

Policy Document – Health (Assisted Human Reproduction) (Amendment) Bill

Introduction

The Health (Assisted Human Reproduction) Act 2024 (referred to as “the Act of 2024” in this document) was signed into law by the President on July 2nd 2024, having passed all stages in both Houses of the Oireachtas.

This complex and far-reaching legislation – containing 13 Parts and extending to over 200 pages – encompasses the regulation for the first time of a wide range of practices undertaken in this jurisdiction. The primary purpose of the legislation is to ensure that assisted human reproduction (AHR) practices and related areas of research are conducted in a more consistent and standardised way and with the necessary oversight. The legislation also provides for the regulation of future surrogacy arrangements undertaken by Irish residents in Ireland and other jurisdictions and provides for the recognition of parentage arising from certain past domestic and international surrogacy arrangements.

The issues covered by the legislation have been widely discussed and examined over the course of many years, including more recently last year during Committee Stage and Report Stage of the Act of 2024 in the Dáil and prior to this by the Special Oireachtas Joint Committee on International Surrogacy. Some of the issues which arose during this process, however, required further consideration and, in this regard, the then Minister for Health, Stephen Donnelly, T.D., committed during the legislation’s progress through the Oireachtas that it was his intention, along with the then Minister for Justice Helen McEntee, T.D, and the then Minister for Children, Equality, Disability, Integration and Youth, Roderic O’Gorman, T.D., to bring forward a Supplementary Bill.

It is proposed that this Supplementary Bill will be titled the Health (Assisted Human Reproduction) (Amendment) Bill, the General Scheme for which was approved by the Government in October 2024. The formal drafting process, led by the Office of Parliamentary Counsel (OPC), is at an advanced stage. The main purpose of this document is to outline the policy underpinning the provisions of the Bill, notwithstanding that the text of the final Bill needs to be agreed with the Office of the Attorney General (AGO) and approved by Government, prior to publication.

A description of the areas covered by the provisions of the Bill are set out below, along with the policy rationale for those provisions. These are divided into four groupings. The two most important and significant policy goals which together will make up the majority of the provisions of the Supplementary Bill seek to provide clarity for Irish residents undertaking donor-assisted human reproduction (DAHR) procedures abroad, firstly, those seeking to obtain a declaration of parentage in respect of a child born as a result of such a procedure, and secondly, to provide a pathway for Irish citizens domiciled abroad who have undergone surrogacy or DAHR in another jurisdiction to have their parentage recognised in Ireland, where this is not already the case.

The third grouping of provisions are concerned with amendments to the Act of 2024. For the most part, these concern ‘technical’ issues, aimed at ensuring consistency between related

provisions across the Parts of the Act of 2024 and also between such provisions and relevant provisions in the Children and Family Relationships Act 2015 (referred to as “the Act of 2015” in this document).

The fourth and final grouping concern proposed amendments to other pieces of existing legislation.

International DAHR

The term “International DAHR” is taken here to refer to the undertaking by Irish residents of DAHR procedures in a clinic located outside the State. Currently, there is no mechanism for a second intending parent to have their parentage recognised under Irish law, in circumstances where they undertook a DAHR procedure abroad after commencement of Parts 2 and 3 of the Act of 2015.

Under the provisions of Parts 2 and 3 of the Act of 2015, in order for intending parents to have their parentage recognised under that Act, they must have undergone a DAHR procedure in a DAHR facility in Ireland, and the donor-conceived child must have been born in the State. This approach seeks to ensure the safety of DAHR procedures, certainty as regards parentage, protection of donors, and the protection of donor-conceived children’s right to identity. This is achieved through the regulation of DAHR facilities in Ireland, which must ensure that certain safety standards are followed in respect of each procedure, that proper consents are in place and signed by both the intending parent(s) and the donor, and that information as regards the donor is sent to the Minister for Health for inclusion on the National Donor Conceived Person Register. This information can then be accessed by the donor-conceived child, should they so wish, upon turning 18 (this will be lowered to 16 by the Act of 2024 on commencement of the relevant provisions). This applies in respect of all DAHR procedures which took place in Ireland following commencement of Parts 2 and 3 of the Act of 2015, which took place in May 2020.

While these provisions apply equally to all couples undergoing DAHR in Ireland, they are of particular importance to same-sex female couples who will require, in all circumstances, a certificate from a DAHR facility in order to re-register the birth of a donor-conceived child and have a second intending mother included on the birth certificate of that child.

The rationale for not including DAHR procedures which took place abroad, post commencement of Parts 2 and 3 of the Act of 2015, in the Act of 2015 stemmed from the lack of regulation and oversight of DAHR facilities located outside Ireland. Consequently, there was concern regarding the absence of an appropriate level of oversight of DAHR procedures undertaken abroad, in particular as regards the provision and inclusion of donor information on the National Donor Conceived Person Register, which could undermine the strong protection of donor-conceived children’s right to identity set out in the Act of 2015.

This position, however, has now changed, largely due to recent changes brought about by the Act of 2024, which includes provisions regulating international DAHR in the context of international surrogacy. Provisions in the Act of 2024, introduced by way of Committee Stage amendments, will allow intending parents to receive a Parental Order where donor gametes have been used as part of an international surrogacy agreement, providing certain conditions established by that

Act have been met. At the same time, the Department of Health has received strong representations and faces challenges regarding the current legal situation and the seeking of amendments to the Act of 2015 on issues including International DAHR.

The proposals set out in the draft Bill therefore seek to provide for the regulation of international DAHR and for the recognition of parentage arising from such procedures, in line with the approach set out in the Act of 2024, to ensure consistency between that Act and the Act of 2015. The specific approach set out in the draft Bill is based on a pre-conception approval model, whereby an application will be made to the Assisted Human Reproduction Regulatory Authority (AHRRA) by intending parents prior to the proposed DAHR procedure being undertaken in a DAHR facility located abroad. This is based on the process set out for international surrogacy in the Act of 2024. However, the requirements to be met for approval of an International DAHR procedure will differ somewhat from those applying to international surrogacy, reflecting the different levels of complexity arising between the two. At the same time, however, each of the measures set out below seeks to ensure the rationale underpinning the approach in the Act of 2015 is similarly found in the new provisions on International DAHR.

Similar to the Act of 2024, it will be necessary that the DAHR procedure takes place in a jurisdiction with at least the same safety standards as those followed in Ireland, and as set out in the EU Tissue and Cells Directive. The person performing the procedure will have to be licensed under the law of that jurisdiction to perform the procedure. The DAHR facility will be required to provide an undertaking that it will, among other matters, ensure all proper consents are in place prior to the procedure and that all information as regards the procedure and any live birth will be provided to the AHRRA for inclusion on the National Donor Conceived Person Register. In line with the approach set out in the Act of 2024, which will also apply to DAHR procedures undertaken in Ireland, it will also be necessary that intending parents undergo counselling prior to the procedure and that a safety of the child assessment is conducted. In line with the approach set out in the Act of 2024, the latter will be performed by the AHRRA. Finally, to ensure an appropriate connecting factor to Ireland, there will be a residency requirement for intending parents undergoing International DAHR and seeking Parental Orders from the Irish Courts. Subject to all requirements as set out in the draft Bill being met, intending parents will be able to seek a declaration of parentage from the Courts.

Overall, the provisions of the Bill seek to ensure a high level of safety as regards DAHR procedures undertaken abroad; certainty as regards parentage; protection of donors; and, most importantly, protection of a donor-conceived child's right to identity. At the same time, the provisions seek to ensure consistency between the Act of 2015 and the Act of 2024.

Irish Citizens Domiciled Abroad

While International DAHR largely relates to the establishment of parentage of children born to Irish residents, this second grouping of proposed amendments is concerned primarily with recognition by the Irish State of the parentage of Irish citizens living abroad, who have undergone surrogacy or DAHR, and whose parentage has been established in that jurisdiction.

As it currently stands, there is no specific mechanism under Irish law through which Irish intending parents who underwent surrogacy or DAHR while domiciled abroad can have their

parentage recognised, unless they are the genetic father or birth mother of the child concerned. These problems often arise from DAHR procedures or surrogacy cases and so can particularly affect gay and lesbian Irish citizens living abroad, with common examples involving an Irish citizen in a same-sex relationship with a non-Irish citizen whereby a child is born but the Irish citizen intending parent is either not the genetic parent of that child (same-sex male couple) or is not the person who gave birth (same-sex female couple). Given the changes introduced by the Act of 2024, which will provide pathways to parentage for intending parents in Ireland in a broader set of circumstances, recognising representations received from stakeholders on this matter, and taking account of challenges regarding the current legal situation, the provisions of the Bill will seek to provide for the recognition of parentage, under certain circumstances, and which will extend Irish citizenship to children whose parentage is recognised under these provisions.

It is proposed that a new Part will be inserted into the Act of 2024 in order to provide a process whereby Irish citizens domiciled abroad can apply to the Irish Courts for a declaration of parentage to be granted which would recognise parentage established in another jurisdiction in respect of a child who was born outside the State, providing that certain criteria have been met. This declaration would ensure both that the child concerned could be granted Irish citizenship and that the parents would be fully recognised as such under Irish law.

Additional Proposed Amendments to the Health (Assisted Human Reproduction) Act 2024

In addition to the new Parts outlined above, the provisions set out in the draft Bill include a number of amendments to the provisions of the Act of 2024. A large number of these relate to ‘technical’ issues and seek to ensure consistency between related provisions in different Parts of the Act of 2024 and also between those provisions and corresponding provisions in the Act of 2015.

There is, however, a number of provisions which include at least some level of change or refinement in the policy as contained in the Act of 2024. Some of the more notable policy areas which are relevant to these provisions of the draft Bill include:

- **Surrogacy: Discretion for Court to Dispense with Consent of Surrogate Mother for granting of ‘Retrospective’ Parental Order**

The Government wishes to provide the Courts with some level of discretionary powers to dispense with the consent of a surrogate mother in ‘retrospective’ surrogacy Parental Order applications under limited circumstances. The exact wording of these provisions is being finalised but the intention is to ensure that the rights of all parties are appropriately protected, including those of the surrogate mother while addressing concerns around a surrogate mother from, in effect, ‘blocking’ the granting of a Parental Order for reasons such as, for instance, seeking financial reward for providing their consent to the making of an order.

- **Surrogacy: Discretion for Court to Dispense with Consent of Intending Parent for granting of ‘Retrospective’ Parental Order**

The Government wishes to provide the Courts with some level of discretionary powers to dispense with the consent of an intending parent in ‘retrospective’ surrogacy Parental

Order applications under certain limited circumstances, similar to the approach as set out in the Act of 2015. The exact wording of these provisions is being finalised but the intention is to ensure that the rights of all parties are appropriately protected, including both intending parents, while addressing concerns around an intending parent from, in effect, 'blocking' the granting of a Parental Order, by not providing consent, in contentious cases, for example, where there may be an acrimonious relationship breakdown.

- **Surrogacy: Discretion for Court to Waive Surrogate Mother's Residency Requirement for granting of 'Retrospective' Parental Order (International Surrogacy)**

The Government wishes to provide the Courts with some level of discretionary powers to waive the requirement for the surrogate mother to have been residing in the relevant jurisdiction for 12 months prior to entering the surrogacy arrangement concerned in 'retrospective' international surrogacy Parental Order applications under limited circumstances. This proposed amendment reflects the practical challenges for intending parents and surrogate mothers to satisfy the residency requirement, as well as providing for cases where the surrogate mother cannot be located. This takes account of the fact that a surrogate mother moving jurisdiction is not necessarily as a result of trafficking or exploitation of that woman. The exact wording of these provisions is being finalised, but it is likely that any decision to grant such a waiver must be explicitly linked with the Court being satisfied that the surrogacy arrangements concerned did not involve a human trafficking element.

- **Surrogacy: Provide for Parental Order Application to be made in respect of Child or Intending Parent who is already Deceased**

Proposed new provisions would provide for the possibility of intending parents applying for a Parental Order in respect of a child who has died prior to the application hearing, whether because of a stillbirth or otherwise, or in respect of an intending parent who is deceased by the time of the Court application.

- **Death of Donor**

This proposed provision will allow for an application to be made to the AHRRA for permission to use an embryo already created using the gametes of a donor (i.e., a person who is not an intending parent), who has since died, when that donor had provided consent to do so at the time of donation. Although it appears likely that instances of the notification of the death of a donor being received by a clinic would be rare, consideration of this issue needs to balance the inability of a donor-conceived child to potentially contact their donor against an existing embryo being prevented from being used (and hence, most probably, the likelihood that it will be destroyed). In this regard, it is important to note that the recognised status of the embryo provided the basis for sections 26(6) and (8) of the Act of 2015 which allow for the use of an embryo formed using anonymous gametes indefinitely, providing it was formed before the commencement of that Act in May 2020. This proposed provision in the Supplementary Bill will similarly allow for the use of an embryo in circumstances where the donor-conceived child's right to identity cannot be fully exercised, but only in a limited number of circumstances.

- **Child Fertility Preservation**

This proposed amendment to the Act of 2024 will confirm that the gametes or tissues of a child can be preserved on the basis of a satisfactory connection to a medical condition which itself a consultant is satisfied will significantly adversely affect a child, as well as to any required treatment associated with that, or another, condition.

- **Consent to Storage**

Proposed new provisions in the Bill would allow for the revocation of consent to store material. Under the Act of 2024, persons who wish to cease their gametes, embryos or tissues being stored can only really do so through defaulting on the payment for such storage. These proposed provisions would also have particular implications for child fertility preservation, as it is envisaged that children will be asked on turning 18 to either revoke or revoke and replace the consent to storage which had initially been provided by their parent on their behalf.

- **'Transitional' Provisions**

Clarification will be provided in the finalised Bill regarding the various 'cut-off' dates in respect of the applicability of the possibility of 'anonymous donor' embryos being used in various scenarios, including both in the context of International DAHR and international surrogacy, as well as the specific circumstances in which such embryos can be used.

- **PAHR (posthumous assisted human reproduction)**

PAHR is defined in the Act of 2024 as being AHR treatment involving the use of the gametes of a person, or of an embryo created by the use of such gametes, subsequent to the death of such person. There are a number of potential changes to the PAHR provisions in the 2024 Act included in the draft Bill and the majority of these are 'technical' amendments or refinements in how the provisions are drafted or set out. All such amendments need the agreement of the OPC and the AGO before being finalised.

Proposed Amendments to Other Existing Legislation

The provisions of the Bill will seek to provide, through an amendment to the **Children and Family Relationships Act 2015**, for the rare set of circumstances where a donor-conceived child is born abroad, following a DAHR procedure undertaken in a DAHR facility in Ireland, in accordance with Parts 2 and 3 of the Act of 2015.

Further proposed amendments to the **Irish Nationality and Citizenship Act 1956** contained in the draft Bill confirm that any child in respect of whom an Irish citizen parent is declared to be a parent under the provisions of the Supplementary Bill (including the new provisions to be inserted into the Act of 2015) will become an Irish citizen from the date of the court order.

Finally, proposed amendment to the **Civil Registration Act 2004** will lead to the introduction of a specific, relatively straightforward process for the birth of a child born in Ireland as a result of PAHR to be registered by the General Register Office.