Opening Statement to Special Oireachtas Committee on International Surrogacy

on

‘International Surrogacy and the particular issues faced by same-sex couples, both male and female, entering international surrogacy arrangements and achieving parental recognition’

Dr Lydia Bracken, Senior Lecturer in Law, University of Limerick

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Chairperson, Members of the Committee.

I am grateful for the opportunity to share my views on international surrogacy and ‘the particular issues faced by same-sex couples’ who engage in this process.

Ireland has made progress in recent years in recognising the rights of children who are raised by LGBTQI+ parents. However, a number of gaps remain. In research that I conducted with LGBT Ireland in 2021,² 53% of the LGBTQI+ parent families captured by the research were not fully recognised under Irish law and, by that, I mean that both parents were not recognised as legal parents. Similarly, in over half of the families, the two parents were not recognised as joint legal guardians of their children. The research indicates that the Children and Family Relationships Act 2015, which regulates the area of donor-assisted human reproduction (DAHR), embraces a variety of ‘new’ and ‘non-traditional’ family forms. However, many other families fall outside of its parentage provisions. This leads to a situation where legal recognition of family relationships in LGBTQI+ parent families is dependent on the mode of conception of the child (how the child was conceived) and, as a result, many families cannot secure full legal recognition.

In my research, 13% of total respondents to the survey indicated that one or more of their children were born through surrogacy. All of these respondents were male, parenting with their male partner. Due to the absence of surrogacy legislation, only one of the fathers was legally recognised as a parent in each family.

In my research, no female couple reported that they had engaged in surrogacy (but it is likely that some female couples do engage in this process). Instead, DAHR was the most common pathway to parentage among female couples. However, in only 50% of families were both of the parents legally recognised. This was due to the fact that a number of DAHR approaches are omitted from the 2015 Act. Perhaps of most relevance to this Committee is the omission of DAHR that is undertaken abroad. If the procedure takes place outside of the State, the parentage

¹ Opening statement submitted 25 April 2022.
provisions in the 2015 Act do not apply and instead parentage is allocated in the same way as any other conception. This also occurs where the child is conceived by DAHR in an Irish fertility clinic but born outside of the State. Other pathways that are omitted from the 2015 Act are non-clinical DAHR procedures and retrospective procedures where a known donor was used. Given that this Committee will be examining the question of retrospective recognition of parentage in surrogacy, it will be important to ensure that any legislative response is consistent with the DAHR legislation. This will require amendments to the 2015 Act because, currently, children born through some DAHR methods are legally disadvantaged based on their method of conception when compared to other children born through DAHR, and many children of LGBTQI+ parents are legally disadvantaged when compared to the children of married opposite-sex couples.3

In international surrogacy, the issues experienced by same-sex couples are broadly similar to those experienced by opposite-sex couples. However, same-sex couples have more limited options in terms of where they can access international surrogacy as some foreign jurisdictions are only open to married opposite-sex couples.

Ireland cannot regulate surrogacy that is undertaken abroad, and it cannot control the ethical or human rights framework that is adopted in another jurisdiction. It can control the recognition or establishment of legal parentage for the purpose of Irish law. In doing so, the key question should be whether the law and practice in the country where the surrogacy took place provides ethical safeguards that are at least equivalent to those provided in domestic law, but not necessarily identical to the Irish framework.

Increasingly, the language of human rights is used as a proxy for ‘ethics’ in discussions about surrogacy.4 As such, in searching for an ‘ethical’ surrogacy framework, it is useful to frame this in terms of upholding the human rights of all participants.

There are a number of provisions of the Health (Assisted Human Reproduction) Bill 2022 that are problematic in their current form and I have detailed some of the issues in my accompanying briefing document. While some of these issues are more relevant in the context of domestic surrogacy, it is necessary to consider these as it seems likely, based on the experience of other jurisdictions, that an overly restrictive or poorly defined domestic framework for surrogacy will deter intending parents from engaging in the domestic process and instead encourage them to engage in international surrogacy.5

To accommodate the diversity of families that exist in Ireland in 2022, there is a need to think about different ways to conceptualise family relationships. In surrogacy, the law should avoid

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3 See further Lydia Bracken, Same-Sex Parenting and the Best Interests Principle (Cambridge University Press, 2020), Chapter 5.
an overly rigid approach in its regulation of family relationships and must remain flexible to ensure that the best interests of the child can be assessed and secured on an individualised basis.

Thank you.