



ombudsman
do leanaí
for children

Provisions of the Health (Assisted Human Reproduction) Bill 2022
relating to surrogacy

Observations of the
Ombudsman for Children's Office

May 2022

Contents

1. Introduction	1
2. International children’s rights standards.....	1
3. Health (Assisted Human Reproduction) Bill 2022.....	9
4. Issues not addressed in the Health (Assisted Human Reproduction) Bill 2022.....	14

1. Introduction

On 28 February 2022, the Minister for Health announced that he had received Cabinet approval to publish the Health (Assisted Human Reproduction) Bill 2022 (2022 Bill).¹ The 2022 Bill will regulate the provision of assisted human reproduction treatment, including for the purposes of domestic altruistic surrogacy.

The Ombudsman for Children's Office (OCO) has previously expressed the view, and continues to hold the view, that provision should be made in law for the rights of children born through surrogacy.² The OCO therefore welcomes the publication of the 2022 Bill. The 2022 Bill represents the first time that Irish legislation will provide a framework for the regulation of surrogacy, some 17 years after the Commission on Assisted Human Reproduction recommended that surrogacy should be permitted subject to regulation.³ In 2014 the Supreme Court held in *MR and DR v An tArd Chláraitheoir* that the lacuna in law as to the rights of children born through surrogacy should be addressed by the legislature, and not the Court.⁴ It is vital, therefore, that the 2022 Bill establishes legal clarity for all children in Ireland born through surrogacy.

The purpose of these observations is to set out the issues that the OCO believes merit consideration in the interests of ensuring that the 2022 Bill has appropriate regard to the rights of all children in Ireland born through surrogacy.

The OCO is an independent statutory body, which was established in 2004 under the Ombudsman for Children Act 2002 (2002 Act). The OCO's observations on the 2022 Bill have been prepared pursuant to section 7(4) of the 2002 Act, which provides for the Ombudsman for Children to advise on any matter concerning the rights and welfare of children.

2. International children's rights standards

As surrogacy engages several children's rights, it is important that regulation in Ireland has due regard to relevant international and European standards, including the UN Convention on the Rights of the Child (CRC), and international guidance on implementing these standards. Such guidance includes guidance of the UN Special Rapporteur on the sale and sexual exploitation of children, and the Verona principles for the protection of the rights of the child born through surrogacy, which were agreed by a group of experts in international law and human rights following a process launched by the International Social Service in 2016. Supported by the UN Committee on the Rights of the Child (Committee), the Verona principles outline the measures necessary to ensure a children's rights approach to the regulation of surrogacy.⁵

¹ Department of Health, [Cabinet approval for publication of Health \(Assisted Human Reproduction\) Bill 2022](#), 28 February 2022.

² OCO (2014) [Advice on the General Scheme of the Children and Family Relationships Bill 2014](#); OCO, [Ombudsman for Children's Office responds to Supreme Court's Surrogacy Judgment](#), 7 November 2014.

³ Commission on Assisted Human Reproduction (2005) [Report of the Commission on Assisted Human Reproduction](#).

⁴ [2014] IESC 60 [116].

⁵ International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#).

UN Convention on the Rights of the Child

Having ratified the CRC, Ireland has an obligation under international law to respect, protect and fulfil the rights set out in the CRC for all children in the State. Though the CRC does not address surrogacy explicitly, the obligations on States Parties under the CRC equally apply to all children that are born through surrogacy.

General principles of the CRC

Particular regard needs to be given to the four general principles of the CRC when implementing children's rights in the context of surrogacy arrangements.

Article 2 of the CRC requires States Parties to respect and ensure the rights in the CRC to every child without discrimination of any kind, including discrimination on the basis of the status of the child's parents or legal guardians and the child's country of birth. This obligation applies to all children born through surrogacy regardless of whether the surrogacy arrangement through which they were born is permitted or prohibited and whether or not legal parentage has been established.⁶

Article 3 of the CRC 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 must be assessed and treated as a primary consideration. The Committee has acknowledged that the best interests of the child may conflict with other interests or rights held by other persons, which will require a careful balancing of the interests of all parties. However, the Committee has underlined that children's right to have their best interests treated as a primary consideration means that their interests have high priority and are not just one of several considerations. As such, greater weight must be attached to what serves the child best.⁷ To assist States Parties in implementing best interests assessments and determinations, the Committee has encouraged States Parties 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 decision-makers in specific areas affecting children.⁸ In its 2016 Concluding Observations on Ireland's progress with implementing our obligations to children under the CRC, the Committee recommended that the State strengthen its efforts to ensure that children's right to have their best interests treated as a primary consideration is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions. It also encouraged the State to develop procedures and criteria to guide the determination of the best interests of the child in every area.⁹

⁶ Maud de Boer-Buquicchio (2018) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/HRC/37/60, para. 77(j); Maud de Boer-Buquicchio (2019) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/74/162, para. 21; International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), para. 3.2.

⁷ UN Committee on the Rights of the Child (2013) [General comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration](#), UN Doc. CRC/C/GC/14, para. 47.

⁸ UN Committee on the Rights of the Child (2013) [General comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration](#), UN Doc. CRC/C/GC/14, paras. 50-51.

⁹ UN Committee on the Rights of the Child (2006) [Concluding observations: Ireland](#), UN Doc. CRC/C/IRL/CO/2, para. 23; UN Committee on the Rights of the Child (2016) [Concluding observations on the combined third and fourth periodic reports of Ireland](#), UN Doc. CRC/C/IRL/CO/3-4, para. 30.

As regards surrogacy, the Committee has recommended that Ireland and other States Parties ensure that children born through surrogacy have their best interests treated as a primary consideration.¹⁰ Elaborating on the Committee's guidance, the Verona principles set out a non-exhaustive list of considerations to be included in a best interests assessment conducted in the context of decisions relating to legal parentage and/or parental responsibility.¹¹ These include:

- the intentions and suitability of the parties to a surrogacy agreement
- the child's genetic and gestational links to each of the parties to the agreement
- the likely effect on the child of the decision relating to parentage
- the child's ascertainable wishes and feelings
- the child's needs
- the child's attachment to the parties
- other circumstances relating to the surrogacy arrangement.

The UN Special Rapporteur has observed differences in approaches to conducting best interests assessments in relation to surrogacy arrangements, noting that in some countries an assessment is conducted prior to the surrogacy agreement, while in other countries an assessment is conducted following the birth of the child.¹² The Verona principles on surrogacy provide guidance to States Parties on how the best interests of the child can be incorporated into decision-making concerning surrogacy arrangements, including by establishing pre-surrogacy arrangements that are in the best interests of the child and carrying out post-birth best interests determinations in certain circumstances.¹³ Appropriate pre-surrogacy arrangements include:

- pre-approval and oversight of the arrangement by a competent judicial or administrative authority
- an independent and ongoing counselling process for the surrogate mother and intending parents
- independent legal advice for the surrogate mother and intending parents as regards the legal consequences of surrogacy
- screening of the surrogate mother and intending parents
- informed consent of the surrogate mother and intending parents.

Both the UN Special Rapporteur and the Verona principles leave it open to States Parties to decide whether judicial or administrative authorities should be assigned responsibility for regulating surrogacy arrangements and determinations as to the best interests of the child.

¹⁰ UN Committee on the Rights of the Child (2016) [Concluding observations on the combined third and fourth periodic reports of Ireland](#), UN Doc. CRC/C/IRL/CO/3-4, paras. 33-34; See also: Maud de Boer-Buquicchio (2019) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/74/162, para. 100.

¹¹ International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), para. 6.7.

¹² Maud de Boer-Buquicchio (2018) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/HRC/37/60, para. 21; Maud de Boer-Buquicchio (2019) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/74/162, para. 52.

¹³ International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), paras. 5.1-5.5. See also: Maud de Boer-Buquicchio (2019) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/74/162, para. 52 and para. 66.

The Verona principles state that pre-surrogacy arrangements, where these are carried out in line with the principles, accomplish some of the purposes of a post-birth best interests of the child determination. However, the principles outline that a post-birth best interests determination should be carried out in certain domestic and international surrogacy arrangements in proceedings concerning legal parentage and/or parental responsibility.¹⁴ These include cases in which:

- there have not been adequate pre-surrogacy evaluations or arrangements
- national laws provide that the surrogate mother is the legal parent at birth and transfer of legal parentage is required
- there is a conflict between the surrogate mother and intending parent(s) or between the intending parents after birth in regard to legal parentage or parental responsibility
- in international surrogacy arrangements, there is at least one State that does not permit the specific arrangement
- there are unforeseen developments, including where none of the parties are in a position or willing to care for the child, or where information has come to light that may affect the child's wellbeing, including indicators that sale of the child or other illicit activity has occurred
- any other circumstances which may jeopardise the rights or best interests of the child.

Article 6 of the CRC requires States to ensure to the maximum extent possible the survival and development of the child. Development should be interpreted in its broadest sense to encompass the child's physical, mental, spiritual, moral, psychological and social development.¹⁵

Implementation of the rights of the child should be aimed at achieving optimal development for all children. In considering the legislative options for regulating domestic and international surrogacy, Article 6 requires the State to adopt the option, which creates the conditions that are most conducive to the optimal development of children born through surrogacy.

Article 12 of the CRC obliges States to assure to children who are capable of forming their own views the right to express their views freely in all matters affecting them, with due weight given to their views in accordance with their age and maturity. Article 12 is closely linked to Article 3, and the Committee has emphasised that if the best interests of a group of children are at stake, opportunities should be provided to hear the children concerned and due weight should be given to their views when taking actions, including legislative decisions, that affect them.¹⁶

Children's right to know and be cared for by their parents and right to a nationality

Among the rights of particular relevance to children born through surrogacy is Article 7 of the CRC, which provides that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. The definition of parents in the context of this right includes the

¹⁴ International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), paras. 6.4-6.6.

¹⁵ UN Committee on the Rights of the Child (2003) *General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/5, para. 12.

¹⁶ UN Committee on the Rights of the Child (2009) [General Comment No. 12 \(2009\) The right of the child to be heard](#), UN Doc. CRC/C/GC/12, para. 73.

child's genetic parents, birth parents and those who care for the child for significant periods during infancy and childhood.¹⁷

The Verona principles leave it open to States as to how to determine legal parentage and parental responsibility at birth. The principles state that the intending parent(s) may be provided with exclusive legal parentage and parental responsibility by operation of law at birth, provided that the surrogate mother has the opportunity to confirm or revoke her consent post-birth and that there are no circumstances that require a post-birth determination of the best interests of the child, as set out above.¹⁸ The principles also recommend that provision should be made for the courts to make interim orders regarding parental responsibility, where necessary after the birth of the child.¹⁹

As regards the right of a child born through international surrogacy to a nationality, the Committee has recommended that States ensure that such children can obtain nationality through a clear process.²⁰ The UN Special Rapporteur has highlighted that, while the child's right to a nationality should not be affected by the method of the child's birth, in the case of international surrogacy there is a real risk that a child will be unable to receive the nationality of either of their parents or the State in which they were born.²¹ The State of the intending parents is therefore responsible for ensuring statelessness does not occur and providing the necessary assistance to ensure the child obtains the nationality of the intending parent.²² States should also take measures to grant without delay a visa or discretionary status to the child to travel from the State of birth pending determination of legal parentage and/or nationality.²³

Children's right to preserve their identity

Article 8 of the CRC requires States Parties to respect the right of the child to preserve their identity, including nationality, name and family relations as recognised by law, without unlawful interference. States Parties must also provide appropriate assistance and protection where a child is illegally deprived of some or all of the elements of their identity.

The Verona principles provide further detail on how the State can implement its obligations to uphold the child's right to preserve their identity. These principles state that States should ensure rigorous collection and storage of identity information relating to all surrogacy arrangements. States should clarify under what conditions identity information will be stored and kept up to date, who can access this information, and when and how this information can be accessed. This should

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

¹⁸ International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), paras. 10.1-10.6.

¹⁹ *Ibid.*, para. 10.11.

²⁰ UN Committee on the Rights of the Child (2019) [Concluding observations on the combined fifth and sixth periodic reports of Australia](#), UN Doc. CRC/C/AUS/CO/5-6, para. 23(c).

²¹ Maud de Boer-Buquicchio (2019) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/74/162, para. 28 and para. 32.

²² Maud de Boer-Buquicchio (2018) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/HRC/37/60, para. 70 and para. 77(j); International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), para. 13.4.

²³ International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), para. 13.8.

include preservation of data when changes occur, such as when intermediaries close down.²⁴ States also have a duty to ensure that every child born through surrogacy has an opportunity to access information concerning their genetic, gestational and social origins and States should assist in this process.²⁵ In this regard, surrogacy arrangements should only involve surrogate mothers and donors who agree that their identifying information may be transmitted to the child born through the surrogacy arrangement.²⁶

The Committee has recommended that States Parties, including Ireland, ensure the right of children born through assisted human reproduction and surrogacy, including international surrogacy, to access information about their origins.²⁷ In its review of periodic reports submitted by States Parties, the Committee has expressed concern at the limitations placed by some States Parties on children's access to information about their identity based on their age.²⁸ The Committee has emphasised that, when States Parties define minimum ages in legislation, they must have regard to the general principles of the CRC and to the child's evolving capacities set out in Article 5 of the CRC. Article 5 requires States Parties to respect the responsibilities, rights and duties of parents to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of their rights. The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights.²⁹ The evolving capacities affect how children's rights may be realised (such as whether children themselves can exercise their rights or whether this responsibility is undertaken on their behalf by their parent(s) or guardian(s)) and not whether such rights exist or children hold these rights at any given moment.³⁰

Children's right to protection from sale

Article 35 of the CRC requires States Parties to take all appropriate measures to prevent the sale of or traffic in children for any purpose or in any form. The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPCRSC), which the Government has signed and has committed to ratifying,³¹ defines the sale of children as *'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.'*³²

²⁴ International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), para. 11.6.

²⁵ Ibid., para. 11.2.

²⁶ Ibid., paras. 11.3-4.

²⁷ UN Committee on the Rights of the Child (2016) [Concluding observations on the combined third and fourth periodic reports of Ireland](#), UN Doc. CRC/C/IRL/CO/3-4, paras. 33-34; UN Committee on the Rights of the Child (2019) [Concluding observations on the combined fifth and sixth periodic reports of Australia](#), UN Doc. CRC/C/AUS/CO/5-6, para. 24(b); UN Committee on the Rights of the Child (2018) [Concluding observations on the combined fifth and sixth periodic reports of Spain](#), UN Doc. CRC/C/ESP/CO/5-6, para. 19; UN Committee on the Rights of the Child (2017) [Concluding observations on the fourth periodic report of Georgia](#), UN Doc. CRC/C/GEO/CO/4, para. 19(b).

²⁸ UNICEF (2007) *Implementation Handbook for the Convention on the Rights of the Child*, pp. 106-107.

²⁹ UN Committee on the Rights of the Child (2006), *General Comment No. 7 (2005) Implementing child rights in early childhood*, UN Doc. CRC/C/GC/7/Rev.1, para. 17.

³⁰ Child Rights International Network (2016) [Age is arbitrary: Setting minimum ages](#), p. 4.

³¹ Government of Ireland, [Ireland joining international stand against sale of children, child pornography and child prostitution](#), 2 January 2019.

³² [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), Article 2(a).

The Committee has expressed concern that surrogacy could lead or amount to the sale of children in certain circumstances if it is not properly regulated.³³ Following a visit to Ireland in 2018, the UN Special Rapporteur on the sale and sexual exploitation of children recommended that Ireland regulate surrogacy arrangements in accordance with human rights standards to ensure that such arrangements do not amount to the sale of children under international human rights law.³⁴

In this regard, the Verona principles provide useful clarification in respect of the safeguards that should be put in place to prevent the sale of children in both commercial and altruistic surrogacy arrangements, in line with international children's rights standards. In particular, emphasis is placed in the Verona principles on ensuring that payments made whether in a commercial or altruistic surrogacy are regulated and separate from the determination or transfer of legal parentage and parental responsibility.

Where commercial surrogacy is permitted, the principles recommend that States ensure that:

- the surrogate mother retains the right to decide whether or not to consent to transfer of legal parentage and parental responsibility at birth
- payment must be made in advance of any post-birth transfer of parentage and parental responsibility or post-birth confirmation of the surrogate mother's consent, and be non-refundable
- all payments must be reported and properly regulated by law
- intermediaries must be properly regulated by law.³⁵

Where States view commercial surrogacy as constituting or unduly risking the sale of children, the Verona principles recommend that such States should prohibit commercial surrogacy. Nevertheless, acknowledging that labelling surrogacy arrangements as altruistic does not in itself satisfy the prohibition on the sale of children, the Verona principles state that such arrangements risk sale of children where:

- there is provision of unregulated, excessive or lump sum reimbursements, or consideration in any other form;³⁶ or
- reimbursement categories include 'pain and suffering'; or
- reimbursement occurs which cannot be completely separated from the establishment or transfer of legal parentage or responsibility.³⁷

³³ UN Committee on the Rights of the Child (2014) [Concluding observations on the consolidated third and fourth periodic reports of India](#), UN Doc. CRC/C/IND/CO/3-4, paras. 57(d) and 58; UN Committee on the Rights of the Child (2018) [Concluding observations on the combined third to sixth periodic reports of the Lao People's Democratic Republic](#), UN Doc. CRC/C/LAO/CO/3-6, paras. 44 and 45(f); UN Committee on the Rights of the Child (2014) [Concluding observations on the report submitted by Georgia under article 12\(1\) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), UN Doc. CRC/C/OPSC/GEO/CO/1, paras. 22-23.

³⁴ Maud de Boer-Buquicchio (2019) [Visit to Ireland: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/HRC/40/51/Add.2.

³⁵ International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), para. 14.7.

³⁶ 'Other consideration', which is a term used in the OPCRCSC, is defined by the UN Special Rapporteur as including any benefit, financial or of another nature, that can be obtained in the transaction. In the context of surrogacy, this can include a promise of future payment.

³⁷ *Ibid.*, para. 14.8.

European Convention on Human Rights

Article 8(1) of the European Convention on Human Rights (ECHR), which provides that everyone has the right to respect for his or her private and family life, is also relevant to the regulation of surrogacy. The European Court of Human Rights has held that under Article 8 of the ECHR, individuals have a vital interest, protected by the ECHR, in receiving the information necessary to know and to understand their childhood and early development.³⁸ The right to respect for private life requires that everyone should be able to establish details of their identity as individual human beings.³⁹ Matters of relevance to one's identity and development for the purposes of Article 8 include the identity of one's parents and a person's nationality.⁴⁰ 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 ECHR.⁴¹

In 2014, the European Court of Human Rights held in *Mennesson v France*⁴² and *Labassee v France*⁴³ that the right to respect for private life under Article 8 of the ECHR requires that domestic law provides a possibility of recognition of a legal parent-child relationship between a child born through a surrogacy arrangement abroad and the intended biological father. Though the Court held that States have a wide margin of appreciation in making decisions relating to surrogacy, this margin of appreciation was narrow when it comes to the matter of parentage, as parentage is considered an important facet of an individual's identity.

In an advisory opinion issued subsequently, the Court similarly held that the absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests and the child's right to respect for their private life under Article 8 of the ECHR.⁴⁴ The Court also emphasised that the need to provide an avenue to recognise the mother-child relationship applies with even greater force in the case of a child born through a gestational surrogacy arrangement and conceived using the eggs of the intended mother.⁴⁵ The Court also held, however, that the means by which to permit recognition of the legal relationship between the child and intended parent(s) falls within the margin of appreciation of the State, as long as the procedures chosen are implemented promptly and effectively, in accordance with the child's best interests.⁴⁶

³⁸ [Gaskin v United Kingdom](#) (No. 10454/83).

³⁹ [Mikulić v Croatia](#) (No. 53176/99), [54].

⁴⁰ [Mikulić v Croatia](#) (No. 53176/99); [Genovese v. Malta](#) (No. 53124/09).

⁴¹ [Mikulić v Croatia](#) (No. 53176/99).

⁴² [Mennesson v France](#) (No. 65192/11).

⁴³ [Labassee v France](#) (No. 65941/11).

⁴⁴ [Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother](#) [No. P16-2018-001].

⁴⁵ *Ibid.*, [47].

⁴⁶ *Ibid.*, [51]-[55].

3. Health (Assisted Human Reproduction) Bill 2022

A. Best interests of children born through surrogacy

As outlined in section 2, the State is required to have regard to the best interests of the child as a primary consideration in decision-making in the context of surrogacy. The issues paper prepared to assist the work of the Oireachtas Joint Committee on International Surrogacy (Joint Committee) states that the welfare and best interests of children born as a result of assisted human reproduction (AHR) is the key principle underpinning all legislative measures in this area.⁴⁷

The best interests principle has been partly incorporated into domestic law. Article 42A.4.2^o of the Constitution of Ireland establishes a higher standard at a domestic level in committing the State to introducing legislation to ensure that the best interests of the child are the paramount consideration in certain court proceedings. Provision was subsequently made in the Guardianship of Infants Act 1964 (as amended) for the best interests of the child to be regarded as the paramount consideration in proceedings concerning the guardianship, custody or upbringing of, or access to, a child.⁴⁸

It is welcome that the 2022 Bill reflects the best interests principle in some of the Part 7 provisions concerning surrogacy, including as part of a list of criteria that must be considered by the court in determining whether or not to grant a parental order (section 63(1)(a)(v)) and the extension of time for making an application to the court for a parental order (section 63(5)(b)). However, the 2022 Bill could be strengthened by expressly providing for the child's best interests to be treated as the paramount consideration in all matters affecting children that fall within the scope of the 2022 Bill, including in respect of the granting by the court of parental orders.⁴⁹ Such provision would be consistent with the protection afforded to the best interests of the child under Article 42A.4.2^o. It would also align with provisions in Irish legislation concerning guardianship, custody and adoption.⁵⁰

The OCO recommends that explicit provision should be made in the 2022 Bill for the best interests of the child to be treated as the paramount consideration in respect of all relevant proceedings and processes within the scope of the 2022 Bill that affect children.

The OCO also recommends that consideration be given to making appropriate provision for a non-exhaustive list of factors that should be considered in assessing and determining what is in the best interests of the child in the context of arrangements, including surrogacy arrangements, regulated under the 2022 Bill, taking into account international children's rights standards and guidance in this regard.⁵¹

⁴⁷ Department of Justice, Department of Health and Department of Children, Equality, Disability, Integration and Youth (2022) *Issues Paper on International Surrogacy for Special Joint Oireachtas Committee*, p. 6.

⁴⁸ [Guardianship of Infants Act 1967](#) (as amended), s 3.

⁴⁹ Similarly, the best interests of the child should be the paramount consideration in respect of section 16(2)(c)(i), which currently provides that, in the Minister's determination of the information to be specified in regulations governing the assessment of relevant persons, the safety of any child is the paramount consideration.

⁵⁰ [Adoption Act 2010](#) (as amended), s 19(1); [Guardianship of Infants Act 1967](#) (as amended), s 3. See also: [Child Care \(Amendment\) Bill 2022](#), s 4.

⁵¹ See also: [Adoption Act 2010](#) (as amended), s 19(2); [Guardianship of Infants Act 1967](#) (as amended), s 31; [Child Care \(Amendment\) Bill 2022](#), s 4.

B. Pre-surrogacy protections and post-birth best interest assessments

The 2022 Bill establishes a set of obligatory pre-surrogacy arrangements with which the surrogate mother, intending parent(s), relevant donors and intermediaries must comply, similar to those that are recommended by the Verona principles in order to uphold the best interests of the child. Section 16 prohibits an AHR treatment provider from providing AHR treatment unless satisfied that the surrogate mother, intending parents and their spouses, civil partners or cohabitants, if any, do not present a potential significant risk of harm or neglect to children. The surrogate mother and intending parent(s) are required to receive counselling in relation to the treatment under section 17 as well as legal advice on the legal implications of the surrogacy agreement under section 58. Both parties must also consent to the provision of AHR treatment pursuant to section 18. Pursuant to section 51, surrogacy agreements must be approved by the Assisted Human Reproduction Regulation Authority (AHRRA), which will be established under the 2022 Bill. Section 12 requires the AHRRA to publish an AHR information document, which must be provided to the intending parent(s) and to the surrogate mother prior to giving their consent to a surrogacy agreement.

In tandem with this set of pre-surrogacy arrangements, the 2022 Bill establishes a post-birth parental order framework, which requires the intending parent(s) to apply to the court for legal parentage to be transferred to them within a specified period of time after the child's birth. This approach is based on the premise that the surrogate mother is the mother of the child at birth irrespective of the surrogate mother's genetic link to the child and intentions relating to the surrogacy agreement. This confirms the existing position under domestic law that the birth mother is the mother of the child. Current domestic law also applies a rebuttable presumption that the spouse of the birth mother, or the father named on the child's birth certificate, if any, is the father of the child.⁵² However, section 59(1) of the 2022 Bill effectively removes the presumption of paternity in respect of a surrogate mother's husband, if any.

In order for a transfer of parentage to take place under the 2022 Bill, Section 61 requires that the surrogate mother must first consent to the child residing with the intending parent(s). Section 156 provides that the intending parent(s) may be appointed guardian of the child alongside the surrogate mother, by way of a statutory declaration that includes agreement by the surrogate mother to the appointment of guardianship. Section 62 provides that the intending parent(s) may then apply to the Circuit Court for a parental order at least 28 days after, and within 6 months of, the child's birth in order to be granted legal parentage. Pursuant to section 63, the court may grant a parental order if satisfied that the surrogacy is a permitted surrogacy, the intending parent(s) and surrogate mother consent to the granting of the order, the child is residing with the intending parent(s) and the granting of the order is in the best interests of the child.

In the absence of international consensus on the appropriate model for determining parentage in surrogacy arrangements, the Verona principles are clear that both pre-surrogacy and post-birth transfers of parentage and parental responsibility are permissible from a children's rights perspective. In both cases, the surrogate mother must be entitled to confirm or revoke her consent to the transfer of parentage following the birth of the child. However, the Verona principles further suggest that, where adequate pre-surrogacy protections have been put in place, and there is no conflict as to parentage of the child or concerns as to sale of the child, a determination as to what is

⁵² [Status of Children Act 1987](#) (as amended), s 46.

in the best interests of the child for the purposes of allocating parentage is not subsequently required following the birth. In circumstances where the current provisions of the 2022 Bill require that a domestic surrogacy must have been pre-approved on the basis of compliance with a set of pre-surrogacy protections, it may be useful to consider whether provision should be made for a pre-conception model of allocating legal parentage to the intending parents on the birth of the child, subject to similar criteria set out in section 63 being met.

In line with the Verona principles, such a framework would require that provision be made in the 2022 Bill for a mechanism whereby the surrogate mother must confirm her consent to the allocation of legal parentage to the intending parents within a specified period of time following the birth of the child. This would necessarily include making provision for situations in which a surrogate revokes her consent and situations in which the intending parent(s) may not wish to take custody of the child following the child's birth. Provision would therefore need to be made so that a post-birth parental order process to determine what is in the best interests of the child to do can be triggered in cases where there is a conflict as to legal parentage. In the interests of providing as much clarity as possible, statutory guidance should be provided through the 2022 Bill to the courts as regards when the courts are called upon to determine what should happen to the child in such cases. In the event that neither the surrogate mother nor the intending parent(s) are able or willing to parent the child, the Verona principles suggest that States should ensure that child protection systems are able to respond and that appropriate orders to provide for alternative care arrangements should be considered in respect of the child.⁵³

A pre-birth allocation of parentage model aligns with the recommendation of the Commission on Assisted Human Reproduction that the child born through surrogacy should be presumed to be the child of the intending parents,⁵⁴ and the recommendations of the current and previous Special Rapporteur on Child Protection.⁵⁵ The UK Law Commissions and the New Zealand Law Commission have also recommended that a pre-birth model for the allocation of parentage be adopted in the context of reforms being considered in the UK and New Zealand respectively.

The OCO recommends that consideration should be given to establishing a pre-birth framework of legal parentage in domestic surrogacy cases that satisfy the criteria for a permitted surrogacy, provided that provision is also made for:

- **the surrogate mother to confirm or revoke her consent following the birth of the child**
- **situations in which a surrogate mother has consented to parentage being granted to the intending parents, but the latter refuse to accept legal parentage or parental responsibility following the birth of the child**
- **a post-birth determination of the child's best interests in respect of agreements where legal parentage or parental responsibility is disputed, where concerns arise as to the adequacy of pre-surrogacy arrangements or where concerns arise as to whether illicit practices were associated with the arrangement, including sale of the child.**

⁵³ Ibid., paras. 17.1-17.2.

⁵⁴ Commission on Assisted Human Reproduction (2005) [Report of the Commission on Assisted Human Reproduction](#).

⁵⁵ Special Rapporteur on Child Protection (2020) [A Review of Children's Rights and Best Interests in the Context of Donor Assisted Human Reproduction and Surrogacy in Irish Law](#); G. Shannon (2018) [Eleventh Report of the Special Rapporteur on Child Protection](#), p. 15 and pp. 39-40.

C. Children’s right to preserve their identity

Provisions concerning children aged 16 and 17

Part 7 of the 2022 Bill addresses access by persons born through AHR treatment pursuant to a surrogacy agreement to information on their genetic and gestational origin.

Section 2 of the 2022 Bill defines a child as a person who has not attained the age of 18 years. However, the 2022 Bill adopts different definitions applicable to children for the purposes of delineating entitlements to information on origins. In this regard, Section 2 also uses the term “Child (AHR)” to refer to a person born as a result of AHR treatment who has not attained the age of 16 years, while the term “Adult (AHR)” is used to refer to a person born as a result of AHR treatment who has attained the age of 16 years.

Section 67 provides that an adult (AHR) may apply to the AHRRA to obtain non-identifying information on the donor and any children who have the same donor. Sections 68 and 69 provide that an adult (AHR) may apply to the AHRRA to obtain identifying information on the intending parent(s), surrogate mother and donor. Section 159 amends the Children and Family Relationships Act (2015 Act) to lower the age at which donor-conceived children may apply to access information on their origins from 18 to 16, so as to align the 2015 Act and the 2022 Bill in this regard.

The provision for children aged 16 and 17 years to apply to access information concerning their identity clearly reflects an acknowledgement that children have a right to access such information as children, which is welcome. However, the approach taken in the Bill to children aged 16 and 17 gives rise to two concerns from a children’s rights perspective.

First, defining a child aged 16 and 17 years of age as an adult for the purpose of entitlements to apply to obtain identity information disregards the fact that children are equally entitled to access such information when they are children, as provided for by the CRC. Article 1 of the CRC defines a child as ‘every human being below the age of eighteen years.’ Though the purpose of using the term adult may be to distinguish from the earlier definition of a child set out in Section 2 of the 2022 Bill, it is important that the CRC definition of a child is used consistently in legislation when referring to any child below the age of 18 and the 2022 Bill is no exception.

Second, in grouping all persons aged 16 and over within a definition of adults (AHR), no distinction is made in the 2022 Bill between children aged 16 and 17 and those aged 18 and over. Though children aged 16 and 17 are approaching adulthood, they are still children and, as such, they are entitled to special protection measures in the exercise of their rights as children, in line with the CRC. Accordingly, it is important to consider appropriate child-specific supports that should be provided to children who request access to information on their origins and what corresponding provisions might usefully be made in the 2022 Bill in this regard.

The OCO recommends that the definition of children under 16 and aged 16 and over as children and adults respectively should be amended to ensure that all children aged under 18 years born as a result of AHR treatment, including pursuant to a surrogacy agreement, are referred to consistently as children throughout the Bill.

The OCO also recommends that the 2022 Bill should make provision for child-specific supports to be made available to children aged 16 and 17 who request access to information on their origins.

Provisions concerning children under 16 years

Under section 67 of the 2022 Bill, the parent(s) or guardian(s) of a child below the age of 16 may apply to obtain non-identifying information on the donor and persons born as a result of the use of such donation. Provision is not made in the 2022 Bill, however, for the parent(s) or guardian(s) of a child born through surrogacy to apply for identifying information on the donor, surrogate mother and intending parents.

Despite explicit reference made in the 2022 Bill to the child's right to know their origins, it is of concern that the 2022 Bill does not make provision for children under the age of 16 to apply to the AHRRA to obtain information relating to their identity. Furthermore, the OCO is concerned that, by not providing for children under 16 or their parent(s) or guardian(s) to request identifying information on the donor, surrogate mother and intending parents, children are effectively excluded from accessing such information until they reach the age of 16.

The obligation on States Parties to respect children's right to preserve their identity under Article 8 of the CRC is not limited with respect to chronological age. The CRC expressly recognises children's right to preserve their identity as a child, and not only later as an adult. Equally, the European Court of Human Rights has made it clear that the right to respect for private life under Article 8 of the ECHR, and the associated entitlement to access information on one's origins, applies to children as it does to adults.⁵⁶ In addition, the obligations on the State to respect children's right to preserve their identity and access information on their origins are not limited as to the type of information that children should be entitled to access. The Verona principles do not distinguish between access to identifying and non-identifying information and specifically recommend that States encourage open surrogacy arrangements and education about the benefits of post-birth contact between the child, surrogate mother, intending parents, and donors.⁵⁷

It is not clear for what purpose sections 67-69 of the 2022 Bill do not provide for children under 16 to apply in their own right to obtain both identifying and non-identifying information on their origins. It is also unclear why provision is made for the parent(s) or guardian(s) of a child aged below 16 to apply for non-identifying information, yet similar provision is not made for them to apply for identifying information. Having regard to the children's rights principles set out in section 2 above, the OCO believes that taking a strictly age-based approach to legislating for when it will be lawful for a child to vindicate their right to preserve their identity and access information on their origins is not optimal, since it fails to take adequate account of children's evolving capacities and of the diversity of capacity that can exist among children of the same age. The OCO has previously highlighted that an approach that does not attach a minimum age to a child's access to information on their origins, and one that respects the evolving capacities of the child, is more in keeping with the CRC.⁵⁸

The OCO recommends that further consideration needs to be given to the provisions of the 2022 Bill relating to access to information on identity, with a view to aligning the 2022 Bill with children's right to preserve their identity and with an approach that respects the evolving capacities of children.

⁵⁶ *Odièvre v France* (No. 42326/98), [50].

⁵⁷ International Social Service (2021) [Principles for the protection of the rights of the child born through surrogacy \(Verona principles\)](#), para. 11.5.

⁵⁸ OCO (2014) [Advice on the General Scheme of the Children and Family Relationships Bill 2014](#).

4. Issues not addressed in the Health (Assisted Human Reproduction) Bill 2022

A. Children born through international surrogacy arrangements

Parentage of children born through international surrogacy arrangements

Subject to section 50(1) of the Bill, a surrogacy agreement is only permitted where it is a domestic surrogacy and it has been approved by the AHRRA. The OCO is concerned about the absence of provision in the 2022 Bill for children born through international surrogacy arrangements. The OCO has outlined its concerns in the past regarding the manner in which the State provides for children born through surrogacy in other jurisdictions and the need to find solutions to deal with the resulting uncertainty for such children.⁵⁹ Notwithstanding the diversity of approaches taken by States worldwide to the regulation of surrogacy and the absence of an international consensus on the appropriate approach to such regulation, the significant children's rights issues raised by international surrogacy arrangements must not be ignored.

In this regard, the OCO welcomes the establishment of the Joint Committee and the commitment by the Ministers for Health, Justice and Children, Equality, Disability, Integration and Youth to consider the Joint Committee's recommendations and submit any necessary legislative proposals to Government.⁶⁰ In particular, we welcome that the Joint Committee has been tasked with considering all aspects of the rights, interests and welfare of children born through international surrogacy and the explicit acknowledgement that such children are independent rights holders. Indeed, legislating to fill the gap concerning children born through international surrogacy arrangements is mandated by the principles enshrined in the CRC and the ECHR, which apply equally to children in Ireland born through surrogacy abroad as they do to children born through surrogacy in Ireland.

As outlined in section 2 above, the European Court of Human Rights has held that domestic law must provide a possibility of recognition of the legal relationship between a child born through a surrogacy arrangement abroad and the intended parent(s), in line with the child's right to respect for their private life under Article 8 of the ECHR.⁶¹

The UN Special Rapporteur has stated that, given the risk of sale of children in both regulated and unregulated commercial surrogacies taking place in other jurisdictions, the State of the child's intending parents should neither automatically reject nor recognise parentage orders or birth records from other jurisdictions, but should instead carefully review proceedings abroad, with the only valid consideration being the best interests of the child.⁶² The UN Special Rapporteur has also stated that a procedure should be put in place that only permits recognition of international surrogacy arrangements that respect specific safeguards.⁶³

⁵⁹ Ombudsman for Children's Office (2014) [Advice on the General Scheme of the Children and Family Relationships Bill 2014](#); Ombudsman for Children's Office, [Ombudsman for Children's Office responds to Supreme Court's Surrogacy Judgment](#), 7 November 2014.

⁶⁰ Department of Justice, [Government to establish Special Joint Oireachtas Committee on International Surrogacy](#), 21 January 2022.

⁶¹ [Mennesson v France](#) (No. 65192/11); [Labassee v France](#) (No. 65941/11).

⁶² Maud de Boer-Buquicchio (2018) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/HRC/37/60, para. 70.

⁶³ Maud de Boer-Buquicchio (2019) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/74/162, para. 49.

The OCO acknowledges the particular concerns that have been expressed in relation to commercial surrogacy arrangements. Section 54 of the 2022 Bill explicitly prohibits commercial surrogacy agreements in which a person receives, makes or gives payment or other reward, with the exception of reasonable expenses, in consideration of facilitating, entering into or giving effect to an agreement.⁶⁴ Reasonable expenses are defined in Section 55 as expenses associated with becoming or trying to become pregnant, pregnancy or birth, and entering into and giving effect to the agreement. Section 56 provides that surrogacy agreements are non-enforceable, except in relation to reasonable expenses. This is consistent with the recommendations made in 2005 by the Commission on Assisted Human Reproduction, which recommended that parties to a surrogacy arrangement should not profit from such arrangements but that surrogate mothers should be entitled to receive reimbursement of expenses related to their participation in such arrangements.⁶⁵

Providing for international surrogacy poses the challenge of reconciling the public policy objective of prohibiting commercial surrogacy with the obligation placed on the State by the CRC and ECHR to act in the best interests of the child born through such arrangements. The issues paper provided to the Joint Committee notes that the majority of surrogacies dealt with in Ireland are commercial surrogacy arrangements undertaken outside the State. The issues paper emphasises that a 'double standard' may arise if commercial surrogacies are prohibited in Ireland, but parental orders may be granted in respect of a child born through a commercial surrogacy arrangement abroad.

The objective of maintaining the integrity of domestic standards concerning surrogacy, including the prohibition of commercial surrogacy, is understandable. However, categorically excluding the possibility of making a declaration of parentage in respect of such children will have immediate and grave consequences for the child. The OCO believes that it is vital for the Oireachtas to ensure that the law provides as much clarity as possible, rather than leaving it to the courts to determine what will happen to children who are born through international surrogacy arrangements. It should be emphasised that this does not mean that intending parents who have entered into a prohibited surrogacy arrangement should automatically be recognised as parents or made guardians of the child. However, consistent with the best interests of the child principle, the court should have the discretion to decide whether or not a parental order should be made in respect of the child, having regard to a range of factors, including the safeguards in place in the jurisdiction in which the child was born.

The OCO recommends that the 2022 Bill includes provision for international surrogacy arrangements. The OCO recommends that consideration should be given to providing for a post-birth parental order application process, which includes a determination of what is in the child's best interests as the paramount consideration, in respect of all surrogacy arrangements conducted abroad.

⁶⁴ Section 55(2) of the 2022 Bill defines reasonable expenses as expenses associated with becoming or trying to become pregnant, pregnancy or birth and entering into and giving effect to the agreement.

⁶⁵ Commission on Assisted Human Reproduction (2005) [Report of the Commission on Assisted Human Reproduction](#).

Children’s right to preserve their identity in international surrogacy arrangements

The Joint Committee has been asked to include in its work a focus on ensuring that children born through international surrogacy can preserve their identity, including their genetic, gestational and social origins.

The UN Special Rapporteur on the sale and sexual exploitation of children has emphasised that the State of the child’s intending parents is responsible for protecting the child’s identity rights and access to origins, and that such rights should be protected regardless of the legal status of the surrogacy arrangement under national or international law.⁶⁶ Such guidance, coupled with the State’s obligation under Article 2 of the CRC to uphold the rights of all children without discrimination, clearly underlines the duty to provide for the acquisition and maintenance of, and access to, information on the genetic and gestational origin of children born through international surrogacy arrangements, as is the case for domestic surrogacy arrangements. This is notwithstanding the fact that the State may face challenges in fully upholding the child’s right to preserve their identity in Ireland, due to practices in other jurisdictions where the surrogacy has taken place, such as anonymous gamete donation or a lack of regulation of the preservation of information on the surrogacy arrangement.⁶⁷

The Law Commission of England and Wales and the Scottish Law Commission have concluded that, where medically verified information is available, it would be beneficial for information from international surrogacy arrangements to be recorded on a national register of surrogacy arrangements.⁶⁸ The New Zealand Law Commission in its review of surrogacy law has also proposed that information in respect of children born through an international surrogacy arrangement, which may be incomplete in certain circumstances, should be permitted to be entered into a national register.⁶⁹

The OCO recommends that provisions relating to international surrogacy arrangements should include provision for all relevant, verified and available information relating to the arrangement to be recorded by the AHRRA in the National Surrogacy Register, following the making by the court of a parental order in respect of children born through such arrangements.

B. Retrospective provision for children born through surrogacy arrangements prior to commencement of the 2022 Bill

The 2022 Bill does not include provisions that allow for retrospective allocation of parentage of children born through a surrogacy arrangement. By providing for the allocation of parentage for children born through future surrogacy arrangements, while excluding the possibility for intending parents to apply for parentage in respect of children that have already been born through surrogacy,

⁶⁶ Maud de Boer-Buquicchio (2018) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/HRC/37/60, paras. 70 and 77(j).

⁶⁷ Maud de Boer-Buquicchio (2019) [Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), UN Doc. A/74/162, para. 38.

⁶⁸ Law Commission of England and Wales and Scottish Law Commission (2019) [Building families through surrogacy: a new law. A joint consultation paper](#), para. 10.100.

⁶⁹ Law Commission of New Zealand (2021) [Review of Surrogacy](#), para. 8.46.

the 2022 Bill may give rise to discriminatory treatment of children born through surrogacy prior to the Bill being commenced.

The absence of provision for retrospective applications contrasts with initial provisions of the Children and Family Relationships Bill 2014 relating to surrogacy, which provided that applications could be made to the court for a declaration of parentage in relation to a child born through a pre-commencement surrogacy arrangement.⁷⁰ The lack of provision for retrospective allocation of parentage in the case of surrogacy also contrasts with the approach taken in the 2015 Act in respect of children born through donor-assisted human reproduction. Sections 21 and 22 of the 2015 Act provide that an application for a declaration of parentage may be made to the courts in respect of a child born in Ireland as a result of a donor-assisted human reproduction procedure performed in Ireland or abroad before the section was commenced, subject to certain conditions being met.

The lacuna in law as regards surrogacy was raised by the Supreme Court in *MR and DR v An tArd Chláraitheoir*, in which it stated that there is clear merit in the legislature providing for retrospective situations of surrogacy.⁷¹

The OCO recommends that the 2022 Bill should include provision for a retrospective application process whereby parentage and parental responsibility may be allocated in respect of children that have, and will have, been born through domestic and international surrogacy arrangements prior to commencement of the 2022 Bill. This should include provision for the recording of all relevant information relating to the retrospective surrogacy arrangement by the AHRRA in the National Surrogacy Register, following the making by the court of a parental order in respect of children born through such arrangements.

⁷⁰ [General Scheme of a Children and Family Relationships Bill 2014](#), Head 13(6).

⁷¹ [\[2014\] IESC 60](#) [116].