

# DÁIL ÉIREANN

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## AN COMHCHOISTE UM SHLÁINTE

## JOINT COMMITTEE ON HEALTH

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*Dé Céadaoin, 27 Feabhra 2019*

*Wednesday, 27 February 2019*

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The Joint Committee met at 9 a.m.

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### MEMBERS PRESENT:

Deputy Stephen S. Donnelly,	Senator Colm Burke,
Deputy Bernard J. Durkan,	Senator Rónán Mullen.
Deputy Margaret Murphy O'Mahony,	
Deputy Kate O'Connell,	
Deputy Louise O'Reilly,	

In attendance: Senator Fintan Warfield.

DEPUTY MICHAEL HARTY IN THE CHAIR.

*The joint committee met in private session until 10.40 a.m.*

## **General Scheme of Assisted Human Reproduction Bill 2017: Discussion (Resumed)**

**Chairman:** The purpose of this morning's meeting is to continue our pre-legislative scrutiny on the general scheme of the assisted human reproduction Bill 2017. We will hear a presentation from LGBT Ireland. We invited representatives of the Iona Institute to this meeting but since the institute had made a presentation via Dr. Joanna Rose at our meeting on 19 December last, it did not propose to add to its testimony. On behalf of the committee, I welcome from LGBT Ireland, Dr. Lydia Bracken, legal adviser, and Ms Paul Fagan, chief executive.

I draw the attention of witnesses to the fact that by virtue of section 17(2)(l) of the Defamation Act 2009, witnesses are protected by absolute privilege in respect of the evidence they give to the joint committee. If, however, they are directed by the committee to cease giving evidence on a particular matter and they continue to do so, they are entitled thereafter only to qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against any person or entity by name or in such a way as to make him, her or it identifiable. I advise witnesses that any opening statements they make to the committee may be published on its website after the meeting.

Members are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside the House or an official either by name or in such a way as to make him or her identifiable.

I invite Ms Fagan to make her opening statement.

**Ms Paula Fagan:** I thank the committee for inviting LGBT Ireland to attend the meeting today. I am joined by our legal adviser, Dr. Lydia Bracken, who authored our recent submission, and we will split our opening statement time between us. Our aim today is to give the committee an understanding of the specific challenges facing same-sex parents and their children in the absence of a clear legislative framework in Ireland relating to donor assisted human reproduction and surrogacy.

By way of introduction, I should explain that LGBT Ireland is a national charitable organisation which provides support and advocacy services to lesbian, gay, bisexual and transgender people and their family members. We provide this through a confidential help line service as well as face-to-face supports through our peer support groups. The issues raised through our front-line services inform our advocacy work. In 2017, calls and emails requesting information on parenting rights were the most frequent advocacy inquiries to our organisation. This led us to hold a series of public meetings and events in Dublin, Cork and Galway in 2018, where we met with hundreds of families and same-sex couples planning parenthood. It is their experiences that inform our submission and input to the committee today.

The proposals we put forward are based on protecting the best interests of the child and are

informed by reference to the rights of the child under the United Nations Convention on the Rights of the Child, the European Convention on Human Rights and Article 42A of the Constitution. It is argued that the best interests of the child are met through laws that recognise the reality of life for the child and that ensure the child can be fully cared for by the adults whom he or she regards as parents. For children raised in families headed by same-sex parents, this means that they should have the opportunity of acquiring a legal relationship with both intended parents and those parents should have all the legal tools necessary to care for their children.

The reality for children being raised by same-sex parents in Ireland today is that they have no way of establishing a legal parental relationship to both parents who care for them. This disproportionately affects donor conceived children with same-sex parents as their relationship to both parents is often questioned, causing considerable stress and uncertainty for these families. This is particularly so where medical consent is required or when obtaining legal documents such as passports but it also arises in everyday situations, for example, providing consent for school trips. Several families we spoke to have children with serious health conditions that require ongoing medical attention, and for these parents the stresses caused by the lack of legal rights put an additional strain on them.

While we acknowledge this is complex legislation and support the thorough examination of all issues involved, we ask that the committee progress its deliberations urgently. This is a time sensitive issue, and families and couples planning parenthood cannot wait indefinitely. The lack of clear regulations leaves couples making decisions about donor assisted human reproduction pathways based on what they think and guess the legislation will be, which may have far-reaching implications for their future family life. As each day passes the number of families living in legal limbo is increasing and this will continue until legislation in this area is fully commenced and widely communicated. It is imperative that the proposed legislation includes retrospective provisions to cover families that already exist.

I will hand over now to Dr. Bracken to continue our submission.

**Dr. Lydia Bracken:** I thank the Chairman and members of the committee for inviting us to attend today's hearing.

Our submission concentrates on the proposed regulation of surrogacy as set out in the Bill, with a particular focus on how the proposed regulation would affect male couples who have already become parents through surrogacy and those who may seek to do so in the future. In our view, the proposed regulation of surrogacy as set out in the Bill would not adequately protect the best interests of children born through surrogacy, so amendments are required. A major issue in the proposed regulation is that there is no provision in the Bill to recognise children who have already been born through surrogacy. For male couples, this means there is no facility to retrospectively recognise both men as joint legal parents of their child. The only option is for the couple to apply for second parent adoption, which we do not believe to be an adequate solution. By contrast, where a child has been born through donor assisted human reproduction, DAHR, once Parts 2 and 3 of the Children and Family Relationships Act 2015 are commenced, the intended parents will be able to retrospectively apply to be jointly registered as legal parents. A similar process should be put in place for surrogacy.

International surrogacy is currently excluded from the Bill, meaning that the legislation will only apply to domestic arrangements. This is problematic because the exclusion of international surrogacy from the Bill will not prevent couples from accessing services abroad. It simply creates significant difficulties for the family when they return to Ireland with their child. The

child has no control over the circumstances of conception and so should not be disadvantaged by virtue of the fact that he or she was conceived through surrogacy abroad. We argue that it is in the best interests of the child for his or her relationship with the intended parents to be legally recognised in Ireland following the international surrogacy arrangement.

We also believe that the model of parentage that is proposed in the Bill, whereby the surrogate is recognised as the legal mother at birth and parentage is later transferred to the intended parents by way of a parental order, is inappropriate. A major difficulty that arises with this delayed or post-birth model of parentage is that, at the time of the child's birth, the non-genetic father is not recognised as a legal parent and cannot be recognised until the time that the parental order is granted. The application for the parental order cannot be made earlier than six weeks and not more than six months after the child's birth. This approach leaves the child in a vulnerable position as he or she is cared for from birth by the intended parents, one of whom will not have any legal parental responsibility or decision making powers for at least six weeks. Instead, the surrogate, as the legal mother, retains decision making responsibility for the child until the time the parental order is granted.

We argue that a pre-conception model of parentage would better protect the rights of all stakeholders in the surrogacy process. Pre-conception court orders would provide approval of the surrogacy arrangement and determine the parentage of the child before conception takes place. This would ensure that both of the intended parents have full legal powers to care for the child and ensure that the child is legally integrated into his or her family from the moment of birth.

Certain additional issues relating to assisted human reproduction are of particular concern to LGBT Ireland members, such as non-clinical DAHR procedures and international DAHR. While we acknowledge that these issues are not addressed in the Bill and are, perhaps, outside of the scope of today's hearing, we believe that they are in need of attention. The Bill could be used as a way to amend the Children and Family Relationships Act 2015 to ensure that it accommodates the widest range of families possible. These areas, and our recommendations for reform, are discussed in detail in our submission and we are happy to speak to them today should any member wish to do so.

**Chairman:** Thank you. I call Deputy O'Reilly.

**Deputy Louise O'Reilly:** I apologise for keeping the witnesses waiting. We had more matters than usual to deal with this morning and I thank them for their patience. I have some questions initially and we might have the opportunity of another round of questions later because this is a matter we must tease out. The submission refers to issues around a second parent adoption. Dr. Bracken said: "The only option is for the couple to apply for second parent adoption, which we do not believe to be an adequate solution." Perhaps she will outline the difficulties with it, apart from the obvious two levels of parent which is not going to work. What specific difficulties do the witnesses foresee? Some people would consider second parent adoption to be a workable solution, while recognising that it is not ideal. However, I believe this will create more problems than it fixes. The witnesses might outline their views on that.

**Dr. Lydia Bracken:** The Adoption (Amendment) Act 2017 stipulates that in order for the partner of a parent, whether the spouse or co-habiting partner, to engage in second parent adoption, he or she has to care for the child for two years to become eligible. There is a two year waiting period before second parent adoption becomes an option in the first instance. Where the waiting period has not been met and the spouse or cohabiting partner has been caring for

the child for less than two years - for example, where the child is under the age of two - a full joint adoption will be required. In a full joint adoption, the birth parent has to give up his or her existing legal rights and jointly adopt with his or her partner or spouse. That changes the child's status in terms of the biological parent and is an unnecessarily complicated situation. This is the main legal reason that second parent adoption is not a viable solution to be used in cases of donor assisted human reproduction, DAHR, or surrogacy.

**Ms Paula Fagan:** Another point to make around the urgency of this legislation is that the Adoption Authority of Ireland is not processing second parent adoption where there is any donor assisted element to it. It is waiting for this legislation to come into effect, so that option is not currently available to people. As Ms Bracken outlined, we do not consider it appropriate, particularly from a child's point of view. Children understand adoption. They know people in their classrooms at school who are adopted or others in their families. They understand on an emotional level what that means. It is a very different situation where the parents intended to have the child and have always been there for them.

**Deputy Louise O'Reilly:** That makes perfect sense. I thank Ms Fagan for outlining that because, while it may seem on the surface that this approach ticks all the boxes, I believe it will create more problems, including difficulties for the child. We must focus on that. It might save us an enormous amount of work if we look at other jurisdictions where such a provision has been implemented correctly. Do the witnesses know of countries which have done this? Perhaps we can copy their homework.

**Dr. Lydia Bracken:** We made reference to the pre-conception approach, which I believe was also mentioned at the previous committee hearing. That type of approach is used in a number of jurisdictions around the world. New Hampshire was mentioned as a model of very good practice at the previous hearing. My academic research has looked at the South African model. Both models are very appropriate. They are both based on pre-conception court orders, where one goes to court before the child has been conceived. Within that court process one gains authorisation to engage in the surrogacy, and parentage is allocated at the outset. This provides certainty at the beginning as to who the parents are once the child is born. It means that once the baby is born, the focus can be on caring for the newborn and going to court again to fix legal parentage issues is not necessary. Those two jurisdictions are very good models of surrogacy, and perhaps provide appropriate blueprints which Ireland might look to when regulating this area.

**Deputy Louise O'Reilly:** That is a very interesting point. People are potentially facing legal battles at a time of their lives when they are up in the middle of the night. The last thing that one wants to do in such circumstances is dig out one's work clothes and make one's way to court.

An issue that was discussed here on a previous occasion, and which is being discussed in other fora, is surrogacy. Very valid issues have been raised about the potential coercion of women, particularly vulnerable women or those from a disadvantaged background. Will the witnesses speak about the potential protections for women that we, as legislators, can put in place? Nobody in this room or outside it wants to be responsible for a situation where we assent to the coercion of vulnerable women outside or within this State. How can we legally provide those protections? Nobody wants that to be an unintended consequence.

**Dr. Lydia Bracken:** The need to protect women is a very important point, as is protecting the best interests of the child. To do both it is important that we focus on an altruistic model

of surrogacy. Rather than engaging in a commercial surrogacy regime, which poses the risk of offering financial incentives for people to act as a surrogate and skewing any informed consent provided, a focus on an altruistic model would ensure that people are not being distracted by other financial issues going into the arrangement from the outset. In addition, it is important that surrogates are provided with appropriate counselling in advance in order that they understand their role and to ensure they are not being coerced into it. They should also be provided with independent legal advice to ensure they have made an informed choice to become a surrogate and understand the legal and social implications of their role as a surrogate. By putting those safeguards in place, we can protect women who act as surrogates and the children, as well as intending parents. Those safeguards can be legislated for.

**Deputy Louise O'Reilly:** Are there other jurisdictions where those safeguards have been legislated for? Can we replicate good practice in this area? Can we look to New Hampshire and South Africa for guidance?

**Dr. Lydia Bracken:** As far as I am aware, both those jurisdictions have systems in place which only allow altruistic surrogacy to begin with. There are also provisions on counselling and independent legal advice for surrogates. We could draw on those other jurisdictions to find a model of best practice to ensure that coercion does not occur.

**Deputy Stephen S. Donnelly:** I thank both witnesses for appearing before the committee and for their ongoing work in this area and the submission they made. Are there any concerns about a lack of rights for the surrogate in terms of the parental switch? We have just had a big referendum on bodily autonomy for women. If I understand the proposal correctly, at some point before birth, whether during the pregnancy or before it, a court order will be made to the effect that from the moment of birth the two parents, neither of whom is bearing the child, are the legal parents of the child. The corollary is that the woman giving birth loses any of those rights ahead of time. Are there any issues of bodily autonomy for the woman bearing the child during the pregnancy? Might a woman give birth and then want to change her mind in terms of giving up the child? How are those two issues being considered in terms of court orders being in place ahead of birth?

**Dr. Lydia Bracken:** In the models of pre-conception arrangements that exist around the world most jurisdictions would stipulate that the surrogate - the woman giving birth to the child - takes all healthcare decisions. If any issue arises during the pregnancy, it is for the surrogate to determine. She retains her bodily integrity in that way.

I will preface my comments on a surrogate wanting to change her mind by stating that I am a legal academic as opposed to someone with specialist knowledge in sociology or psychology, but the research that I have read shows that such cases are highly unusual. At the previous committee hearing on this issue, a figure of 4% was mentioned. I am not sure of the origins of that figure, but from my research, in the United Kingdom there have been three reported cases in the past 20 or 30 years of a surrogate refusing to hand over the child. That case has gone to court. Of course, there may be other cases or issues that do not make it to court or problems arising. Three difficult cases from what are probably hundreds of successful surrogacies indicate it is very unusual that a surrogate would want to change her mind.

**Deputy Stephen S. Donnelly:** Would Dr. Bracken like to see any clauses added if the legislation could be amended that would provide some mechanism in those situations? Abroad is it the case that when the court order is in place, that is that?



**Dr. Lydia Bracken:** We need to legislate for all circumstances but that is a matter for the Legislature to determine. There is a very small chance of somebody changing her mind but it must be included in the legislation. However, there could be a case where a court application could be made but to be determined based on the best interests of the child. That needs to be our paramount focus in any legislation. The court would then determine what is best for this child in such a case.

**Deputy Stephen S. Donnelly:** There could be some sort of emergency or review clause.

**Dr. Lydia Bracken:** There potentially could be.

**Deputy Stephen S. Donnelly:** I thank Dr. Bracken. She raised a very interesting point that as the Bill is drafted, there will be continue to be an issue for kids born now. The issue is for children born via donor-assisted reproduction but not through surrogacy.

**Dr. Lydia Bracken:** Yes.

**Deputy Stephen S. Donnelly:** Will Dr. Bracken talk us through an example for each of those and what the problem is procedurally in one but not in the other case?

**Dr. Lydia Bracken:** Is the Deputy talking about when somebody has already had a child through donor-assisted reproduction or through surrogacy?

**Deputy Stephen S. Donnelly:** Yes.

**Dr. Lydia Bracken:** Currently, if a person has had a child through donor-assisted human reproduction, DAHR, once Parts 2 and 3 of the Children and Family Relationships Act 2015 are commenced, sections 20 to 22, inclusive, will allow for a retrospective application to be made. A person can go to court to be recognised, along with a partner, as the legal parents of that child. There is no equivalent provision in the assisted human reproduction Bill we are discussing. If a child has already been born through surrogacy, there is no equivalent process to go to court and have both intending parents recognised as legal parents. In my opening submission, I mentioned that second parent adoption, although it is not allowed, could be the only solution. Otherwise a person could apply for guardianship of the child if that person is not currently recognised as an intended parent. We do not have provision within the Bill to retrospectively recognise parentage. We argue that a similar process to that which applies in cases of DAHR should be allowed for cases of surrogacy. It would create parity in our legislation and recognise the fact that a number of children have been born through surrogacy in the past number of years. A survey was released last year or the year before indicating that Ireland is currently the second-highest user of surrogacy in the world. Many children have been born through surrogacy who need their family relationships to be regularised. One way to do that is to include provisions in this assisted human reproduction Bill allowing for retrospective parentage.

**Deputy Stephen S. Donnelly:** Is it a straightforward gender issue? Is it essentially a case that if there are two woman and one of them gives birth, she would be one parent while her partner would, under current law be able to apply to be a second parent whereas for two men, the man who was a donor can apply to be a parent but his partner cannot? Is that essentially the issue?

**Ms Paula Fagan:** No. It is quite complex. Currently, some female couples are covered under the Children and Family Relationships Act 2015 and there are certain parameters around that. It must be a non-identifiable donor. Retrospectively, they can have accessed services

abroad and prospectively only in Ireland. There are variations. Many female couples are now finding out they are not covered under the Children and Family Relationships Act. We are proposing in our submission that this-----

**Deputy Stephen S. Donnelly:** Sorry, but why are they not covered?

**Ms Paula Fagan:** For example, they may have used a known donor, such as where a friend or a family member of the non-birth partner has donated sperm. They would not be covered under the Children and Family Relationships Act 2015 because the donor would be known.

**Deputy Stephen S. Donnelly:** Why is that the case? Was a rationale put forward for known versus unknown donors at the time?

**Ms Paula Fagan:** I will hand over to my legal colleague but I believe it relates to case law.

**Dr. Lydia Bracken:** With a known donor, prior to the laws coming into place, he technically is the legal father. It is more difficult to transfer rights from the existing legal father to the intended parents. It can certainly happen through a post-conception consent model as proposed in our submission. I am not aware of the exact policy reasons for it not being included but that is probably a good indication of it.

**Ms Paula Fagan:** The important part is the trail of consent. Many families have good relationships with known donors in that they would consent to both of the female parents being the legal parents. The consent issue would be sorted out but there are no regulations to allow the second female parent to register. It is just not provided for.

**Deputy Stephen S. Donnelly:** That is if the donor is known.

**Ms Paula Fagan:** Yes.

**Deputy Stephen S. Donnelly:** Will the current Bill, as drafted, address any of that or are these additional matters?

**Ms Paula Fagan:** This assisted human reproduction Bill will not do it.

**Deputy Stephen S. Donnelly:** Okay. So we need to look at amending the existing Act as well.

**Ms Paula Fagan:** Exactly. It would have to be broadened.

**Deputy Stephen S. Donnelly:** It is an issue for two women if the donor is known. Is it an issue for two men in every circumstance?

**Ms Paula Fagan:** Pretty much. The way same-sex male couples are accessing parental pathways means they primarily use surrogacy or adoption, although adoption is not really open in Ireland currently. A same-sex couple can apply jointly to be assessed for adoption but there are very few countries open to same-sex couples. In theory they may be able to access international adoptions but it is not a practical possibility, apart from South Africa.

Donor-assisted human reproduction has advanced even since the Children and Family Relationships Act 2015 was enacted and we know from our consultations with families that people are accessing services abroad because there is more advanced technology abroad and options for people with fertility issues. Same-sex couples have fertility issues as well as needing donor assistance. Our main concern is that while the Children and Family Relationships Act 2015 is



fantastic for the families it covers, many families have been left behind. The second pillar in regulating assisted human reproduction must consider such issues and try to address them. The children exist and they need to have their parents recognised.

Across pages 3 to 6 in the submission, we have covered what we see as a framework to do that. Basically, this relies on parents being able to establish consent with a donor or have a court process where they can show the child will have his or her right to identity protected. We see that this should absolutely be enshrined in the law but there should be ways, through regulations and a donor conception register, to have that information recorded.

**Deputy Stephen S. Donnelly:** That is great. I thank the witnesses.

**Deputy Margaret Murphy O'Mahony:** I welcome the witnesses and I am sorry again for keeping them waiting. They have been patient. They mentioned holding public meetings around the country. I presume the same issues arose in each of the three places.

**Ms Paula Fagan:** Yes.

**Deputy Margaret Murphy O'Mahony:** Sometimes we in Cork have a different way of thinking. It may be a nicer way of saying things. We are superior. The issues across the board were probably common.

**Ms Paula Fagan:** They had very much in common. Some people had a slightly easier time registering their child. Same-sex couples cannot be registered with both parents on the birth certificate at present. That still has not been commenced. For some couples who went to the Civil Registration Service on Lombard Street to register the birth, it was possible to use a double-barrelled surname but down the country, registrars were not used to that. Generally, there is a significant lack of information. Once a same-sex couple engages with any State service, they are meeting a lot of barriers because the civil servants are not equipped or do not have the knowledge to deal with them. That can be very difficult. I was speaking to a family the other day. The parents went in to register their child but could not register both parents, even though they are a married couple. They were watching an opposite-sex couple who had quite a complex situation, although I cannot remember the details. The registrar was able to work with the opposite-sex couple and get both parents registered. Post-marriage equality, same-sex couples do not know a lot of these details, either. They are going ahead and having children. Clinics are open to them. They find all this out retrospectively. It is a real issue. The work we are trying to do is to inform people that regulations are not in place yet. Countrywide, there is not much difference in the experience.

**Deputy Margaret Murphy O'Mahony:** Registering a child should be a very special time. Maybe there should be training for staff.

**Ms Paula Fagan:** Yes.

**Deputy Margaret Murphy O'Mahony:** It is a very special time for all couples. In respect of the surrogacy people themselves, are they happy with the proposal?

**Ms Paula Fagan:** Is the Deputy referring to the surrogate mother?

**Deputy Margaret Murphy O'Mahony:** Yes. Has the witnesses come across any problems?

**Dr. Lydia Bracken:** In respect of the proposed law?

**Deputy Margaret Murphy O'Mahony:** Yes.

**Dr. Lydia Bracken:** Our best information probably comes from the UK, where they are in the process of considering the amendment of their own legislation. The Law Commission of England and Wales is looking at their regulation. Currently the UK regulation is based on a delayed or post-birth model but a number of people have found that to be inconsistent with the reality of surrogacy. They do not feel it is working well. In a survey published by Surrogacy UK, a number of surrogates responded that they did not believe the current UK model was fit for purpose. The majority of respondents believed the intended parents should be the legal parents from the moment of birth. That reflects what we have proposed in our submission, namely, that it should be a pre-conception model. Sociological and psychological research shows that surrogates generally do not see the child as their own. They understand that they are providing this great gift for another individual or couple. They do not bond with the child in the same way that another mother might. They understand that it is someone else's child and are happy with that arrangement.

**Ms Paula Fagan:** The families we have met who have used surrogacy - all the families I have met are of male couples - would have quite a strong relationship with the woman who acts as a surrogate. As it happens, I have seen that.

**Deputy Margaret Murphy O'Mahony:** Yes, which is nice.

**Ms Paula Fagan:** A lot of couples who use donor conception will have a great-----

**Deputy Margaret Murphy O'Mahony:** Closeness

**Ms Paula Fagan:** I have donor-conceived children, so I know the thought process when people wonder how to protect the child's best interests. People consider that before they ever-----

**Deputy Margaret Murphy O'Mahony:** Yes, the child is the centre.

**Ms Paula Fagan:** The couples we are meeting now have maintained a relationship with the surrogate in order that the child can have that face and some sort of relationship. That is the reality we have seen in terms of the couples we have met. That is the genuine reality. One couple we mentioned in our submission have a child who is very ill. The woman who acted as a surrogate has a lot of contact.

**Deputy Margaret Murphy O'Mahony:** That is nice, too, if everyone is happy with it.

**Ms Paula Fagan:** It is helpful to share the real stories.

**Deputy Margaret Murphy O'Mahony:** We forget that behind all these figures and our talk are people and their lives. In respect of provisions to cover families that already exist, is it the case that they are very much on board, people who have gone through the whole system? There are no problems coming from any women-----

**Ms Paula Fagan:** The only problem that is arising are the lack of a legal pathway to get recognition. It is very practical stuff a lot of the time that people ring us about, for example, applying for a passport. A married couple who planned and have had a child together are going in to get a passport for the child. Whoever is the birth parent is forced to sign an affidavit saying they are a lone parent. That is very difficult. People are constantly ringing us saying it cannot be right. They are putting forward all their documentation-----

**Deputy Margaret Murphy O'Mahony:** Thinking it will be straightforward.

**Ms Paula Fagan:** -----but the State is telling them they have to sign this.

**Deputy Margaret Murphy O'Mahony:** It is cruel.

**Ms Paula Fagan:** It is a real dilemma for people. That is where it comes up. Nobody is coming to us saying they regret that they used a donor conception.

**Deputy Margaret Murphy O'Mahony:** I was not necessarily getting at that, but do they feel hard done by that it could be sorted for new parents and it was not sorted for them?

**Ms Paula Fagan:** I see what the Deputy means. I do not think so. Prospectively, I think the difference is that at least people will be clear. They will be making decisions in an informed way. They will know. People are still somewhat in the dark at the moment, even with the Children and Family Relationships Act, because it is not fully commenced. They are making decisions. We met a family the other day that was trying to decide whether to go to England or stay here, around having their second child. They were trying to pre-empt what the legislation is going to contain.

**Deputy Margaret Murphy O'Mahony:** That is a hard place to be.

**Ms Paula Fagan:** That is really the biggest issue. Prospectively, while people have some concerns which may not be addressed because the Legislature may feel a narrower definition is needed, at least they will know that before they start.

**Deputy Margaret Murphy O'Mahony:** Yes.

**Chairman:** Is Deputy Durkan happy to allow Senator Warfield come in now or would he like to contribute himself?

**Deputy Bernard J. Durkan:** I will come in now myself because I have to leave. I am sorry about that. I thank the witnesses. We have done our best to read ourselves up to date on this very complicated but important subject. We all know aspiring parents, people who wish to have children but cannot, for all the reasons we have gone into before. Most important is that we are assured as to the legal foundations on which the legislation is to be built, and the extent of the legislation. Are the witnesses satisfied that we can establish best practice or be in line with best practice elsewhere, and that we can be reasonably assured that the legal challenges will not turn the legislation on its head?

**Dr. Lydia Bracken:** One of the benefits of being so late in the day in terms of legislation is that we have the benefit of observing what other countries have done. That makes it easier to identify best practice. We can pick advantageous parts of other states' legislation to create a really solid foundation for our own regulation. The proposals we have put forward in our submission would create a more coherent structure for surrogacy in Ireland and would better balance the rights of all stakeholders in the process. It is very important to remember that there are a number of stakeholders involved and all of their rights and interests need to be balanced against one another. Looking at what has been done in other jurisdictions helps with that and allows us to build coherent legislation.

**Deputy Bernard J. Durkan:** The stakeholders include the baby, the donor and the surrogate mother. To what extent, on the basis of court cases already taking place in other jurisdictions, can we have reasonable assurance that we are covered in most eventualities? A few years

ago, we had a couple of high-profile cases. That seems to have tapered off recently. Would the witnesses comment on anonymous donors? Although we do not propose to go that route it would be no harm to have their advice on the pros and cons, as experienced in other jurisdictions.

**Dr. Lydia Bracken:** Under the Bill in its current form, that is not an appropriate model for surrogacy. If, however, we look to other jurisdictions in the context of amending this Bill, we can create a coherent model of surrogacy. Using the pre-conception approach would enhance the best interests of children, in particular. I mentioned South Africa where there is a lot of case law which emphasises the benefits of the pre-conception approach, focusing on how the best interests of the child can be prioritised in that way because there is certainty for everyone involved. When the child is born the parents have full capacity to care for them from that moment. The case law from that jurisdiction can be very useful in helping us to understand why that is a very good approach to take.

The Children and Family Relationships Act 2015 makes it very clear that anonymous donations will not be allowed. Any donor gametes that are used have to be fully identifiable and the same process will be used in cases of surrogacy. That is really important from a children's rights perspective so that children have access to information about their backgrounds, to vindicate their right to identity. Having identifiable information is very important from a legal perspective.

**Ms Paula Fagan:** The Children and Family Relationships Act 2015 retrospectively allows for anonymous donation simply because that has happened. Up to very recently, much of the donor sperm came to clinics that had offered only anonymous gametes. It is a question of legislating for the children who already exist, regardless of whether they fit the parameters we want for the future. Anonymous donation has to be considered retrospectively but prospectively it is possible to set out clear protections for the child's right to identity. Not recognising the parents of the child who already exists does not do the child any favours regardless of whether they know the donor or not. That is a layperson's perspective.

**Deputy Bernard J. Durkan:** I am conscious of that situation, for example, there are children in this country who are the product of anonymous donations. The question arises of whether retrospective application in the law can cover all eventualities. Do our guests know how many such children live in this jurisdiction, having come here from other jurisdictions? There are quite a few.

**Ms Paula Fagan:** It is very difficult to know because it is more obvious in same-sex couples but most fertility treatment or assisted human reproduction is accessed by opposite-sex couples and that is a much more hidden area. We do not know the figure for donor-conceived children who already exist who would be the product of an anonymous donation. Research in the UK would say that only 2% of heterosexual couples would tell their children that they are donor-conceived. We have to deal with the reality that these children are here. It is good that the Children and Family Relationships Act 2015 does provide for anonymous donations. Maybe that could be replicated, retrospectively.

**Deputy Bernard J. Durkan:** Are our guests satisfied that adequate protection exists for all the parties involved, namely, the surrogate mother, the child and the proposed or new parents? Given the previous legislation and the number of submissions from various interest groups are they satisfied that the vital interests of those three are adequately upheld?

**Dr. Lydia Bracken:** In the proposed Assisted Human Reproduction Bill 2017, I do not think that everyone's interests are adequately protected. If, however, amendments were made to that and we were to rethink the model of parentage proposed, to focus more on a pre-conception model, to include provisions to recognise cases of international surrogacy and to include the retrospective provisions to recognise children who have already been born through surrogacy, we can construct a new Bill that would adequately protect the rights of the child, the rights of the surrogate and the rights of the intended parents.

**Senator Colm Burke:** Where do the witnesses think the legislation functions best in other countries, where is the best structure in place? Have they identified a country we could learn lessons from? In other countries there is legislation but here in Ireland we have to consider the constitutional issues. Are there any constitutional issues that we need to be concerned about and to flag up at this stage in order that they do not arise in five years' time when someone suddenly takes a constitutional challenge? It is a very complex legal area because so many different parties are involved. It is important to get it right. It is not possible to always get legislation 100% right but let us at least make every effort to do that.

**Dr. Lydia Bracken:** My academic research focuses on South African law and entails a comparative analysis. Its model for regulating surrogacy is very good. I chose to research South Africa because the constitution of that country very clearly and expressly protects children's rights. The relevant provision is much stronger than our Article 42A and expressly protects the best interests of the child. They have to be of paramount importance in every matter concerning the child. As a result of its own constitutional provisions, the surrogacy legislation there has been shaped in a way that really puts the rights of the children in the forefront. It uses a pre-conception model and the structure of the legislation provides a very good balance between the rights of all stakeholders and in particular secures the rights of children. That pre-conception approach would be a good blueprint for Ireland to follow. At the last hearing, the New Hampshire model was mentioned. It also takes a pre-conception judicial approach. I am not as familiar with that model but it is along the same lines as the South African one in that it is judicially authorised prior to conception. Those are very good models to consider.

We need to be cognisant of Article 42A and the rights of children, particularly in the context of ensuring that the rights of all children are respected and that there is no discrimination between children by virtue of the fact that they have been born through donor conception or surrogacy or any other form of conception. That is a very important point to bear in mind. Once our legislation is child focused I do not see any potential constitutional issues arising.

**Chairman:** Is our guests' advice for people who go abroad for assisted human reproduction, whether it is married couples or those who are single, that they should opt for an identified as opposed to an anonymous donor?

**Dr. Lydia Bracken:** Yes, absolutely.

**Chairman:** There is no obligation on them to choose one or the other.

**Dr. Lydia Bracken:** It depends the jurisdictions to which they go. They may have the option of choosing anonymous or non-anonymous donors. From a children's rights perspective, we would always encourage couples to use identifiable donors. Once they have left the jurisdiction, however, they have a different range of options.

**Chairman:** Would the application of the proposed legislation differ in respect of cases



where couple go abroad and those where conception takes place here?

**Dr. Lydia Bracken:** International surrogacy is not recognised in the assisted human reproduction Bill as it currently stands. We propose that it should be recognised. However, for it to operate, whatever country the couple is travelling to would need to have a bilateral agreement with Ireland or there would need to be equivalence between its laws and the law here to ensure the identifiable gametes are used and other stipulations are met. Once that has been adhered to, it will be possible to construct a new provision or new legislation that would accommodate international surrogacy and ensure that the way in which parentage is allocated in the other country can then be recognised in Ireland, either before the couple leaves or once they come back to the country.

**Chairman:** Would it be the case that once the legislation is enacted, we would have to go through a process of making bilateral agreements with other countries?

**Dr. Lydia Bracken:** A number of options are available. Bilateral agreements are simply one option. That would streamline the process. We could have a bilateral agreement with New Hampshire stating that if any Irish couple was to travel to that jurisdiction to engage in surrogacy, provided all the steps had been followed, we would then recognise the parentage when they returned to Ireland. It may be possible also to do this without a bilateral agreement and to simply provide that once the couple returns to Ireland, they would be able to apply for a declaration of parentage, again recognising the two intended parents as the legal parents, provided they are able to provide documentation from a clinic stating that identifiable gametes have been used and other criteria that the State is happy with have been adhered to. It does not necessarily have to be through a bilateral agreement but that might streamline the process and make it a consistent procedure in every case.

**Senator Fintan Warfield:** I welcome the witnesses to the committee and thank them for a very detailed and comprehensive submission. What I took from the interaction between the witnesses and Deputy Durkan was that we have to proceed urgently to ensure that we have a framework that is fit for purpose and we never encounter these problems again. While we might not have the answers in this room today, the failure to retrospectively recognise has led to some of the problems and the legal limbo we see facing LGBT families. Some broader issues were mentioned. Will Ms Fagan explain how they intertwine with the Children and Family Relationships Act?

**Ms Paula Fagan:** What we are proposing in terms of the families who are not covered by the provisions in the Children and Family Relationships Act falls under the first three recommendations we make in our submission. First, where a child is conceived through non-clinical donor assisted human reproduction, procedures should be in place to recognise a second parent as a legal parent. That is one aspect. Second, we have spoken about a retrospective application for a declaration of parentage in cases of DAHR under section 20 of the Act. We believe that should be possible where a known donor was used so that those families are not left behind. Third, we must ensure that the second intended parent is recognised as a legal parent in cases where she provides an egg to enable the conception of the child. Reciprocal IVF is a way of conceiving that has emerged relatively recently. It is where one partner in a female couple donates an egg to the other so that they have a genetic link, which is what we have been calling for.

What we are saying is that an amendment could be made to the assisted human reproduction Bill. The Children and Family Relationships Act does not allow for recognition because the donor has to be non-identifiable or traceable. In any case, the wording does not allow for it. We



are suggesting a small amendment to provide for recognition where the donor of the gamete or embryo is the spouse of a partner or cohabitant of the mother. That would be similar to other jurisdictions that have allowed for that because they understand that reciprocal IVF is a reality for people and it should not bar one or other of female couple from donating if it makes sense to do so.

The Government should also consider the possibility of recognising donor assisted human reproduction conducted abroad after Parts 2 and 3 of the Children and Family Relationships Act have been commenced. Similar to what Dr. Bracken spoke about, looking at areas that have good practice where couples will go, it is a very costly procedure. The technology and services are not as advanced in Ireland so people will continue to access services abroad. We propose legislating around that.

**Senator Fintan Warfield:** Dr. Bracken's statement refers to "the model of parentage proposed in the Bill where the surrogate is recognised as the legal mother until birth and that parentage is then transferred". Why has the State chosen to include those restrictions? Is it legally possible to do anything other than as provided for in the Bill?

**Dr. Lydia Bracken:** That approach was chosen. Given that it is very similar to what is currently in place in the UK, we have simply looked across the pond and copied their legislation. They have a post-birth model in the UK where the surrogate is recognised as the legal mother once the child is born and parentage is transferred later. As the timelines in the proposed Bill are exactly the same as those in the UK legislation, I believe the provision was copied from the UK. That is not an adequate approach because, as we said, it means that at birth the child will not have a legal relationship with the second intending parent, namely, the parent who is not genetically related to the child. That leaves the second parent in a vulnerable position as it means that in the first few weeks of the child's life, people are going to court to establish a parentage as opposed to simply caring for their child as they should be able to do.

We recommend a pre-conception approach. This is where a person goes to court prior to the conception of the child and securing a court order authorising surrogacy. This would ensure the different criteria have been met and allocate parentage at that stage. This approach allows for certainty and means that as soon as the child is born, both intended parents are recognised as legal parents. The surrogate mother is not recognised as a legal parent and there is no need to go back to court after the birth of the child to establish who the parents are.

**Senator Fintan Warfield:** The parentage is established at the time of birth.

**Dr. Lydia Bracken:** Yes, exactly.

**Senator Fintan Warfield:** During the previous session, when Deputy Murphy O'Mahony asked about people changing their mind, we were informed - I cannot recall by whom but it will be in the Official Report - that 1% of surrogate mothers change their mind. What happens in such cases?

**Dr. Lydia Bracken:** It is very unusual that a surrogate would change her mind. Looking at UK case law, if the issue was to go to court, the best interests of the child would be paramount. I should say again that if we look at the UK approach, it is a post-birth model, meaning that at birth the surrogate is recognised as the legal mother. In the very few cases where there has been a dispute and the case has gone to court, it does not necessarily mean the surrogate is allowed to keep the child or that care of the child will not still be transferred. In at least two of

the three cases I am aware of where an issue such as this has arisen, care of the child was still transferred to the intended parents. The UK operates a very strict model whereby parentage cannot be transferred without the surrogate's consent. She has remained as the legal mother but the courts have recognised that it is not in the best interests of the child for her to keep the child and so the care of the child has been transferred. In some jurisdictions there is a court process to address that, while in others no such process is in place. It is all based on pre-conception intent. It would be a question for the Legislature as to whether it wanted to have, as discussed earlier, that kind of emergency provision for a surrogate who changes her mind. On reflection, that might go against the ethos of our proposed legislation in terms of it being a pre-conception approach, because one of the advantages of a pre-conception approach is the certainty that attaches to it for all of the parties involved. If there was an opportunity for a surrogate to bring a case after the birth of the child, one is negating that element of certainty, but I suppose that would be a question for the Legislature to determine whether it wanted to have a court provision afterwards.

**Senator Fintan Warfield:** I have one final point which relates to two issues that are relatively minor, although they might not be minor to some. The Bill requires that intending parents wishing to undergo assisted human reproduction be provided with counselling. We had some conversation about that at the previous meeting. I would welcome a comment if Dr. Bracken has something to say about that, as it was not included in her submission.

I would also welcome a comment on the age limits. The specification is that a person would have to be aged 21 or over and not over the age of 47.

**Dr. Lydia Bracken:** We do not have any comments on those matters.

**Senator Fintan Warfield:** I thank the witnesses.

**Deputy Louise O'Reilly:** Reference was made to the emergency provision for a surrogate. I fully accept that it is most unlikely that this would happen but nobody wants to discuss legislation that will not work. We want to try to get it right if we can. Dr. Bracken referred to the emergency provision for a surrogate who may change her mind. Presumably, that would involve a legal case. We could talk about models of best practice and where some country is getting it right. It would be a good idea if we could look at that. However unlikely it is, it may be necessary to legislate for it because there are people - I am not one of them but that makes no difference - who believe that this is a very important matter and we need to provide for it in legislation. Are there models of best practice in this area? I do not like to hear it being called an emergency provision because that sounds like everyone would just jump into a car and go to the High Court. Is there anywhere we could look at where such a measure has been included and has worked?

**Dr. Lydia Bracken:** In the South African legislation there is a provision that allows for a gestational surrogate. In a situation where a woman provides her own eggs to enable the conception, she has the right to change her mind or to petition a court within 60 days of the birth of the child. In the current legislation we do not propose to allow for that type of surrogacy, where the surrogate is also the genetic mother. In the South African legislation, the woman can petition the court. Having that petition available but also having a timeline on it allows for the certainty I was talking about and ensures the intended parents are not worried that the application would be made further down the line. It also ensures the child is fully legally integrated into his or her family. That would be one example.

**Deputy Louise O'Reilly:** In that scenario, is pre-conception counselling available for the couple and the surrogate, and is it mandated by law or is it simply considered best practice?

**Dr. Lydia Bracken:** As I am not completely sure about the point on counselling, I am afraid I cannot answer that question.

**Deputy Louise O'Reilly:** That is fine. I am just wondering whether we should incorporate some form of counselling, as it would give the best chance of never having to use such an emergency provision. However, one has to balance that with the fact that most people do not think about it. Perhaps they should but it is a simple fact that very often they do not. If we put the two together, that would probably seriously minimise the risk of the emergency provision being used, while ensuring that all parties are well aware of the emergency provision. That would avoid a scenario where somebody could get to day 61 of the pregnancy and say she was not aware of it. There may be a role for counselling, although my initial reaction is that it is not necessarily a brilliant idea. It would be useful, however, to extend the legislation to encompass that scenario because counselling would make a little more sense in that context.

**Dr. Lydia Bracken:** Counselling is important but independent legal advice for the surrogate is also very important. She would then be aware of the legal petition that can be made and all of the obligations or consequences of her role as a surrogate.

**Deputy Louise O'Reilly:** That is excellent.

**Chairman:** If the surrogate mother runs into difficulties during her pregnancy, which mean she could not have any further children, would that create a precedent whereby she could try to have parentage applied to herself, having previously agreed not to do so, because of that particular medical circumstance?

**Dr. Lydia Bracken:** I do not know. I have never encountered a case like that so I do not know if I am equipped to answer it.

**Chairman:** It is a theoretical possibility.

**Ms Paula Fagan:** The provision concerning 60 days provides a mechanism.

**Dr. Lydia Bracken:** While the woman may have a medical condition whereby she cannot have another child, based on the research we have on surrogates, they do not typically see the child they are carrying for another person as their own. As such, I do not necessarily believe that would mean a woman in such circumstances would be more inclined to want to keep the child because at the end of the day, it is not her own genetic child.

**Chairman:** That concludes our pre-legislative scrutiny of the Bill. We have had four meetings and the committee will now produce a report which will be laid before the Houses of the Oireachtas. I hope our report will inform those drafting the legislation and they will take on board many of the recommendations we have heard during our hearings. I thank Dr. Bracken and Ms Fagan for their expert evidence.

**Senator Colm Burke:** It is important to acknowledge the Chairman's role in the work the committee has done on this issue. This is a very complex area which gives rise to many legal and constitutional issues. We all very much appreciate the Chairman's work.

**Deputy Louise O'Reilly:** I concur with that.

JH

**Chairman:** I thank the members.

The joint committee adjourned at 11.45 a.m. until 9 a.m. on Wednesday, 6 March 2019.