

Opening Statement to Joint Committee on Health on the General Scheme of the Assisted Human Reproduction Bill 2017

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17 December 2018

- Thank you for the opportunity to share my views in relation to the General Scheme of the Assisted Human Reproduction Bill 2017. I have submitted a more detailed paper in relation to the Bill and at this point would like to highlight from that submission the area of most pressing concern to me which is surrogacy.
- Surrogacy can play an invaluable role in helping to create new families but it raises complex legal and ethical issues on which there are many diverse views. From a policy perspective it is important to bear in mind that surrogacy is a present reality and must be dealt with by ensuring respect and protection for all parties involved, particularly the rights and interests of children. In my opinion, prohibitive approaches in this area will fail; we must not put our heads in the sand but rather learn from what works and does not work elsewhere to craft an appropriate legislative model for this country.
- Developments in assisted reproduction mean that it is now possible to separate conception, gestation and child-rearing with a number of different potential parents due to various combinations of gametes and roles. This challenges our traditional and cultural norms in relation to what parenthood is and what a family should look like. An important question that arises in surrogacy is *who* should be recognised as the legal parents of the child and *why*.
- In answer to this question, the Bill proposes that a surrogate mother (who is required by law to be genetically unrelated to the child she carries) should be the legal mother of that child. This requires intended parents (who are genetically related) to go through a legal procedure to gain recognition of that relationship. We know from studies of surrogate mothers that surrogates generally do not consider the children they bear to be theirs and do not wish to be regarded as the legal mothers of those children. I submit that this proposed legal policy is not in the best interests of surrogate mothers, the intended parents, and certainly not the child.

- The Commission on Assisted Human Reproduction (2005) recommended that the child born through surrogacy should be presumed to be that of the intended parents. This recommendation was based on the 'intent of reproduction' concept which aims to identify those people who are most strongly motivated to have a child, have initiated the reproductive process without which the child would not exist, have been closely involved throughout the pregnancy, and have demonstrated a commitment to caring for and rearing the child as their own. In my view, this concept would provide the most consistent outcome in surrogacy cases and, most importantly, would prioritise the best interests of the child as it would legally recognise him or her as the child of those who were highly motivated to plan and bring about its conception and who fully intend and desire to take on the responsibility to raise and care for it.
- I would urge Members of this Committee to examine the surrogacy frameworks in other jurisdictions where legal parentage is accorded to the intended parents prior to birth, rather than take the easy route of following flawed legislation from the UK which has been the subject of extensive criticism in recent years from lawyers, judges, advocates and academics. In fact, the Law Commission in the UK is currently reviewing surrogacy law there, having taken the view that their surrogacy laws are not fit for purpose. Yet we are proposing to copy those same laws.
- Payment of surrogate mothers is also an issue that provokes much debate. The Bill proposes a model of reimbursement of vouched reasonable expenses. However, the consequences of transgression are extremely harsh and expose the intended parents to potential criminal prosecution with significant penalties. Most importantly, transgression results in loss of eligibility to apply for a parental order. In these circumstances the birth mother and her husband will remain the unwilling legal parents of the child to whom they are genetically unrelated. How is this a child-centred approach?
- The reality is that in the UK, on which our scheme is modelled, family courts always authorise payments to surrogates in excess of notional 'reasonable expenses' so that parental orders can be made in the child's best interests. One of the UK's most senior family judges, Sir James Munby, recently called for a relaxation of the rules against paying surrogates saying that it would be better to face up to reality rather than have the law say one thing but accept another. The current proposals in this Bill risk causing parents to mislead the court about payments, and will cause huge anxiety to honest people who fear that their child will be removed from their care if they cannot justify the payments made to surrogates. Why is it proposed to copy the English model and insert a similar provision into the legislation here that we know will similarly be ineffective and will be ignored by Irish judges in practice?

- It may be argued that facilitating payments to surrogates encourages commercialisation of reproduction which can be exploitative of poorer women and I fully accept that there are legitimate and important ethical concerns in this regard. However, the avoidance of potential exploitation will not be achieved by this Bill; it will just ensure that it doesn't happen in our jurisdiction. In my opinion, the appropriate response is not to put an unenforceable prohibition in place but rather to insist on proper safeguards to ensure written agreements, counselling, screening and preparation.
- The Bill does not attempt to regularise the situation of those couples who are faced with trying to bring their child back from another jurisdiction, which will be the reality for most families who choose to have a child through surrogacy. As the experience of other jurisdictions demonstrates, this may leave children in legal limbo, potentially stateless and parentless pending the outcome of litigation.
- This Bill will result in the birth of Irish children in other countries who will probably never know the identity of the woman who carried them for nine months and gave birth to them. This is inconsistent with the right of the child to access the identity of their biological parents as provided both by the United Nations Convention on the Rights of the Child, and the Children and Family Relationships Act 2015. I agree with the Chief Justice of the family Court of Australia, Judge Diana Bryant, who described it as 'extremely irresponsible' for governments not to deal with international surrogacy arrangements. In my view, this Bill cannot therefore be described as child-centred and I would urge the Committee to recommend to the Minister that it be revised.