Abstract

The Children and Family Relationships (Amendment) Bill 2018 is a short Bill which proposes to amend the Children and Family Relationships Act 2015 to correct some technical drafting issues which have been identified in the Act.

According to the Department of Health, correcting these technical issues will allow the Minister to commence Parts 2 and 3 of the Act, which relate to Donor Assisted Human Reproduction and recognition of parentage. It will also facilitate commencement of other sections of the Act which provide specifically for the births of donor-conceived children to be registered.
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Summary

The *Children and Family Relationships (Amendment) Bill 2018* (hereafter ‘the Bill’) was published on 9 July 2018. According to the Bill’s [Explanatory Memorandum](http://www.irishstatutebook.ie/eli/2015/act/9/enacted/en/html), the purpose of the Bill is:

“…to correct a typographical and technical error in the Children and Family Relationships Act 2015, which will facilitate the subsequent commencement of Parts 2 and 3 of that Act.”

Though not on the Government Legislative Programme, the need for this Bill has arisen, according to the Department of Health, following the identification of a number of “technical drafting issues” in Parts 2 and 3 of the *Children and Family Relationships Act 2015*, which relate to Donor Assisted Human Reproduction (DAHR) and recognition of parentage.¹ These issues need to be corrected before these Parts of the Act can be commenced by the Minister for Health.

The amendments will also facilitate commencement of other sections of the Act which are linked to Parts 2 and 3, particularly Part 9 which provides specifically for the births of donor-conceived children to be registered.

This is a short and technical Bill with only five sections. As this Bill does not contain any policy changes, this Digest does not contain a critical analysis of the issues surrounding DAHR or the provisions contained within the Act of 2015. A summary of the Bill’s provisions is presented in Table 1 below:

Table 1: Summary of the Bill’s provisions

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Effect</th>
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<tr>
<td>1</td>
<td>Definition</td>
<td>Standard provision. Defines the “Principal Act” as meaning the Children and Family Relationships Act 2015.</td>
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<tr>
<td>2</td>
<td>Amendment to section 4 of the Children and Family Relationships Act 2015</td>
<td>Provides for an amendment to the definition of ‘donor’ contained in section 4 of the Children and Family Relationships Act 2015.</td>
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<td>3</td>
<td>Amendment to section 14 of the Children and Family Relationships Act 2015</td>
<td>Provides for an amendment to section 14(7) of the Children and Family Relationships Act 2015 allowing the Minister to prescribe forms for the declaration of consent to the use of an embryo in a DAHR procedure.</td>
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<tr>
<td>4</td>
<td>Amendment to section 16 of the Children and Family Relationships Act 2015</td>
<td>Provides for an amendment to section 16(7) of the Children and Family Relationships Act 2015 allowing the Minister to prescribe forms for the declaration of consent to the use of an embryo in a further DAHR procedure.</td>
</tr>
<tr>
<td>5</td>
<td>Short title and commencement</td>
<td>Standard provision that defines the short title of the Bill and provides for commencement by Ministerial order. Commencement orders may be limited to particular provisions of the Bill or purposes.</td>
</tr>
</tbody>
</table>

Source: Prepared by the L&RS based on the Children and Family Relationships (Amendment) Bill 2018

Further related Library & Research Service resources

On this Bill:

L&RS Bills Tracker page on the Children and Family Relationships Bill 2018

On previous Bills:

L&RS Note: Children and Family Relationships Bill 2015

Other related L&RS resources:

L&RS Spotlight: Surrogacy, parentage and citizenship: Ireland in the wider world (2013)
Background

The Children and Family Relationships Act 2015

The Children and Family Relationships Act 2015\(^2\) was signed into law on 6 April 2015. It is a substantial piece of legislation with 180 sections divided into thirteen parts. It addresses a number of areas of child and family law, including:

- parental rights of children living in diverse family arrangements;
- parentage in the case of donor-assisted human reproduction (excluding surrogacy);
- the establishment of a national donor-conceived person register;
- paternity in certain circumstances;
- the definition of the “best interests” principle with regard to children;
- guardianship for non-marital fathers;
- joint adoption for civil partners and cohabiting partners;
- applications for guardianship for certain persons;
- access entitlements for a wider range of people, and
- defined maintenance provisions for civil partners and cohabiting partners living with a child for a certain amount of time and provisions to help make parenting work better.\(^3\)

It has been described as “the most significant change in family law in a generation” and an attempt “to reflect the social reality of contemporary family life in Ireland.”\(^4\)

As Prof. Geoffrey Shannon has noted, it “must also be viewed in the context of a changed constitutional landscape”, with the constitutional amendment enshrining the rights of children in the Constitution being signed by the President later that same month. “


**Donor Assisted Human Reproduction in the Act - Parts 2, 3, and 9**

Part 2 consists of sections 4 to 23 of the Act and deals with the issue of parentage in cases of Donor Assisted Human Reproduction (DAHR). It clarifies that a donor of a gamete (egg or sperm) or embryo is not the parent of a child born as a result of a DAHR procedure. It deals with issues of consent to donate and the procedures to be followed for this. It also allows for declarations of parentage on foot of an application to Court by either the child or intending parents.

Part 3 consists of sections 24 to 42 of the Act and regulates DAHR. It prohibits anonymous donations and provides for the establishment of a National Donor-Conceived Person Register which will record details of both donors and donor-conceived children. It also sets out the manner in which donors or donor-conceived children may access information from the Register. It obliges DAHR facilities to maintain certain records and gives the Minister certain powers to inspect those records and the facilities themselves.

Part 9 consists of sections 92 to 99 and is a series of amendments to the *Civil Registration Act 2004*. It provides for special arrangements for the registration of the birth of children born as a result of DAHR. It enables a man or woman to be registered as the second parent of a donor conceived child, and sets out the procedure to be followed in order to do this. It provides for a note to be made on the register of births that the child is a donor-conceived child. If that child, after reaching 18 years of age, applies for a copy of their birth certificate, the Registrar may contact them and inform them that further information is available at the National Donor-Conceived Person Register. It also allows for the re-registration of children, giving effect to the applications that may be made under Part 2 of the 2015 Act as a result of the new provisions on declarations of parentage.

**Commencement of the Act**

While some aspects of the Act have been commenced by Ministerial Order since 2015, Parts 2 and 3 dealing with donor assisted human reproduction have not. Nor has Part 9, which made several amendments to the Civil Registration Act 2004.

In response to a Parliamentary Question in April 2018, the Minister for Health said:

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7 Information on commencement of this Act can be found here: [http://www.irishstatutebook.ie/eli/isbc/2015_9.html](http://www.irishstatutebook.ie/eli/isbc/2015_9.html)
“A number of technical drafting issues have come to light in relation to Parts 2 & 3 of the Children and Family Relationships Act 2015. The implications of these issues are being explored by officials in my Department and the Office of the Attorney General and clarification on whether primary legislation is required to resolve these issues is being sought. In the event that primary legislation is required I would seek to deal with it as a matter of urgency.”

Subsequently, in response to oral questions on the same issue in Dáil Éireann on 20 June 2018, the Minister said:

“I assure all Members that the Government shares their sense of urgency and wants to resolve this matter. The Deputies are entirely correct. I intend to go to Cabinet shortly with a view to bringing about a legislative solution on which I hope we will work, on a cross-party basis, with a view to passing it by the summer recess. There are two vehicles through which we could do this, either through a simple stand-alone Bill or by including it in other legislation that will come before the House before the summer recess.”

On 26 June 2018, it was announced that Cabinet had approved the drafting of a standalone piece of legislation which would correct the drafting issues, thus allowing the Minister to commence Parts 2 and 3 of the Act.

**Commentary**

Since the enactment of the 2015 Act, and particularly since 2016, there have been media reports that some couples with donor-conceived children have been experiencing difficulties due to the fact that these aspects of the Act had not been commenced.

It has been argued that this issue particularly affects same-sex couples who, following the enactment of the *Children and Family Relationships Act 2015*, and the legalisation of same-sex marriage shortly afterwards, began to plan to have children via DAHR procedures, with the expectation that these provisions would have been commenced and thus they would be legally recognised as their child’s parents on their birth certificate. However as this has not happened, they have been left in somewhat of a legal limbo.

In January 2017, Barnardos criticised the delay in commencement, saying:

“This delay is affecting the legal protection and identity of children being raised in these families. We welcome that work is now under way at the Department of Health to commence these sections, and that there are dedicated resources in place. However, we...”

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8 [https://www.oireachtas.ie/en/debates/question/2018-04-17/967/?highlight%5B0%5D=967](https://www.oireachtas.ie/en/debates/question/2018-04-17/967/?highlight%5B0%5D=967)
would urge this work is completed as a matter of urgency, in the interests of the children affected and their families."\(^{12}\)

In September 2017, the Children’s Rights Alliance also called for the “urgent commencement of the relevant parts of the Act so that the rights of all children conceived through AHR are protected and respected.”\(^{13}\)

In his Tenth Report, published in December 2017, the Special Rapporteur on Child Protection Professor Geoffrey Shannon addressed the issue of commencement of Parts 2, 3 and 9 of the Act.\(^{14}\) He outlined the steps needed to be taken prior to, and alongside the commencement of these parts. The substance of his comments are largely beyond the scope of this particular Bill Digest, but may be of interest to Members in their consideration of further anticipated legislative developments in the area of Assisted Human Reproduction.


\(^{13}\) http://www.childrensrights.ie/resources/anonymous-donation-assisted-human

Provisions of the Bill

Amendment of section 4 of the Children and Family Relationships Act 2015

Section 2 of the Bill proposes to amend the definition of the word ‘donor’ in s.4 of the Act of 2015. In its current form, the definition of ‘donor’ in s.4 reads as follows:

“donor”—

(a) in relation to a gamete, means—

(i) a person who has consented, under section 6 or in the manner referred to in section 26(1)(b)(ii), to the use in a DAHR procedure of a gamete provided by him or her, or

(ii) the donor of a gamete to which section 26(6) applies,

and includes a donor of a gamete that is used in the formation of an embryo that is used in a further DAHR procedure, and

(b) in relation to an embryo, means—

(i) a person who has consented under section 14 or 16 or in the manner referred to in section 26(2)(b)(ii), to the use of the embryo in a DAHR procedure or a further DAHR procedure, or

(ii) the donor of an embryo to which section 26(6) applies;

The Bill proposes to amend paragraph (a)(ii) of this definition to replace “section 26(6)” with “section 26(5)”. It would appear that this amendment is intended to correct a typographical error.

What is Section 26(5)?

Section 26(5) is a transitional provision which deals with situations where an anonymously donated gamete has been acquired by a DAHR facility prior to the commencement of Parts 2 and 3 of the Act. This section allows such gametes to be used in a DAHR procedure within a period of 3 years after commencement of those Parts where an intending parent wishes to use the donation to have a genetic sibling for a child already born to them.  

Amendment of section 14 of the Children and Family Relationships Act 2015

Section 3 of the Bill proposes to amend s.14 of the Act of 2015 to allow the Minister to prescribe forms for the declaration of consent to the use of an embryo in a DAHR procedure.

Section 14 provides that where an embryo is formed for the purposes of an assisted human reproduction procedure, and the man and woman who originally requested the procedure do not wish to use it, they may consent to its use in another procedure in which neither of them is an intending parent. Both the man and woman concerned must consent.

In order to consent to this procedure, a person must have received certain information (specified in s.15 of the Act) and must make a declaration in accordance with sections 14(6) and 14(7):

- Section 14(6) provides that the declaration must be made before the donation of the embryo is made. It must be in writing, dated, and signed, in the presence of an authorised person from the DAHR facility.

- Section 14(7) sets out the things which must be included in such a declaration. They include an acknowledgement that the person has received the required information, that they consent to the use of the embryo in the procedure, and that they are aware they will not be the parent of any resulting child. They must also consent to information about the procedure being provided to the Minister. Finally they must consent to their information being recorded on the National Donor Conceived Person Register and acknowledge that they understand the child may, at some point in the future, access that information and seek to contact them.

In consenting to the procedure, a person can specify that their consent is restricted to the use of the embryo in a procedure requested by a specified intending mother or set of parents.

As currently drafted, s.14(7) does not confer a power on the Minister to prescribe the form to be used for the purposes of a declaration of consent to the use of an embryo in a DAHR procedure. It is this omission which the current amendment is intended to rectify. To achieve this, the Bill proposes to insert the words “shall be in such a form as may be prescribed” into the section.
Amendment of section 16 of the Children and Family Relationships Act 2015

Section 4 of the Bill proposes to amend s.16 of the 2015 Act to allow the Minister to prescribe forms for the declaration of consent to the use of an embryo in a further DAHR procedure.

Section 16 of the 2015 Act sets out the procedure for obtaining consent to the use of an embryo in a further DAHR procedure. It envisages a situation where, for example, a person or couple has completed treatment and wish to donate an embryo which was not used to another person or couple. The requirements of consent in this section largely mirror those in s.16 described above.

In the case of a couple wishing to donate, both parties must consent to the donation. They must receive certain information (set out in s.17 of the Act) and make a declaration in accordance with sections 16(6) and 16(7):

- Section 16(6) provides that the declaration must be made before the donation is made. It must be in writing, dated, and signed in the presence of an authorised person from the DAHR facility.

- Section 16(7) sets out the matters which must be included in the declaration. They include an acknowledgement that the person has received the information in s.17, that they consent to the use of the embryo in a further DAHR procedure, and that they are aware that they will not be the parent of any child born as a result of that procedure. They must also consent to information about the procedure being provided to the Minister. Finally they must consent to their information being recorded on the National Donor Conceived Person Register and acknowledge that they understand the child may, at some point in the future, access that information and seek to contact them.

In consenting to the procedure, a person can specify that their consent is restricted to the use of the embryo in a procedure requested by a specified intending mother or set of parents.

As currently drafted, s.16(7) does not confer a power on the Minister to prescribe the form to be used for the purposes of a declaration of consent to the use of an embryo in a further DAHR procedure. It is this omission which the current amendment is intended to rectify. To achieve this, the Bill proposes to insert the words “shall be in such a form as may be prescribed” into the section.