingdom); Part 3 of the Assisted Human Reproductive Technology Act 2004 (New Zealand); and section 33 of the Assisted Reproductive Technology Act 2007 (New South Wales, Australia).

3.15 The second limb of a statutory provision relating to birth information for those born through assisted reproduction would be identifying the repository for the information gathered by service providers. In some jurisdictions, this function is carried out by the regulatory authority with responsibility for assisted reproduction (such as the Human Fertilisation and Embryology Authority in the United Kingdom). In others, the obligation to maintain a register of information relating to assisted reproduction falls to the body charged with overall responsibility for civil registration (such as the Registrar-General in New Zealand) or indeed to a Department of State (as is the case in New South Wales, Australia). Given that there is currently no regulatory authority for assisted reproduction in Ireland, it would seem most appropriate to explore the possibility of the General Register Office taking on this function, without prejudice to any future changes that might be introduced should a regulatory authority be established in Ireland.

3.16 The third aspect of legislation regarding access to birth information relates to how that information may be accessed and by whom. This would, of course, have to include access by those born by assisted reproduction to information - including identifying information - on donors and surrogates. In addition, the relevant legislation could also provide for matters such as the provision of information to donor-conceived individuals regarding genetic siblings, the provision of information to descendants of donor-conceived people and the setting up of a voluntary contact register.

3.17 An issue that arises with respect to access to birth information is the age at which individuals can access such information. Practice varies between jurisdictions. In some, identifying information cannot be accessed until the person becomes an adult; in others, access to a donor's identity is possible at an earlier stage (14 in Austria, 16 in the Netherlands and Western Australia, for example).[51] Sweden and Victoria (Australia) rely on a "sufficient maturity" test rather than specifying an age at which this information may be obtained by a donor-conceived person.[52] This approach is more in keeping with the principles set out in the UN Convention on the Rights of the Child, specifically those relating to respecting the evolving capacities of the child and respect for the views of the child.[53]

3.18 The fourth element of legislation regarding birth information relates to civil registration. The Ombudsman for Children's Office is mindful of the fact that there

[51] Blyth, E., "Access to genetic and birth origins information for people conceived following third party assisted conception in the United Kingdom", *International Journal of Children's Rights 20 (2012) 200-318*, p. 311
[52] Ibid.
[53] See in particular Articles 5 and 12 of the Convention.

is a judgment pending from the Supreme Court in the case of *M.R. and D.R.* and that the outcome of that case will be crucial to determining how parentage will be reflected on birth certificates in cases of gestational surrogacy. However, in general terms, the Ombudsman for Children's Office believes that the process of birth registration must facilitate an individual born through assisted reproduction being able to access full and accurate information that reflects the reality of his or her lineage and birth. This would necessarily include the identity of any gamete donors or surrogate.

3.19 It does not follow that all of that information should necessarily be included on a birth certificate. Indeed, there is a compelling argument for omitting sensitive information of this nature from a birth certificate: the birth certificate is a public document that can, in principle, be obtained by anyone. It would represent an unacceptable infringement of the privacy of those born through assisted reproduction for a publicly available document to disclose such information regarding their conception and birth.

3.20 However, it is possible to link the register of births with a statutory register of information concerning those born through assisted reproduction. The Assisted Reproductive Treatment Act 2008 in Victoria, Australia provides for a form of annotation which allows registrars to see whether a particular birth certificate relates to a donor-conceived person; if it does, the registrar is then obliged to attach an addendum to the birth certificate stating that further information is available about the entry.[54] Crucially, the registrar may not issue the addendum to any person other than the person conceived by a donor treatment procedure named in the entry.

3.21 Ensuring there is a link between the register of births and a register of information concerning those born through assisted reproduction also serves another important purpose: it provides a clear incentive for parents to inform a child at some point that he or she was born through assisted reproduction. An individual cannot seek additional information regarding his/her birth and origin without first being made aware such information exists.

3.22 It is clearly not for a piece of legislation to address how and when such information is to be conveyed. Providing for a link with the register of births as outlined above would, however, facilitate greater openness because of the reality that an individual is overwhelmingly likely to require the full version of their birth certificate at some point – for a passport or driving licence, for example - and that it

[54] Section 153 of the Assisted Reproductive Treatment Act 2008 provides for an amendment to the relevant section of the Births, Deaths and Marriages Registration Act 1996.

would therefore encourage parents to be open with their children about their birth and origins. This is similar to the way in which adopted people in Ireland will necessarily discover that they are adopted if they seek the long version of their birth certificate.[55]

3.23 The Ombudsman for Children's Office appreciates that the inclusion of a new part in the General Scheme relating to access to information for those born through assisted reproduction would represent a substantial addition to the forthcoming legislation. However, this Office believes that as imperfect as the solution may be, it is one that must be considered.

Recommendation

The General Scheme should be amended to provide for the gathering, retention and disclosure of information to people born through assisted reproduction and surrogacy regarding their birth and origins.

Parentage in the context of assisted reproduction other than surrogacy

3.24 There would appear to be two central legal propositions in Head 8 of the General Scheme which form the foundation for some of the subsequent elements in the Heads of the Bill. Firstly, the donation of human reproductive material does not confer parenthood on the donor. Secondly, it specifies that there is no presumption of parenthood in relation to the partner of a surrogate.

3.25 Head 10(2) provides that where a child is conceived through the provision of human reproductive material or an embryo provided by a man only, the parents of the child are his/her birth mother and the child's genetic father provided that he consented to be a parent of the child and did not withdraw the consent before the child's conception. Head 10(3) addresses the situation of donor sperm so that the child's parents are the birth mother and the person who:

a) was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the birth mother at the time of the child's conception, and

[55]Unfortunately, adopted people in Ireland do not have a statutory right to access their original birth certificate (see Ombudsman for Children's Office, *Advice of the Ombudsman for Children on the Adoption Bill 2009* [2009]). However, the fact that the General Register Office is not able to provide that document will necessarily indicate to an individual that he or she is adopted. See Part 10 of the Adoption Act 2010 (No. 21 of 2010)

b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before that child's conception.

3.26 The consent referred to at (b) is presumed in law, "unless the contrary is proven."[56] Head 10(3) may raise issues for clarification in respect of donor insemination where the parents are a lesbian couple. There are two particular issues that occur.

3.27 Firstly, it is clear from Head 10(3)(b) that the sperm donor will not be recognised without his consent. If the birth mother is in a civil partnership or cohabiting, then under Head 10(3)(a), her partner is presumed to be the other parent. However, it is unclear as to whether her partner is an automatic legal guardian of the child. Secondly, a circumstance could arise where a woman in a same-sex relationship carries her partner/cohabitant's genetic child. Head 10(3) suggests that provided limbs (a) and (b) are satisfied, then it does not matter which woman is the genetic parent and both women would be recognised as parents. It may be that these two issues require further clarification from the legislature in the form of explanatory Notes to any future legislation.

3.28 Head 10(5) covers the situation whereby both donor egg and donor sperm is used. The child's legal parents are then the birth mother the person with whom she was married to or in a civil partnership with or cohabiting in an intimate and committed relationship at the time of the child's conception. As with Head 10(3), male parentage is premised upon his consent and that the said consent was not withdrawn before the child's conception. The consent is again as with Head 10(3) presumed in law, "unless the contrary is proven."

3.29 Head 10(7) gives the provisions retroactive effect which supports the Bill's general approach to legal certainty for a child's identity.

3.30 The General Scheme does not specify the form of any consent for the purpose of ascertaining parentage nor the circumstances in which that consent is deemed to be withdrawn. Rather, Head 10(8) provides that Regulations may specify these elements of consent. It is unclear why the General Scheme does not simply address consent. The question of consent is central to the operation of many of the provisions of the General Scheme and it is arguably better to address it as part of the primary legislation rather than by means of Regulations.

[56] See Head 10(6).

Recommendation

The General Scheme should specify the form of any consent required for the purposes of ascertaining parentage rather than providing for it by means of secondary legislation.

3.31 Head 11 provides for declarations of parentage in relation to assisted reproduction other than surrogacy. Where a declaration is sought under this Head, the court is required to have regard to the applicable presumptions set out in Head 10, and to give effect to the relevant presumption and make the relevant declaration accordingly.

3.32 Head 11(7) provides that there shall be no appeal from a declaration of parentage nor shall the court hear and determine any application under Head 7 in relation to a child after a declaration is made. The Notes explain the rationale behind Head 11(7) as follows: *"Subhead (7) proposes that a declaration will act as a blocking order in relation to any alternative attempts to determine the legal parentage of a child born through AHR. This is to ensure the child's status as the member of a particular family is safeguarded."* This form of blocking order, while it has a worthwhile policy objective of securing legal certainty for a child, may raise questions on possible interference with access to the courts, which is a well-established principle of Irish law.[57] It may be that a better balance between having legal certainty and access to the courts would be achieved by a short appeal timeframe and specified periods within which a return date must be given.

Recommendation

The provision that prevents appeals from a declaration of parentage should be amended to allow for appeals within a short time period and specified periods within which a return date must be given.

Parentage in cases of Surrogacy

3.33 Head 12, read alongside Head 13, addresses how parentage may be assigned by the courts in cases of surrogacy. It essentially provides for three different scenarios in respect of the parents of the child, namely:

[57] See, *inter alia*, *Macauley v. Minister for Post and Telegraphs* [1966] I.R. 345.

(i) the parents are the man who provides human reproductive material, and his spouse, civil partner or cohabitant if that person has consented to be a parent of the child;

(ii) the parents are the woman who provides human reproductive material, and her spouse, civil partner or cohabitant if that person has consented to be a parent of the child;

(iii) the parents are the man and woman who have both provided human reproductive material.

3.34 Parentage under all of the categories at (i) to (iii) is only assigned where the birth mother is declared under Head 13(9) not to be a parent. Head 13(9) seeks to protect the rights of the surrogate and/or child by ensuring that the surrogate consents to the declaration and it is in the best interests of the child to make the declaration.

3.35 What is clear throughout Heads 12 and 13 is the intention to record the birth mother as the child's mother in a surrogacy arrangement but to allow the surrogate or commissioning parents to apply to court within a reasonable period of time for the assigning of legal parentage to them. The basis for assigning legal parentage is genetic connection to one or both of the intending parents and where genetic connection exists in relation to one, then by extension to the spouse, civil partner or cohabiting partner of that person. In the absence of the surrogate's consent, she remains the legal mother of the child.

3.36 A matter that is not addressed in the General Scheme is the situation where the surrogate consents to the assignment of legal parentage to the commissioning mother, but the latter refuses to accept legal parentage. In this circumstance, the question is whether legal parentage would be "forced" on the surrogate or the commissioning mother. It is probable that legal parentage would be assigned to the commissioning mother who may subsequently be released from parental duties, whether under the Adoption Act, 2010 or the Child Care Act, 1991 (as amended). If deemed to be a child to a commissioning mother, then the mother owes constitutional duties to him/her. By cancelling a surrogacy arrangement, it could be argued that the mother had breached her constitutional duty, thereby freeing the child for adoption or to become subject to legal proceedings under the Child Care Act 1991 (as amended); although an unlikely situation, Ireland's experience in intercountry adoption suggests that it would be prudent to provide for such an eventuality in the General Scheme.[58]

[58] For the cancellation of the registration of a foreign adoption in circumstances where the adoptive parents no longer wished to have custody of the child, see *Dowse v. An Bord Uchtála* [2006] 2 I.R. 507.

Recommendation

The General Scheme should provide for situations in which a surrogate consents to the assignment of legal parentage to the commissioning mother, but the latter refuses to accept legal parentage.

Cross-border and commercial surrogacy

3.37 Under Head 17, a surrogacy arrangement is not an enforceable contract save where this relates to the payment of a birth mother's reasonable expenses but even then, only if the surrogacy arrangement is one made prior to conception. Reasonable expenses include reasonable medical costs, loss of earnings for the surrogate mother, counselling and legal advice expenses.

3.38 Save for the reimbursement of a birth mother's surrogacy costs, Head 18 of the General Scheme prohibits the making or receiving of payment in relation to a surrogacy arrangement. Head 23 makes it an offence to make or receive or agree to receive any payment in relation to a surrogacy arrangement in contravention of Head 18.

3.39 The area of cross-border surrogacy raises many complicated issues in private international law. There is no worldwide consensus on the legality or otherwise of surrogacy arrangements. Several countries including France, Italy, Germany and China prohibit surrogacy arrangements completely, even if there is no commercial element to the agreement. Other countries permit non-commercial or altruistic surrogacy arrangements. Examples of this second approach include the United Kingdom, Australia, New Zealand and Holland. However, there is a third approach which recognises as legally enforceable commercial surrogacy arrangements. Examples of this last approach include India, Russia, Thailand and some American states such as Florida and California.

3.40 With regard to non-commercial surrogacy, the proposed legislation does not address the recognition or otherwise of foreign surrogacy arrangements and/or court orders and the consequent parental status conferred on parties. Equally, the legislation does not address parental status under other types of assisted reproduction entered into abroad. These issues raise questions of European Union law and private international law which cannot be ignored. It may be that the legislature could enact regulations in a similar manner to statutory instruments that

address the recognition of foreign same-sex relationships. There have been numerous statutory instruments which have recognised that certain classes of foreign relationships are entitled to be recognised in the State as a civil partnership.[59]

Recommendation

The General Scheme should confer a power on the Minister for Justice and Equality to recognise court orders relating to assisted reproduction or surrogacy from other jurisdictions that are compatible with Irish law and public policy.

3.41 This in turn raises other questions for consideration. If, for example, the foreign non-commercial surrogacy does not conform to the regulatory regime in this jurisdiction, will recognition be refused on public policy grounds? If however the father seeking recognition of a foreign surrogacy arrangement/court order is biologically related to the child, the child is entitled to Irish citizenship in any event.[60] Issues to do with nationality and immigration arise in the context of foreign surrogacy arrangements, even for those that are not commercial in nature.

3.42 Given the absence of any international surrogacy regime, there is no reciprocity between Ireland and other countries which creates a great deal of uncertainty for the regulation of this area. Although the Department of Justice and Equality has issued Guidance in this area, it is non-statutory.[61] In addition, the Guidance will require updating or replacement once the legislation is enacted to ensure compatibility between the two. For example, the Guidance operates on the basis that *"the surrogate mother and the child will have a life-long relationship with one another."* This second proposition no longer necessarily accords with parental status proposed under the General Scheme (should the surrogate consent to transfer of parentage) and the Guidance therefore no longer reflects what is proposed in the legislation.

3.43 With respect to commercial surrogacy, it is clear that the Bill prohibits persons from making or receiving payments in relation to a surrogacy arrangement other than

[59] The Minister for Justice and Equality's powers to make such Orders are set out in section 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. The most recent of these Orders was S.I. No. 490/2013.

[60] Irish Nationality and Citizenship Act, 2004. See also Passport Act, 2008.

[61] 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*, (February 2012).

the birth mother's reasonable costs. This approach reflects the position adopted in 2005 by the Commission on Assisted Human Reproduction.[62]

3.44 There are other instances in Irish law which operate to guard against the risk of commercialisation. The most relevant example may be found in section 145 of the Adoption Act 2010, which contains a prohibition against receiving, making or giving certain payments and rewards in consideration of an adoption. The provisions of the General Scheme prohibiting commercial surrogacy are therefore consistent with analogous provisions of existing Irish legislation.

3.45 If the legislation contains a prohibition of this sort – which is entirely reasonable and important given the significant ethical difficulties posed by commercial surrogacy – it follows that there must also be a sanction. However, the Ombudsman for Children's Office is of the view that in such situations the consequences should fall on the parties responsible for the commercial surrogacy arrangement rather than the child.

3.46 At present, the General Scheme does not outline what the exact consequences would be for a child whose parents enter into a commercial surrogacy arrangement. It is clear that the parents would be guilty of an offence by virtue of Head 18 and Head 23 of the General Scheme. In addition, it would appear from Head 13(19) that the courts would be precluded from making a declaration of parentage.

3.47 The General Scheme does not provide for what will then happen to the child. Specifically, it is not clear who else might be appointed as a guardian for the child, how the denial of parentage would affect the citizenship of the child – with all the consequences that would flow from that – and whether the child would be left in the care of the individuals who had entered into the surrogacy arrangement (one or both of whom would be the child's genetic parents) but who could not act as the child's guardians.

3.48 It is instructive to consider how this issue has been addressed in the United Kingdom. Section 54(8) of the Human Fertilisation and Embryology Act 2008 provides that in the context of applications for a parental order:

> "The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—

[62] *Report of the Commission on Assisted Human Reproduction,* p. 50

(a) the making of the order,
(b) any agreement required by subsection (6)[relating to the consent of third parties],
(c) the handing over of the child to the applicants, or
(d) the making of arrangements with a view to the making of the order, unless authorised by the court."[63]

3.49 In practice, the courts in the United Kingdom have been willing to retrospectively authorise payments to surrogate mothers that exceed "reasonable expenses" within the meaning of section 54 of the 2008 Act. The basis for taking this course of action has been that it would not be in the interests of the child born as a result of the surrogacy arrangement for the court refuse to make the parental order.[64]

3.50 The difficulty posed by this approach in reconciling the public policy objective of prohibiting commercial surrogacy and acting in the best interests of the child in such cases was summarised by Mr Justice Hedley in *Re X and Y (Foreign Surrogacy)*:

> "I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order."[65]

3.51 The General Scheme poses the challenge of reconciling these two competing principles in the Irish context. The Ombudsman for Children's Office believes that it is appropriate for the Oireachtas to provide as much clarity as possible, rather than

[63] Section 54(8) of the Human Fertilisation and Embryology Act 2008 (United Kingdom)
[64] See, for example, *Re L(A Minor)(Commercial Surrogacy)* [2010] E.W.H.C. 3146 (Fam) at para. 9-10 and *Re S (Parental Order)* [2009] E.W.H.C. 2977 (Fam) at paras. 7-8
[65] [2008] EWHC 3030 (Fam) at para. 24

leaving it to the courts to determine what will happen to children of Irish citizens or residents who enter into surrogacy arrangements in other jurisdictions.

3.52 Maintaining the integrity of the prohibition of commercial surrogacy is entirely legitimate. Allowing a situation to develop in which there is routine recognition and effective authorisation of commercial surrogacy arrangements based on the interests of individual children would in practical terms undermine that prohibition. Such a pattern could potentially establish itself in Ireland.[66] This arguably works against the interests of children more generally as a group and indeed women in jurisdictions where commercial surrogacy is lawful.

3.53 However, categorically excluding the possibility of making a declaration of parentage will have immediate and very grave consequences for a child born as a result of a commercial surrogacy arrangement. If legal recognition of filiation with an Irish citizen parent is denied, it is not clear how the child could be granted Irish citizenship and consular protection; as the child may well be regarded as an Irish citizen by the state in which he/she was born, this could therefore have the effect of leaving the child stateless.

3.54 In addition, a child could be left without a guardian, with the attendant short- and long-term problems this would create in relation to who would make important decisions about the child and who would be obliged to provide for the child's well-being and development. It could be argued that this would fall to the Child and Family Agency in accordance with the Child Care Act 1991. However, it is not clear how immediately applicable the provisions of the 1991 Act would be if a child born as a result of a commercial surrogacy arrangement were cared for appropriately by the commissioning parents, one or both of them being the child's genetic parents.

3.55 The Ombudsman for Children's Office believes that consideration should be given to an approach that eschews the extremes of effectively removing the sanction for entering into commercial surrogacy arrangements and of leaving children born from such arrangements in a situation of great legal uncertainty and vulnerability.

3.56 This Office believes that such a balance may be achieved by retaining the criminal sanction for those who enter into commercial surrogacy arrangements but by

[66] Such a situation would arguably be rendered more likely should Article 42A of the Constitution come into effect. The new article 42A.4.1° provides, *inter alia*, that provision shall be made by law that in the resolution of all proceedings concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration. The capacity of primary legislation to provide that other considerations – such as maintaining the prohibition of commercial surrogacy – would override a consideration of an individual child's best interests in proceedings relating to parentage and guardianship is therefore debatable.

allowing for a declaration of parentage to be made in relation to the child under certain circumstances. It should be emphasised that this does not mean that parents who have entered into a commercial surrogacy arrangement would automatically be recognised as parents or made guardians of the child. The court would have regard to a range of factors, including the extent to which any payments exceeded the "reasonable expenses" contemplated by the General Scheme; whether any contravention of the legislation was inadvertent; and whether any alternatives to making the declaration of parentage would be in the child's best interests.

3.57 The Ombudsman for Children's Office is not aware of any concrete, alternative proposal that would cater for the child's interests in these circumstances. The General Scheme certainly does not do so in its current form.

3.58 Moreover, this Office believes that the retention of a criminal sanction would act as a deterrent for couples who contemplate entering into a commercial surrogacy. No deterrent is absolutely effective but a sanction could be framed in order to have an appropriately dissuasive effect.

Recommendation

The General Scheme should retain a criminal sanction for those who engage in commercial surrogacy arrangements. The General Scheme should also provide for the legal consequences that arise for children born as a result of such arrangements; however, the Ombudsman for Children's Office does not believe that declarations of parentage should be denied where this would leave the child born as a result of a commercial surrogacy arrangement in a vulnerable legal position.

4. The best interests principle

4.1 The requirement to make the best interests of the child a primary consideration in proceedings that affect him/her is one of the general principles of the UN Convention on the Rights of the Child, as outlined above.

4.2 This principle also found expression in the amendment to the Constitution on the rights of the child passed by referendum in November 2012. Should the referendum result be upheld by the Supreme Court, the relevant part of Article 42A.4 of the Constitution will provide as follows:

> 1° Provision shall be made by law that in the resolution of all proceedings—
>
> i. brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected,
>
> or
>
> ii. concerning the adoption, guardianship or custody of, or access to, any child,
>
> the best interests of the child shall be the paramount consideration.

4.3 The General Scheme reflects the best interests principle in a wide range of provisions, including those relating to: declarations of parentage (Heads 7, 11 and 13); legal advice relating to surrogacy (Head 22); direction for the use of DNA tests (Head 25); the duties of guardians (Head 35); the appointment of guardians (Head 39); the duration and termination of guardianship (Head 44); applications for custody (Head 47); applications for access (Head 48); the making of interim custody or access orders (Head 50); the power of the court relating to the production of a child (Head 51); orders in respect of custody or access agreements (Head 57); furnishing court reports on the welfare of the child to the child in question (Head 58); and the presence of a child during proceedings that concern him/her under the legislation (Head 59).

4.4 However, the most significant provision of the General Scheme relating to the best interests principle is Head 32, which is concerned solely with how the best interests of the child are to be determined in the course of proceedings relating to guardianship, custody, access or the upbringing of a child. It provides that:

- if 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;
- in any such proceedings the court shall have regard to the general principle that unreasonable delay in determining the question may be contrary to the best interests of the child; and
- in determining what is in the best interests of the child, the court shall have regard to a range of factors including the benefit of having a meaningful relationship with both parents, the views of the child, the need for stability, the preservation of relationships with other relatives, the desirability of cooperation between guardians and the protection of the child's safety and psychological wellbeing.

4.5 In its 2006 concluding observations on Ireland's report under the UN Convention on the Rights of the Child, the UN Committee on the Rights of the Child recommended that the State ensure 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.[67] Asserting the paramountcy of the best interests principle is therefore an essential element of the legislation; indeed, it is significant that the principle is established in the General Scheme as the paramount consideration rather than being a primary consideration.

4.6 However, as noted above, the UN Committee has indicated that States' obligation to implement the best interests principle applies without restriction to all judicial proceedings and relevant procedures concerning children, including conciliation, mediation and arbitration processes.[68] In light of this, consideration should be given to extending the application of the best interests principle within the meaning of the legislation to encompass all the relevant proceedings and processes that have an impact on children, including in the context of mediation.

[67] UN Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties under Article 44 of the Convention: Concluding Observations - Ireland* CRC/C/IRL/CO/2 (29 September 2006), para 23
[68] UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) UN doc. CRC/C/GC/14 at p. 8.

Recommendation

The General Scheme should provide for the general application of the best interests principle within the meaning of the legislation to encompass all the relevant proceedings and processes that have an impact on children, including in the context of mediation.

4.7 It is welcome that there is an explicit acknowledgement of the impact of delays on children and how they act against children's interests. This Office's investigations into the actions of public bodies have consistently highlighted how delay in providing services to children and resolving disputes can rapidly produce an adverse effect on a child, in a manner that is qualitatively worse than it is for adults.

4.8 The decision to include a list of factors in subhead 3 to which the court must have regard when determining what it considers to be in the best interests of children is also a welcome addition. The UN Committee on the Rights of the Child has commented that it is useful to provide decision makers with guidance on how to undertake a best interests determination when it has to be applied in a specific context; the UN Committee has indicated that drawing up non-exhaustive and non-hierarchical lists of elements to be included in such assessments can give greater precision to the decision-making process and thereby ensure that the different aspects of a child's interests and rights are appropriately weighed.[69]

4.9 The Ombudsman for Children's Office notes that subhead 4 requires the court to have regard to any family violence when making a determination on the best interests of the child; this violence is defined as including behaviour by a parent or guardian or a household member causing or attempting to cause physical harm to the child or another parent or household member, including sexual abuse or causing the child or a parent or other household member to fear for his safety or that of another household member.

4.10 Requiring that particular attention be paid to the presence of any family violence is a logical and useful addition to the legislation. However, the Ombudsman for Children's Office notes that the definition of violence in the General Scheme is confined to physical harm, including sexual abuse, or causing a child or household member to fear for his/her safety. This definition is not as expansive as the definition adopted by the UN Committee on the Rights of the Child in its General Comment on the protection of children from all forms of violence, which outlines how for the purposes of the implementation of the relevant parts of the UN

[69] UN Committee on the Rights of the Child, *General Comment 14*, p. 12

Convention, “violence” is understood to mean “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse”.[70] Consideration should be given to expanding the defintion of family violence contained in subhead 5 to include these additional elements.

Recommendation

The definition of family violence should be extended to ensure its conformity with the definition favoured by the UN Committee on the Rights of the Child.

[70] UN Committee on the Rights of the Child *General Comment 13*, CRC/C/GC/13, para. 4

5. Respect for the views of the child

5.1 As noted above, respect for the views of the child is one of the general principles of the UN Convention on the Rights of the Child. It also forms part of the amendment to the Constitution on the rights of the child passed by referendum in November 2012. Should the referendum result be upheld by the Supreme Court, Article 42A.4 of the Constitution will provide as follows:

> 1° Provision shall be made by law that in the resolution of all proceedings—
>
> i. brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected,
>
> or
>
> ii. concerning the adoption, guardianship or custody of, or access to, any child,
>
> the best interests of the child shall be the paramount consideration.
>
> 2° 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.

5.2 It should be noted that a child's right to express views on matters affecting him/her has been recognised as an unenumerated right under Article 40.3 of the Constitution; however, pending the amendment of the Constitution to include Article 42A, it is not yet explicitly provided for.[71]

5.3 The General Scheme makes provision for children and young people to express their views and for those views to be given consideration in a range of circumstances:

[71] See, *inter alia*, the comments of Finlay Geoghan J in *F.N. and E.B. v C.O.* ([2004] 4 I.R. 311 at para 29) and *M.N. v R.N.* (Child Abduction) ([2009] 1 I.R. 388 at para.32). The Supreme Court approved the approach of Finlay Geoghan J in *B.U v B.E.* (Child Abduction) ([2010] 3 I.R. 740) and also in *UA v UTN* (Unreported, Supreme Court, October 13, 2011; [2011] IESC 39)

- When it falls to the court to consider what is in the best interests of child in the context of proceedings relating to the guardianship, custody, upbringing, access to or administration of the property of the child, it must have regard to the ascertainable view of the child, giving due weight to such views having regard to the age and maturity of the child (Head 32);
- In obtaining the views of the child in accordance with Head 32, the court shall ensure that the manner in which such views are provided to the court facilitates the child freely expressing such views and, in so far as is practicable, that the views so expressed are not as a result of the undue influence of another, including a parent of a child (Head 32);
- In determining whether to grant an application for access by a relative of a child or a person acting in loco parentis, the court shall have regard to all the circumstances, including in particular the views of the child (Head 48);
- When a guardian *ad litem* is appointed, the guardian is obliged to ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court (Head 60).

5.4 Taken together, it is clear from these provisions that the intention of the General Scheme is to advance respect for children's right to express their views in the context of relevant proceedings and for those views to be given appropriate weight in accordance with the child's age and maturity. It is also evident that the General Scheme thereby seeks to give effect to the requirements of Article 42A.4.2°, in so far as they relate to private law.

5.5 However, the Ombudsman for Children's Office believes that the General Scheme could go further in securing children's right to express their views on the very important matters provided for in the proposed legislation.

5.6 In keeping with the approach of the UN Convention on the Rights of the Child and Article 42A of the Constitution, the obligation to afford children the opportunity to express their views and for those views to be given due weight should have parity with the provision relating to the bests interests of the child, in the sense that it should be a separate and overarching provision in the legislation. At present, it is included in the General Scheme as a consideration that informs a determination of what is in a child's best interests.

5.7 It is true that a determination of what is in a child's best interests within the meaning of the UNCRC must incorporate a consideration of the child's views, where the child wishes to express those views and is able to do so.[72] However, it must be borne in mind that within the framework of the Convention respect for the

[72] UN Committee on the Rights of the Child, *General Comment 14*, p. 13

best interests of the child and respect for the views of the child are interrelated; it is not the case that one is derived from the other.

5.8 A general legislative provision on respect for the views of the child could incorporate a number of the elements identified by the UN Committee on the Rights of the Child as being inherent aspects of Article 12 of the UNCRC, such as:

- The applicability of the provision without limitation to all judicial proceedings and mediation processes affecting children;
- The expression of views as a choice for children, with no obligation to express an opinion on any matter relevant to the proceedings if the child does not wish to do so – this accords with the experience of the Ombudsman for Children's Office that children wish to have an input but not to have the responsibility for significant decisions;
- The exercise of this right should not be limited by reference to any particular age at which children may express their views;
- The provision of appropriate information to a child and support in understanding such information and the relevant proceedings;
- The provision of an appropriate environment and mechanisms to facilitate children in making their views known, either directly or through a representative.

5.9 With respect to the final point listed above, the General Scheme could benefit from greater clarity regarding the mechanisms by which children may express their views. This has a particular importance in light of the requirements of Article 42A.4.2° in that the legislation must secure as far as practicable that in all relevant proceedings, the views of the child *shall* be ascertained and given due weight having regard to the age and maturity of the child (emphasis added). The mandatory nature of this requirement would suggest that greater rigour is required in setting out the mechanisms through which this right can be vindicated.

<u>Guardian ad litem</u>

5.10 The methods by which children express their views in relation to proceedings covered by the General Scheme can vary. One of the principal provisions of the General Scheme in this area is set out in Head 60, which relates to the appointment of a guardian *ad litem.*

5.11 Head 60 provides that if, in proceedings under the legislation, the child to whom the proceedings relate is not a party, the court may, if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child and in the interests of justice to do so, appoint a guardian *ad litem* for the

child. In deciding whether to appoint a guardian *ad litem*, the court shall have regard to a number of factors, including:

- the age and understanding of the child;
- the nature of the issues in dispute in the proceedings;
- any report on any question affecting the best interests of the child that is furnished to the court under Head 58 of the General Scheme;
- the best interests of the child;
- whether and to what extent the child should be given the opportunity to express the child's wishes in the proceedings, taking into account any statement in relation to those matters in any report under Head 58, and whether the expression by the child of the child's wishes in the proceedings and consideration of same requires assistance being given to the court by a guardian *ad litem*;
- and any submission made in relation to the matter of the appointment of a guardian *ad litem* that is made to the court by or on behalf of a party to the proceedings or any other person to whom they relate.

5.12 Head 60 goes on to specify the role of the guardian *ad litem* as an independent officer of the court, charged with forming an independent view of what is in the best interests of the child, reporting to the court and ensuring that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court.

5.13 A number of points arise with respect to the system for appointing guardians envisaged by the General Scheme.

5.14 The first of these is that the existing statutory provisions relating to the appointment of guardians in the context of private law proceedings - section 29 of the Guardianship of Infants Act 1964, as amended – have never been commenced. It is hoped that, whatever shape Head 60 finally takes, it will not remain inoperative after the enactment of the legislation.

5.15 The second point is that there is a potential inconsistency between Head 60 and the obligations contained in both Article 12 of the UNCRC and sub-article 4.2° of the constitutional amendment on the rights of the child. As outlined above, one of the factors to be considered by the court in determining whether to appoint a guardian is "whether and to what extent the child should be given the opportunity to express the child's wishes in the proceedings". This is framed in a way that is more discretionary than either the Convention or the constitutional amendment appears to contemplate. From the point of view of the UNCRC, the question is not whether a child should be given the opportunity to express his/her views in relation to proceedings but rather whether the child wishes to do so and, if so, how that can

be done most effectively. In respect of Article 42A.4.2°, the obligation to seek the ascertainable views of the child in relation to the relevant proceedings is circumscribed only with reference to the practicability of obtaining those views, not with reference to whether a court determines whether and to what extent the child should be afforded such an opportunity. The wording of Head 60 therefore appears to provide weaker protection for children's right to express their views than is provided for in the recent amendment to the Constitution.

5.16 This is not to suggest that a guardian ad litem should be appointed in every case. However, it is essential that there be a presumption in favour of allowing children and young people to express their views and that this possibility be explored at an early stage of proceedings. The Ombudsman for Children's Office understands that as part of reform of the courts under consideration by the Minister for Justice and Equality, an independent court welfare assessment service may be established. It may be that an officer of this service could be charged with exploring the avenues by which children at the centre of disputes may be able to express their views - whether directly or indirectly – and make appropriate recommendations to the court. The Ombudsman for Children's Office notes that other jurisdictions have introduced systems by which trained professionals – usually psychologists or social workers – interact with families at an early stage in the interests of finding a resolution to the family law dispute, including direct interaction with any children of those families.[73]

5.17 A further point relates to the reality that guardians currently operate in an unregulated environment. The Ombudsman for Children's Office has previously expressed concerns in relation to this in the arena of child care proceedings.[74] This Office notes, however, that Head 91 provides explicitly for the Minister for Justice and Equality to make regulations concerning guardians *ad litem* that cover matters such as:

- eligibility to be a guardian *ad litem* and the nature of their qualifications;
- the training of guardians *ad litem*;
- the establishment of a register of guardians *ad litem*;
- detailing the work to be undertaken by guardians *ad litem*; and
- prescribing the fee structure applicable to guardians *ad litem*.

[73] The Family Court of Australia, for example, introduced a Child Responsive Program, which involves a series of meetings between a family consultant (either a social worker or psychologist with experience of working with families), the parents and the children. The meetings focus on the children's needs and the aim is to assist parents and the court to achieve the best outcomes for the children. Family consultants meet the children separately from the parents. Further information on the programme may be obtained at www.familycourt.gov.au

[74] Ombudsman for Children's Office, *Advice on the Child Care Amendment Bill 2009* (Dublin: OCO, 2010) section 3

5.18 This is a welcome development. The Ombudsman for Children's Office believes that it would be advantageous for the Minister for Justice and Equality to prepare draft regulations in accordance with Head 91 during the course of the Children and Family Relationships Bill's passage through the Houses of the Oireachtas. This would inform the debate on the legislation and allow greater precision in the analysis of its impact.

5.19 Finally, it is clear from Head 60 that a guardian will not be appointed when a child is party to proceedings and that, as an independent officer of the court, the guardian will not be a party. With respect to the exclusion of guardians when children have legal representation, the Ombudsman for Children's Office notes that guardians and legal representatives have very different roles and contribute to proceedings in distinct ways. As a result, it would seem prudent to allow for the opportunity - under appropriate circumstances – to permit the appointment of a guardian even when a child is a party and has legal representation.

Recommendation

The General Scheme must enhance the protection of a child's right to express views in the context of family law disputes by ensuring that there is a presumption in favour of seeking a child's views, subject to the child being willing to express those views. Appropriate mechanisms must also be put in place to allow children's views to be made known to the court in a manner that is sensitive and respectful of the young person.

Judicial interviews

5.20 Another method by which children's views are made known to the courts is by means of direct engagement with members of the judiciary.[75]

5.21 In commenting on this issue, the Ombudsman for Children's Office is mindful of the fundamental reform of the family law courts that is currently under consideration by the Department of Justice and Equality. One of the aims of this process of reform is to ensure that a more specialised group of judges will have responsibility for family law cases. This will have a direct impact on the capacity of judges to elicit the views of children sensitively and to weigh them accordingly.

[75] In *R.B. v A.S*. Keane CJ stated that "It has long been recognised that trial judges have a discretion as to whether they will interview children who are the subject of custody or access disputes in their chambers, since to invite them to give evidence in court in the presence of the parties or their legal representatives would involve them in an unacceptable manner in the marital disputes of their parents." [2002] 2 I.R. 428 at para. 456

5.22 Although this issue is not addressed in the General Scheme, it will have a significant bearing on the effectiveness of the framework put in place to give effect to our obligations under the Convention on the Rights of the Child and Article 42 A with regard to respecting the views of children. It must therefore form part of any review of the operation of the legislation once enacted.

Court Reports

5.23 Head 58 provides for the preparation of a report on any question affecting the welfare of the child in proceedings to which the legislation relates. This provision is broadly analogous to section 47 of the Family Law Act 1995.

5.24 One of the novel aspects of this element of the General Scheme is that it allows the court to consider whether to furnish a report prepared in accordance with Head 58 to the child. Matters to which the court must have regard in coming to its decision include:

- the age and maturity of the child;
- the capacity of the child to understand the report;
- the impact on the child of reading the report and the effect it may have on her/his relationship with his/her parents or guardians;
- the best interests of the child; and
- whether, in the circumstances, such a report should be furnished to the child's parent, guardian, next friend or guardian *ad litem* but should not be furnished to the child.

5.25 The provision of appropriate information to a child is a pre-requisite for meaningful participation in proceedings affecting him/her. In light of this, the capacity of the courts to provide welfare reports to children affected by proceedings under the legislation is most welcome, subject to the safeguards already outlined in the General Scheme.

5.26 A concerning aspect of the existing system for providing welfare reports to the courts is the cost of obtaining them. As the fees and expenses incurred in the preparation of the report fall to the parties, this can place a significant burden on families, especially those of limited means. Disputes regarding the proportion of costs to be borne by such parties can also lead to delays in family law proceedings. Against this background, consideration should be given to State funding for the preparation of reports.

5.27 These reports are crucial to ensuring that proceedings under the legislation are fully informed and equipped to come to the best possible decision in the interests of children. It should not be the case that the provision of such reports be contingent on the financial resources available to the child's parents or guardians.

Recommendation

In light of the importance of court reports on the welfare of children in the context of private law proceedings, the cost of preparing them should not be borne by parties of limited financial means.

Consent

5.28 A significant reform in the process for appointing guardians and awarding custody is provided for in Heads 39 and 47 respectively, namely requiring the consent of a child who is 12 years of age or older for the relevant orders to be made.

5.29 The inclusion of this requirement clearly reflects a desire to give young people a more significant input into a crucially important decision that affects them. From this point of view, the intention of the General Scheme is most welcome.

5.30 The UNCRC does not mandate particular ages at which young people should be able to consent to particular matters. As noted above, the obligation to ensure that young people have the right to express views on matters that affect them is not limited with respect to chronological age; the UN Committee on the Rights of the Child has issued very clear guidance to States Parties in this regard.

5.31 Consent is distinct from consultation. However, one of the key aspects of children's right to express their views on matters affecting them is that it must be presented as a choice rather than an obligation on children; it should never become a burden that children must bear. This is especially important in the context of potentially acrimonious family law disputes, where children and young people may be particularly sensitive to the idea that they are responsible for choosing the outcome of the process.

5.32 In light of these considerations, it would be preferable to remove the reference to the requirement to obtain children's consent. If the relevant proceedings provide a meaningful avenue for children and young people to express their views – should

they wish to do so – it should be possible for the relevant decision-maker to give appropriate weight to the child's views. If done effectively, this will provide the safeguard that the current proposals relating to consent are attempting to provide.

Recommendation

The requirement to obtain the consent of children aged 12 or over contained in Heads 39 and 47 should be removed.

6. Parentage and presumptions of paternity

6.1 Head 5 of the General Scheme confirms the existing position under domestic law to the effect that the parents of a child are his or her birth mother and biological father, except where the child has been adopted within the meaning of the Adoption Act, 2010. The new insertion relates to a child born as a result of assisted reproduction, including surrogacy, where it is indicated that parentage shall be determined in accordance with the provisions of Part 3 of the Act.

6.2 Heads 6(2) and 6(4) are very similar to current statutory rules, though there are some differences.

6.3 Firstly, section 4 of the Children Act, 1997 amended section 2 of the Guardianship of Infants Act, 1964 so that in respect of the definition of "father", it provided for circumstances surrounding the annulment of a marriage. Further, section 46(4) of the Status of Children Act 1987 refers to a subsisting marriage as including a voidable marriage. Although Heads 6(2) and (4) do not refer to rules on paternity in the context of nullity, Head 31(1) of the Bill which provides the definition of "father" in the context of guardianship, custody and access replicates section 4 of the Children Act, 1997 in so far as it deals with nullity. It might therefore be preferable if Head 6 of the General Scheme contained some cross reference to Head 31 to indicate that the issue of nullity remains part of the rules on the presumption of paternity.

6.4 Head 6(5) expands the grounds upon which the presumption of paternity may be rebutted in relation to a husband such that where a married woman who is living apart from her husband and gives birth to a child more than 10 months after the last occasion when there was contact between her and the husband, it shall be presumed that her husband is not the father of the child unless the contrary is proved on the balance of probabilities. This provision in relation to the *"last occasion when there was contact"* does not replicate any existing statutory provision. If the presumption of paternity in the context of married couples were to continue unrestricted, it may result in the denial of a child to know his/her true biological identity. It can also deny the biological father of his right to apply for guardianship and equally, attach the status of guardianship to a man who has no biological connection to the child.

6.5 Turning from the marital situation to circumstances which include the non-marital, perhaps the most significant amendment to existing law is the introduction of the

presumption of paternity on the balance of probabilities where the man has cohabited with the child's mother for at least 12 consecutive months prior to the child's birth and, where applicable, the cohabitation ended less than 10 months before the child's birth. However, whereas there is a requirement for the couple to be in an intimate and committed relationship, what constitutes such a relationship is not defined. The Ombudsman for Children's Office notes that a list of criteria is set out in the Civil Partnership and Certain Rights and Obligation of Cohabitants Act 2010 which a court must consider in its determination of whether an "intimate and committed relationship" exists but it is unclear whether the same criteria are applicable under the General Scheme.

6.6 Furthermore, while the presumption set out in Head 6 is clearly rebuttable, it is to be noted that section 47 of the 1987 Act admits of the evidence of a husband or wife in proceedings to prove that marital intercourse did not take place between them during any period. A similar provision would appear sensible within Head 6(3) given that there could be an array of situations where a man and woman cohabited for 12 consecutive months prior to a child's birth in the absence of a sexual relationship.

6.7 Head 6(3)(c) further provides for a man to be presumed to be the father where he has been found by a court of competent jurisdiction to be the father of the child for any purpose. The General Scheme does not define *"a court of competent jurisdiction"*. It requires clarification as to whether and if so, in what circumstances, the legislation would propose to recognise as parents under Irish law those individuals who are recognised as parents in other jurisdictions.

<u>Recommendation</u>

The General Scheme should further define in what circumstances it would propose to recognise as parents under Irish law those individuals who are recognised as parents in other jurisdictions.

6.8 Head 7 contains some modifications to the corresponding section 35 of the 1987 Act. Firstly, the category of persons who may apply to court for a declaration that the person is or is not the parent of the child is expressly listed and extends beyond the child to various other applicants including *"any other person who, in the opinion of the court, has a sufficient interest in the matter."* Secondly, the new notice requirements to a minor child based on whether notice would be appropriate given the age and best interests of the child reflects more general developments in Irish law regarding the voice of the child. Thirdly, whereas it was open to a court under

section 35(4) of the 1987 to refuse to hear a case in full or part, if at any stage, the court considered that it would be against the interests of the applicant to determine the application, there is no discretion contained in the Bill for a court to refuse to hear an application for a declaration of parentage. This is linked to the importance of ascertaining "biological truth" in all circumstances and is therefore a welcome addition.

6.9 Head 29 provides for a situation in which there is a failure to comply with a direction to take a DNA test for the purposes of a test to establish parentage. The Head allows the court to draw certain inferences where a person refuses to comply with a direction to undertake DNA testing or, in cases involving assisted reproduction, the court may dismiss the application. However, the General Scheme does not oblige a person, against whom a paternity suit is brought, to comply with court orders to undergo DNA tests.

6.10 The Minister may wish to consider the compatibility of this provision with Article 8 of the European Convention on Human Rights as the ECtHR has held that a failure to oblige a person to undertake a DNA test can leave a child uncertain as to his or her personal identity and does not strike an appropriate balance between the child's right to have his or her interests safeguarded and the right of the parent to refuse to undergo a DNA test.[76]

Recommendation

The Minister for Justice and Equality should examine the compatibility of Head 29 with Article 8 of the European Convention on Human Rights.

[76] Mikulić v. Croatia, (No. 53176/99) and A.M.M. v Romania (No. 2151/10)

7. Guardianship, custody and access

7.1 Part 7 of the General Scheme provides for the issues of guardianship, custody and access. In general terms, the proposed changes will provide greater protection for children by expanding the range of relationships given legal protection under Irish law.

7.2 This Part of the General Scheme has been the subject of extensive legal analysis, including by the Special Rapporteur on Child Protection. The issues addressed were also dealt with in significant detail by the Law Reform Commission in its *Report on the Legal Aspects of Family Relationships,* which included extensive analysis of the State's obligations under the UN Convention on the Rights of the Child. As a result, the Ombudsman for Children's Office has confined its comments to the most substantial issues arising from a children's rights perspective in order to avoid duplication.

Unmarried fathers

7.3 As noted above, Head 6 of the General Scheme introduces a new presumption of paternity with respect to unmarried fathers that have cohabited with a child's mother for at least twelve consecutive months prior to the child's birth and, where applicable, the cohabitation ended less than ten months before the child's birth.

7.4 Head 31 goes on to provide that the definition of "father" for the purposes of Part 7 of the General Scheme includes unmarried fathers who have cohabited with a child's mother in the circumstances set out in Head 6. The effect of this is to extend the category of those who are automatically guardians of a child to include a father who has cohabited with the child's mother in such situations.[77]

7.5 The policy intention behind this proposed amendment to the current law governing guardianship is to increase the number of men who are automatically guardians of their children. From a children's rights perspective, this serves to support the vindication of a child's right to know and be cared for by his/her parents (Article 7 of the UNCRC) and also the obligation on the State to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of their child (Article 18 of the UNCRC). The changes envisaged by Part 7 are therefore positive.

[77] See Head 37 of the General Scheme

7.6 The Ombudsman for Children's Office notes, however, that the approach of the General Scheme to this issue does not conform to the recommendation made by the Law Reform Commission in this area. In its report on the legal aspects of family relationships, the Commission recommended that a mechanism be put in place which confers joint guardianship on the parents of a child by linking it to compulsory joint registration of the birth of a child.[78] The Commission outlined in significant detail the rationale for using joint registration as a trigger mechanism for determining guardianship; what amendments to the Civil Registration Act 2004 would be required to put in place the relevant procedures; why a register of guardians is very desirable; and how to address situations in which the mother of a child does not know the identity of a father or has fears for her safety or that of the child.

7.7 While extending the categories of father who are automatically guardians of their children, the General Scheme does not include within its scope automatic guardianship for fathers who do not meet the cohabitation requirement but who nonetheless would seek to assume their responsibilities with respect to their children.

7.8 It is clear why a cohabitation criterion would be considered in the context of drafting the legislation; it is not clear why it should be decisive for the purposes of determining automatic guardianship because there are a range of situations in which a father would clearly wish to become a guardian but would not satisfy this criterion. The Ombudsman for Children's Office recalls in this regard that the European Court of Human Rights has consistently stated that family life can exist between a father and his child irrespective of the cohabitation arrangements of the parents.[79]

7.9 The Ombudsman for Children's Office therefore concurs with the recommendations of the Law Reform Commission with respect to this issue and notes that they are similar to reforms introduced by the Welfare Reform Act 2009 in the United Kingdom. This Office believes that implementing the recommendation of the Law Reform Commission would go further than the proposals contained in the General Scheme in advancing the important children's rights principles outlined above. It is important to recall that this would include important – indeed necessary – safeguards in situations where a mother has a

[78] Law Reform Commission, *Report: Legal Aspects of Family Relationships* (2010) LRC 101-2010, see sections C and D of Chapter 2.
[79] See section 2 of this Advice.

legitimate reason not to place a father's name on the birth certificate and thereby trigger the conferral of guardianship on him.

Recommendation

The Ombudsman for Children's Office believes that the cohabitation period required for the conferral of automatic guardianship on unmarried fathers should be removed. This Office supports the Law Reform Commission's recommendation with respect to joint birth registration and its connection with guardianship.

Appointment, powers and role of guardians

7.10 Head 34 sets out in broad terms what the powers, rights and responsibilities of guardianship are. Head 35 goes on to provide that guardians and those who have custody of a child must act in the best interests of the child, while Head 36 mandates how guardians are to act jointly in respect of children.

7.11 The intention of Head 36 is to ensure that guardians act in a collaborative fashion in discharging their obligation to act in the best interests of children. Among other things, Head 36 provides that the guardians:

- shall provide information to any other guardian relating to the exercise of powers, rights and responsibilities of guardianship, at the request of that other guardian;
- shall use their best efforts to co-operate with one another in exercising their powers, responsibilities and entitlements of guardianship; and
- may together enter into an agreement with respect to the allocation of powers, rights and responsibilities of guardianship.

7.12 Head 36 provides further that except where otherwise stated by way of court order, each guardian is entitled:

- to be informed of and consulted about and to make all significant decisions affecting the child in the exercise of the powers, rights and responsibilities of guardianship; and
- to have sufficient contact with the child to exercise those powers, rights and responsibilities.

7.13 The policy intention behind these provisions is laudable and reflects the important children's rights principle that both parents have common responsibilities for the upbringing and development of their child. However, practical difficulties may arise with a provision that mandates parents to work together. It must be recalled that where the guardians of a child do not have a good relationship, cooperation can be difficult to maintain; indeed, this has been evident in a number of investigations undertaken by this Office. While it may be argued that mandating such cooperation may be of assistance in such situations, requiring there to be consistent contact between guardians and an exchange of information may be unworkable, particularly as the guardians may disagree about what "significant decisions" are and, consequently, about when they are entitled to be informed of certain matters by the other guardian.

7.14 In light of this, it may be more practical to replace a general statutory requirement to cooperate with a specific provision outlining the matters in respect of which guardians cannot act unilaterally, for example decisions regarding medical treatment or the child's education.

Recommendation

The provision requiring guardians to cooperate and communicate with each other should be replaced with a specific provision outlining the matters in respect of which guardians cannot act unilaterally.

7.15 Head 36(7) provides that a guardian who exercises any of the powers referred to in subhead 6 shall do so in a manner consistent with the age and maturity and evolving capacity of the child.

7.16 The inclusion of a provision explicitly recognising the importance of a child's evolving capacity is significant, and it reflects Article 5 of the UNCRC, which provides that:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

7.17 Given the over-arching nature of this responsibility on guardians, it may be more appropriate to include this provision under Head 35 of the General Scheme.

Recommendation

The obligation on guardians to exercise their powers in a manner consistent with the age and maturity and evolving capacity of the child should be placed in Head 35, given its over-arching importance.

Custody and access arrangements

7.18 Head 47 and Head 48 allow a relative of a child or a person acting in loco parentis, meeting certain criteria, to apply to court for custody of or access to a child.

7.19 The Ombudsman for Children's Office notes that the Law Reform Commission recommended that where the court makes an order granting custody to a relative or person in loco parentis, guardianship rights would attach to that person for the duration of the court order. This would not remove guardianship rights from the parents.

7.20 The Commission recommended further that the person exercising guardianship rights by virtue of a court order granting him or her custody should not be permitted to make any decisions in relation to the adoption of the child or to appoint a testamentary guardian to care for the child. These recommendations are based upon the legislative framework in place in England and Wales.

7.21 The introduction of such a provision could address a gap identified by the Ombudsman for Children's Office in previous advices to Government, namely the absence of a statutory provision for special guardianship orders which could be beneficial to children in a range of circumstances including children in step-families, families affected by changing structure through divorce or for the children of a widow/widower.

Recommendation

The Minister for Justice and Equality should consider implementing the recommendation of the Law Reform Commission with respect to conferring limited guardianship rights on relatives of a child or those acting in loco parentis when the court makes an order granting custody to them.

Mediation and counselling

7.22 Head 61 provides that the cost of any mediation or counselling services provided for an applicant or respondent who is or becomes a party to proceedings under Part 7, or for the child to whom the proceedings relate, shall be in the discretion of the court concerned.

7.23 Given the central importance of mediation and counselling services – not least in achieving a more speedy resolution to disputes in a manner that avoids unnecessary recourse to the courts – it is critically important that parties should not be placed at a disadvantage by virtue of their financial circumstances. State support for such services is therefore integral to the effective operation of this Part of the proposed legislation.

Recommendation

The Minister for justice and Equality should ensure that sufficient resources are in place to support parties' access to mediation services.

7.24 A related point is the need to have access to appropriate and understandable information regarding family law proceedings and the various avenues that are open to parties to resolve their differences. The Ombudsman for Children's Office recalls that, in collaboration with the Courts Service, it developed two short films for separating parents and their children about key aspects of family law proceedings in the District Court, and possible alternatives to Court, in particular family mediation. The aim of these productions is to support parents and young people in making whatever decisions are best for them.

8. Making parenting orders work

8.1 Part 9 of the General Scheme provides mechanisms for enforcing court orders relating to parenting, particularly custody and access orders.

Enforcement Orders

8.2 Under Head 63, if an applicant has been denied custody or access to the child by another guardian or parent, an enforcement order can contain a provision requiring the respondent to give the applicant compensatory time, security or to reimburse the applicant for any necessary expenses actually incurred. Furthermore, the court may vary or discharge a previous order or require that one or both parties attend a post-separation parenting program, family counselling or participate in a mediation process. Where a guardian or parent has a right to spend time with the child but fails to exercise this right without reasonable notice, the court may direct that he or she reimburses the other guardian or parent for any necessary expenses actually incurred.

8.3 As noted in the explanatory note to Head 63, the most likely remedy for non-compliance with access and shared custody orders under the law as it stands is to find the non-compliant party in contempt of court. This is perceived – quite correctly – as a serious step to take; there is therefore a lack of graduated options available to the court in order to bring about compliance with its orders.

8.4 The proposals set out in the General Scheme with regard to enforcement orders are progressive and innovative, and they reflect an increasing number of circumstances where individual parents do not comply with court orders, thus denying a child access to their non-resident parent. By providing a wider range of means by which contact can be supported, the thrust of the legislation is to support the child's right to know and be cared for by his or her parents. They appear to be broadly in line with the jurisprudence of the European Court of Human Rights as well as with the European Convention on Contact concerning Children.[80]

8.5 A connected point is the extent to which non-legislative measures undertaken to support families could obviate the need for the courts to make enforcement orders. The Ombudsman for Children's Office notes in this regard that an

[80] Convention on Contact concerning Children CETS No. 192. Ireland has not signed or ratified this instrument.

evaluation of the Child Contact Centre service run on a pilot basis between 2011 and 2013 by One Family and Barnardos was very positive.[81]

8.6 It would be highly unfortunate if the courts had to exercise the powers conferred on them by the General Scheme more often than necessary because supports such as those provided by Child Contact Centres or other services were not available to children and families. The Ombudsman for Children's Office recalls in this regard that the State's compliance with international obligations under the UN Convention on the Rights of the Child and other instruments comprehend both legislative and non-legislative measures. This Office therefore recommends that the Minister for Justice and Equality give consideration to how the General Scheme will interact with the wider range of services available to children and families in order to ensure that the courts do not become overly reliant on the more coercive elements of the legislation, where this could be avoided.

Recommendation

The Ombudsman for Children's Office recommends that the Minister for Justice and Equality give consideration to how the General Scheme will interact with the wider range of services available to children and families in order to ensure that the courts do not become overly reliant on the more coercive enforcement elements of the legislation.

Mandatory mediation

8.7 Head 63(3)(c) provides that a direction made by the court under that Head may include that both parties participate in a mediation process concerning issues in dispute between them that may have an impact on their parenting capacities. Although the intention of this provision – to promote mediation as a method of resolving family law disputes – is very laudable, it could be argued that mandating participation in an alternative dispute resolution process contravenes a basic aspect of such processes, namely that they are voluntary.

8.8 In addition, if an Act of the Oireachtas required participation in a mediation process, it would have to clarify that it would in no way impair an individual's right to access a court in order to resolve the matter at the heart of the dispute, as this would clearly raise an issue with access to justice, which has a constitutional dimension.

[81] Holt, S and Murphy, C. *Final Evaluation of the Barnardos/One Family Pilot Child Contact Centre* (CMAdvice Ltd: December 2013). See in particular Chapter 8 conclusions and recommednations

Recommendation

The provision relating to mandatory mediation should be amended so that it respects the voluntary nature of the process and does not impair an individual's right to access the courts.

Role of An Garda Síochána

8.9 Head 64 gives the court discretion to make supplementary orders where an enforcement order is itself breached, including fining the respondent, requiring the respondent to undertake community service or, in extreme cases, directing a member of An Garda Síochána to assist in enforcing access.

8.10 When assisting in enforcing access, a member of An Garda Síochána is not required to bring the child to the applicant immediately if he or she determines that it is not in the best interests of the child to do so but may enter the premises with such assistance and using such force as is reasonably necessary. No action can lie against any member of the Gardaí, or a person giving assistance, on the basis of an action or omission carried out in good faith under the powers conferred in Head 66.

8.11 The General Scheme clearly contemplates the involvement of An Garda Síochána as a measure of last resort, to be employed only in exceptional circumstances. Nonetheless, the Ombudsman for Children's Office has serious concerns regarding the inclusion of this power in the proposed legislation. Enforcing access or custody orders does not generally involve situations of urgency; if there is an immediate and serious risk to a child, An Garda Síochána already has appropriate powers under section 12 of the Child Care Act 1991 to deal with such situations.

8.12 The impact on a child of the arrival of members of An Garda Síochána in his/her home and the child's subsequent removal should not be underestimated. While clearly necessary where there is a threat to the child's safety or welfare, it may be doubted whether such extreme measures are necessary and proportionate in order to enforce a custody or access order. It should be noted in this regard that this would involve An Garda Síochána exercising a statutory power in a context very different from that in which the Gardaí currently interact with families.

8.13 The Ombudsman for Children's Office therefore recommends that this provision be removed; should the other measures set out in Part 9 prove inadequate in some respect, they could be revisited in the context of an evaluation of the operation of the legislation.

Recommendation

The provision enabling children to be removed by members of An Garda Síochána in the context of enforcing orders made in the course of private family law proceedings should be removed.

9. Child Maintenance

9.1 Part 10 of the General Scheme provides for the extension of maintenance liabilities for children to certain persons who are not the biological or adoptive parents of the child. The explanatory note to Head 68 highlights that similar liabilities already exist for spouses in relation to a child who is treated as a "child of the family". Those who may be called upon to provide maintenance for a child will now include civil partners and cohabitants who are not biologically related to the child.

9.2 This is a welcome development that provides greater protection and security to children in families that are not currently provided for in this domain. In a sense, it will move towards creating parity between a child with a step-parent and a child with a parent who is not biologically related to him/her but who is either cohabiting or in a civil partnership with the child's parent.

Equality between children of marital and non-marital families

9.3 Head 71 provides, among other things, for the clarification of the court's jurisdiction to make a lump sum order for the benefit of a child in maintenance proceedings and, specifically, to ensure that all children are treated equally regardless of the marital status of their parents.

9.4 This clarification is welcome, though it is unfortunate that it is necessary. The Ombudsman for Children's Office recalls the concerns of the Oireachtas Committee on the Constitutional Amendment on Children with respect to the lingering difference in treatment between children of marital and non-marital families in this area.[82]

Cross-border maintenance

9.5 Finally, the Ombudsman for Children's Office notes that the cross-border aspect of child maintenance is not addressed in the legislation and notes further that this issue is the subject of the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations, which the European Union ratified in 2010.[83] Given the difficulties that can present in disputes regarding maintenance with an

[82] See the Final Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children, pp. 48-49 AC

[83] Hague Conference on Private International Law, Protocol on the Law Applicable to Maintenance Obligations (23 November 2007). The EU ratified the instrument on 8.4.2010

international dimension, consideration should be given to the possibility of reflecting the provisions of the Hague Protocol in this part of the General Scheme.

Recommendation

Consideration should be given to the possibility of reflecting the provisions of the Hague Protocol on the Law Applicable to Maintenance Obligations in the General Scheme.

10. Amendment of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

10.1 Part 11 of the General Scheme provides for a range of amendments to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, specifically in the areas of shared home protection, maintenance and dissolution. In summary, these modifications will have the effect of ensuring that when it falls to a court to determine questions relating to those areas, the court will be required to have regard to the needs of dependent children of the family.

10.2 The need for these amendments arises from a decision made at the time the Act was drafted to exclude the needs of children from its scope. This is specifically acknowledged in a note to Head 73 of the General Scheme, which highlights that while the provisions of the Family Home Protection Act 1976 were in large part replicated for civil partners in Part 4 of the 2010 Act, the references to the needs of dependent children of the family were not included as a result of a policy decision at the time. The impetus for this policy decision is not fully explained but it may be inferred that the needs of children were explicitly omitted from the legislation in an effort to distinguish civil partnership from civil marriage.

10.3 The Ombudsman for Children's Office was highly critical of this decision in its 2010 advice to the Minister for Justice, Equality and Law Reform.[84] Firstly, it ignored the reality that practical – and perfectly foreseeable – difficulties would arise for children being raised by civil partners whose interests would be directly affected by decisions concerning the family home, maintenance and dissolution, but for whom there was no statutory protection. The Office noted that children being raised by parents in a civil partnership require these protections for the same reason that children being raised by parents in a civil marriage require them; their needs are not contingent on the nature of their parents' relationship.

10.4 Secondly, the Ombudsman for Children's Office expressed serious concern at the approach to law-making represented by this deliberate omission. When legislation that comes before the Oireachtas fails to provide adequately for children, difficulties are more likely to arise because their interests and rights have not been considered. However, in the case of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, the situation of children was considered but in

[84] See generally Ombudsman for Children's Office, *Advice of the Ombudsman for Children on the Civil Partnership Bill 2009* (2010)

precisely the wrong way. Their interests were explicitly subordinated to other considerations, in this case a policy decision to differentiate between civil partnership and civil marriage. A situation was contemplated in which a statute would explicitly remove protections provided to children in other legislation in order to satisfy this policy imperative.

10.5 In light of this, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provided a particularly stark example of a failure to observe the best interests principle in the process of drafting legislation.

10.6 Part 11 of the General Scheme is therefore most welcome, as it rectifies these unwarranted omissions from the 2010 Act and is clearly animated by a desire to act in the best interests of children by securing legal protection for them.

11. Amendment of the Adoption Act 2010

11.1 Part 12 of the General Scheme provides for a number of amendments to the Adoption Act 2010. The purpose of these amendments is to include civil partners within the categories of those eligible to apply for an assessment of suitability to adopt and to provide for consequential amendments to the provision of the Adoption Act 2010 concerning the application process, parental rights and property rights.

11.2 As the Ombudsman for Children's Office noted in its advice to the then Minister for Children and Youth Affairs on the Adoption Bill 2009,[85] adults do not have a right to adopt. Adoption concerns the right of a child to become integrated into a family where one or both of the child's biological parents are, for whatever reason, unable or unwilling to care for the child. The question of eligibility of prospective adopters must therefore be viewed primarily from the perspective of the children who may be adopted by them. As regards the categories of persons who are eligible to apply for an assessment of suitability to adopt, the issue is whether maintaining the categories as they stand or extending them would have an adverse effect on children and undermine their rights.

11.3 Article 7 of the Revised European Convention on the Adoption of Children states that the law shall permit a child to be adopted by: two people of different sex who are married to each other or, where such an institution exists, have entered into a registered partnership together; or by one person. Article 7(2) of the Convention provides that States are free to extend the scope of the Convention to same-sex couples who are married to each other or who have entered a registered partnership together and to opposite-sex and same-sex couples who are living together in a stable relationship.

11.4 In its advice on the Adoption Bill 2009, the Ombudsman for Children's Office noted that the eligibility of prospective adopters can affect children in different ways, depending on their situation. Children with no prior connection or relationship with prospective adopters are affected by the eligibility criteria to the extent that altering those criteria can widen or diminish the pool of potential adoptive parents. There are other children for whom adoption means altering the legal relationship with one or both of the child's parents or caregivers within an existing family unit.

[85] See generally Ombudsman for Children's Office, *Advice of the Ombudsman for Children on the Adoption Bill 2009* (2009)

In these situations, adoption affects the legal conditions in which the family finds itself rather than the family's actual composition. The Ombudsman for Children's Office emphasised that the provisions of Ireland's adoption legislation governing the eligibility of prospective adopters must be framed in a manner that is sensitive to the needs of all of these children and to the wide variety of situations in which being adopted could be advantageous to a child. Fundamentally, an adoption should not be denied to a child who could benefit from one.

11.5 In light of the foregoing considerations, the Ombudsman for Children's Office recommended that the categories of persons eligible to apply for an assessment of suitability to adopt should be extended in order to remove the statutory bar on unmarried opposite-sex and same-sex couples from making such an application. The provisions contained in Part 12 of the General Scheme with respect to civil partners are therefore most welcome.

11.6 However, this Office notes that unmarried couples are still barred from making an application for an assessment of suitability to adopt. Although the rationale for excluding unmarried couples from the scope of the legislation is not elucidated, it can be inferred from the explanatory note to Head 79 that the decision is based on the fact that unmarried couples have not entered into any legally binding relationship with concomitant rights and responsibilities.

11.7 It is instructive to consider how a similar argument was examined by the Houses of Lords when it ruled that the provision of the Adoption (Northern Ireland) Order 1987 which excluded unmarried couples from applying to adopt violated the European Convention on Human Rights.[86] The Court found that while it may be possible to generalise regarding the correlations between certain family structures and outcomes for children (in this instance the relevant consideration was the stability of relationships between unmarried couples in general), there is no logical reason to elevate such reasonable generalisations to the level of irrebuttable presumptions of unsuitability.[87] With regard to the relevant provision of Northern Irish legislation, such an approach was found to create a situation in which "the interests of the particular child, which Article 9 [of the Adoption (Northern Ireland) Order 1987] declares to be the most important consideration, [had] disappeared from sight, sacrificed to a vague and distant utilitarian calculation".[88]

[86] Re P [2008] UKHL 38
[87] See comments by Lord Hoffmann at para.18
[88] At para. 16

11.8 The distinction between eligibility and suitability to adopt is crucial in this context. Providing that an individual or couple is eligible to adopt implies only that they can apply for an assessment of suitability to adopt. Such assessments are, quite rightly, rigorous and exacting.[89] An adoption order will only be granted where the competent authorities are satisfied that, with respect to a wide range of factors and in light of the in-depth examination of the prospective adopters, they are suited to adopting a child. This represents a very significant safeguard of the child's interests.

11.9 Against the background of these considerations, and given that there are children who could benefit from an adoption but currently cannot be adopted for the reasons set out above, the eligibility criteria for prospective adopters should be extended fully in line with the Revised European Convention on the Adoption of Children to include the possibility that unmarried couples may apply jointly for an assessment of suitability to adopt.

Recommendation

The eligibility criteria for prospective adopters should be extended fully in line with the Revised European Convention on the Adoption of Children to include the possibility that unmarried couples may apply jointly for an assessment of suitability to adopt.

[89] The assessment process includes home visits, individual and joint interviews, and an examination of areas such as the couple's relationship, their motives for adopting, their expectations of the child and their ability to help the child to a knowledge and understanding of his/her background.