Irish Human Rights and Equality Commission

Observations on the Children and Family Relationships Bill 2015

March 2015

Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

1. Introduction

The Irish Human Rights and Equality Commission ('the Commission') was established by the Irish Human Rights and Equality Commission Act 2014 ('2014 Act').[1] The Commission has a statutory remit to protect and promote human rights and equality in the State, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.[2] The Commission is tasked with reviewing the adequacy and effectiveness of law, policy and practice relating to the protection of human rights and equality and with making recommendations to Government on measures to strengthen, protect and uphold human rights and equality accordingly.[3] In accordance with section 10(2)(c) of the 2014 Act, the Commission would like to take this opportunity to provide its observations on the human rights and equality implications of the Children and Family Relationships Bill 2015 ('2015 Bill').[4]

The 2015 Bill was published after lengthy consideration by the State of the need for reform to modernise the legislative framework that underpins the rights of the child in diverse parenting situations in Ireland and to provide legal clarity on parental rights and responsibilities. The Law Reform Commission published a consultation paper in 2009 on the legal issues concerning family relationships, followed by a report and recommendations in 2010.[5] In 2014, the general scheme of the Children and Family Relationships Bill was published and scrutinised by the Joint Oireachtas Committee on Justice, Equality and Defence.[6] A revised general scheme was published,[7] and the 2015 Bill was laid before Dáil Éireann on 17 February 2015.[8] The 2015 Bill also draws on and partially applies some of the recommendations of an earlier examination of the need for the development of law to respond to the emerging scientific developments in assisted human reproduction undertaken by the Commission on Assisted Reproduction which published its report in 2005.[9] The former Equality Authority contributed to the consideration of these issues through a submission to the Law

[1] The Irish Human Rights and Equality Commission Act 2014 merged the former Irish Human Rights Commission and the former Equality Authority into a single enhanced body.
[2] Section 10(1)(a)–(e) of the 2014 Act.
[3] Section 10(2)(b) and section 10(2)(d) of the 2014 Act.
[4] These Observations reflect the view of the majority of the 15 Members of the Commission. See further section 16(3) of the 2014 Act which provides '[e]very question at a meeting shall be determined by a majority of the votes of the members of the Commission present and voting on the question and, in the case of an equal division of the votes, the chairperson of the meeting shall have a second or casting vote'.
[5] Law Reform Commission (2009) *Consultation Paper: Legal Aspects of Family Relationships* (LRC CP 55). Law Reform Commission (2010) *Report: Legal Aspects of Family Relationships* (LRC 101 – 2010).
[6] The first general scheme was published at http://www.justice.ie/en/JELR/Pages/PB14000026. The Joint Oireachtas Committee received 37 submissions (available at http://www.oireachtas.ie/parliament/media/committees/justice/FINAL-Combined-Submissions.pdf). It held public hearings on 9 April 2014 at which it heard from 13 experts and organisations: http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUJ2014040900002. In May 2014, the Joint Oireachtas Committee published its report with recommendations: www.oireachtas.ie/parliament/media/committees/justice/CFRB-Bill-REPORT_Final.docx
[7] http://www.justice.ie/en/JELR/Pages/PB14000256.
[8] http://www.oireachtas.ie/viewdoc.asp?DocID=28242&&CatID=59.
[9] http://health.gov.ie/wp-content/uploads/2014/03/Report-of-The-Commission-on-Assisted-Human-Reproduction.pdf.

Reform Commission on its consultation paper and a submission to the Joint Oireachtas Committee on Justice, Defence and Equality on the (first) general scheme of the Bill.[10]

2. Overview of the Children and Family Relationships Bill

The Commission welcomes the publication of the 2015 Bill. The 2015 Bill seeks to put in place a modern legislative regime for the recognition and protection of the rights of children and the rights of people in diverse family forms which have not been adequately protected in Irish law before now.[11] The 2015 Bill recognises that in addition to being raised in families based on traditional marriage, children are raised in families where the parents are unmarried, or are cohabiting, or do not live together, or are in a civil partnership, or are in a second relationship (and combinations of these), and provides legal protections for those children. It also contains new provisions in Irish law to regulate some elements of donor-assisted human reproduction, in particular the legal relationships that arise between parents, donors and children, which include provisions concerning the right of children to information relating to their identity.[12] The 2015 Bill contains provisions to protect the right of children to relationships with members of their extended family such as grandparents, and provides legal mechanisms to protect children when those relatives or others undertake the primary caring role of children.[13] The 2015 Bill contains important provisions on the right of children to be heard in decisions that affect them and on the principle of the best interests of the child when decision are being made.[14]

The legislative process has commenced at the time that these observations are being prepared and the 2015 Bill has proceeded quickly through the Houses of the Oireachtas. The accelerated manner of the legislative process at Bill stage has constrained the Commission's ability to prepare comprehensive observations on all aspects of the 2015 Bill. To assist the Government and members of the Oireachtas, the Commission confines its observations to a number of discrete concerns that it has with the 2015 Bill as initiated. Specifically, these matters are the right of a child to preserve her

[10] *Response to the Equality Authority to the Law Reform Commission Consultation Paper on Legal Aspects of Family Relationships*, www.equality.ie/Files/Equality%20Authority%20Submission%20to%20Law%20Reform%20Commission.doc; *Submission to the Joint Oireachtas Committee on Justice, Defence and Equality: Preliminary Observations on the General Scheme of the Children and Family Relationships Bill 2014* (unpublished).

[11] The mechanisms it uses are: (a) setting out new legislation on some elements of donor-assisted human reproduction in Parts 2 and 3 of the Bill, containing 36 sections; (b) making extensive amendments to eight primary pieces of legislation governing the rights and responsibilities of children, guardianship, and families (the Guardianship of Infants Act 1964; the Succession Act 1965; the Family Law (Maintenance of Spouses and Children) Act 1976; the Children Act 1987; the Family Law Act 1995; the Civil Registration Act 2004; the Adoption Act 2010; and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010); and (c) making a smaller number of consequential amendments to seven further pieces of legislation (the Passports Act 2008; the Redundancy Payments Act 1967; the Unfair Dismissals Act 1977; the Child Care Act 1991; the Maternity Protection Act 1994; the Adoptive Leave Act 1995; and the Parental Leave Act 1998).

[12] Sections 31 to 37 of the 2015 Bill.

[13] For example, section 53 and section 58 of the 2015 Bill.

[14] See, for example, sections 9, 45 and 51 of the 2015 Bill on a child being heard in proceedings that affect her or him. (However, see below on the absence of a right of the child to be heard in proceedings referred to in section 53 of the 2015 Bill.) On the principle of the best interest of the child, the key provisions are in sections 4 and 58, with additional provisions in sections 19, 20, 45, 47, 53, 54, 56, and 144 of the 2015 Bill.

or his identity, the right of a child to have her or his views heard, the status of unmarried, non-cohabiting fathers, and the issue of access to justice in the context of the cost of reports to be prepared for a court.

3. Issues regarding the Right to Preserve Identity

Parts 2 and 3 of the 2015 Bill establish a new legal regime concerning some elements of donor-assisted human reproduction. Anonymous donation of a gamete or embryo will be prohibited by law.[15] The National Donor-Conceived Person Register will be established to record the details of a donor of a gamete or embryo, and of children born following the donation of a gamete or embryo.[16] The 2015 Bill provides that a child born as a result of donor-assisted human reproduction will, generally, have, on reaching the age of 18, the right to receive information on the identity of the donor(s) of the gamete(s) or embryo.[17] They will also have the right to be informed of the identity of donor-conceived siblings who consent to their identity being disclosed to donor-conceived siblings.[18]

The right to information relating to one's identity is the subject of human rights law.[19] The United Nations Convention on the Rights of the Child (UNCRC) provides that a child has the right to know his or her parents (article 7) and to preserve his or her identity (article 8). In the context of its examination of State reports, the UN Committee on the Rights of the Child has observed that national laws that preserve donor anonymity in donor-assisted reproduction contradict the provisions of the UNCRC.[20] The right to information concerning one's identity, including the identity of one's parents, is also established in case law under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[21] For example, the European Court of Human Rights has held that under Article 8 of the ECHR, individuals have a vital interest in receiving the information necessary to know and to understand their childhood and early development.[22] Depending on the specific facts of the case before it, the European Court of Human Rights has used both the right to 'family life' and the right to 'private life' under Article 8 in its judgments concerning the right to information relating to one's identity and the ability to enjoy relationships in 'non-traditional' family situations.[23] Specifically, the Court has found that, 'everyone must be able to

[15] See sections 6, 14, 15, 22, 26, 31, 32, and 33 of the 2015 Bill.
[16] Sections 31 to 39 of the 2015 Bill.
[17] Section 33 of the 2015 Bill.
[18] Section 35 of the 2015 Bill.
[19] It is beyond the scope of these Observations to provide a comprehensive account of all relevant jurisprudence under international and regional human rights law in this field. For a comprehensive overview see the Ombudsman for Children's submission on the first general scheme of the Bill. See OCO, *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014*, at p. 10 (jurisprudence of the European Court of Human Rights); at p. 11 (jurisprudence of the Irish courts); and at pp. 5–7 (jurisprudence of the Committee of the Rights of the Child under the UN Convention of the Rights of the Child).
[20] Concluding Observations, Norway, 2005, para. 10 (document no. CRC/C/15/Add.23 in the UN Treaty Bodies Database http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx)
[21] See, for example, *Mikulić v Croatia* (No. 53176/99); *Jäggi v Switzerland* (No. 58757/00); and *Ebru and Tayfun Engin Çolak v Turkey* (no. 60176/00).
[22] *Gaskin v United Kingdom* (No. 10454/83). See also: *Mikulić v Croatia* (No. 53176/99); *Jäggi v Switzerland* (No. 58757/00); *Ebru and Tayfun Engin Colak v Turkey* (No. 60176/00); *Odièvre v France* (No. 42326/98).
[23] In *Odièvre v France* (No. 42326/98), the European Court of Human Rights stated '[b]irth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life

establish the substance of his or her identity'.[24] When a particularly important facet of a person's identity is at stake, such as questions relating to parentage, the Court has found that the margin of appreciation allowed to States in legislating in this area is more narrowly restricted.[25] Where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin of appreciation will be wider.[26] Finally, in accordance with Article 14, the substantive rights in the ECHR must be protected without direct or indirect discrimination on a number of grounds, including on the ground of birth. A difference of treatment is discriminatory where there is no objective and reasonable justification; in other words, it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised by a difference of treatment.[27]

The Commission is concerned that the proposals in the 2015 Bill as initiated do not provide a mechanism for the entry onto the National Donor-Conceived Person Register of the identity of a donor for a person conceived by donor-assisted reproduction who was born before the entry into force of those provisions. In many cases that information may not be available because a gamete or an embryo was provided anonymously before the commencement of the provisions of the Child and Family Relationships Act. However, there may be some cases where a parent does have or can obtain that information, and where the donor is in a position to and willing to consent to their details being entered on the National Donor-Conceived Person Register. The Commission considers provision should be made for children to whom these circumstances apply to ensure, where possible, that they have access to information relating to their identity on the same basis as children born after the provisions come into force.

It is not necessary to summarise the provisions in the 2015 Bill on donor-assisted human reproduction. However, the Commission notes that central to the operation of those provisions are that a donor-assisted human reproduction procedure must be performed by a doctor or nurse[28] and under the auspices of a 'DAHR facility'.[29] The DAHR facility is central to the operation of the provisions on donor-assisted human reproduction. For example, it is the DAHR facility that is required to obtain the written consent of a donor[30] and of intending parents,[31] and information on

---

guaranteed by Article 8 of the Convention' (at para. 29). The right to family life has been found applicable in, for example, *S.H. and Others v Austria* (No. 57813/00) and *Mennesson v France* (No. 65192/11).

[24] *Mennesson v France* (No. 65192/11) at para 99.

[25] See, for example, *Mennesson v France* (No. 65192/11) and *S.H. and Others v Austria* (No. 57813/00).

[26] See for example *S.H. and Others v. Austria* where the European Court of Human Rights observes, '[s]ince the use of in vitro fertilisation treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments … the Court considers that the margin of appreciation to be afforded to the respondent Sate must be a wide one. … The State's margin in principle extends both to its decision to intervene in the area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests' at para. 97.

[27] See for example *Burden v. United Kingdom* (No. 13378/05) at para. 60.

[28] Section 23 of the 2015 Bill.

[29] A DAHR facility is defined in section 4 of the 2015 Bill. DAHR is the abbreviation used in the 2015 Bill for 'donor-assisted human reproduction'.

[30] Section 6 of the 2015 Bill.

[31] Sections 9, 11, and 14 of the 2015 Bill.

their identity.[32] The DAHR facility is required to provide the information to the Minister that triggers an entry being made in the National Donor-Conceived Person Register when a person is born following donor-assisted human reproduction.[33] The 2015 Bill is silent on the consequences of what might be called 'informal donor-assisted reproduction' – that is, donor-assisted human reproduction undertaken informally outside a medical setting.[34] The Commission notes that a person born in such circumstances after the 2015 Bill comes into force retains the right to information relating to their identity, and that right should not be diminished in any way because her or his parent breached the provisions of the legislation on the use of a DAHR facility. The Commission considers that the 2015 Bill should provide a mechanism for the entry onto the National Donor-Conceived Person Register of the identity of a donor for a person conceived following informal donor-assisted reproduction notwithstanding that the terms of the legislation concerning donor-assisted human reproduction have not been observed.

Recommendation 1: The Commission recommends that, in order to more fully secure the right to information relating to one's identity in a manner that respects the principle of equality, the 2015 Bill should be amended to provide that the National Donor-Conceived Person Register can receive details of persons who were born through donor-assisted human reproduction that occurred before the coming into force of the Act and of the donor of the gamete or embryo where that information is available or can be obtained with the full consent of the donor.

Recommendation 2: The Commission recommends that, in order to more fully secure the right to information relation to one's identity in a manner that respects the principle of equality, the 2015 Bill should be amended to provide that the National Donor-Conceived Person Register can receive details of persons who are born through donor-assisted human reproduction that occurs outside a DAHR facility after the Act comes into force, and of the donor of the gamete or embryo where that information is available or can be obtained with the full consent of the donor.

The Commission is concerned that section 35 of the 2015 Bill is not comprehensive enough in relation to the right to identity information in respect of siblings. Section 35 provides that a person born following donor-assisted human reproduction may (on reaching the age of 18) consent to have the register amended to record that he or she is willing to have his or her information released to any donor-conceived siblings he or she has. However, the 2015 Bill does not provide that the sharing of identity information can include the identity of *biological* children of a donor where those children were not conceived through donor-assisted human reproduction.[35] Nor does the 2015 Bill provide that a person who was not born through donor-assisted human reproduction but who has a donor-conceived sibling would have the opportunity, equivalent to that provided to children born following donor-assisted reproduction, to obtain full information of their identity through the operation of the National Donor-Conceived Person Register. The Commission is concerned that the 2015 Bill applies a narrow concept of 'identity' and what access to identity information means in a manner that may not be in full compliance with the UN Convention on the Rights of the Child. Article 8 of the Convention on the Rights of the Child requires the State to recognise that siblings, among others,

[32] Sections 22 and 23 of the 2015 Bill.
[33] Section 26 of the 2015 Bill.
[34] Section 22 of the 2015 Bill.
[35] Section 31(1) provides only that entries onto the register shall be in respect of a child born in the State as a result of donor-assisted human reproduction.

may be as important to a child's sense of identity as his or her parents are.[36] As noted by the Ombudsman for Children, the European Court of Human Rights has found that family life can include relationships between siblings.[37]

Recommendation 3: The Commission recommends that Section 35 of the 2015 Bill be amended to enable the National Donor-Conceived Person Register to contain an entry for a person who was not born through donor-assisted human reproduction but who may have a donor-sibling.

The Commission is concerned that the 2015 Bill stipulates that individuals do not have the right to receive information on the identity of a donor, or of a sibling, until they reach the age of 18.[38] One of the core principles in the UNCRC is that laws should respect the evolving capacities and views of the child. Setting an age requirement of 18 years appears to be incompatible with that principle. The Commission notes that the Ombudsman for Children's Office in its advice on the first version of the general scheme advised that a 'sufficient maturity test' such as that used in similar situations in Sweden would be more appropriate.[39]

Recommendation 4: The Commission recommends that the 2015 Bill be amended to enable persons under the age of 18 years who wish to receive identity information to be enabled to receive such information subject to a 'sufficient maturity' requirement.

The Commission notes that the question of the right to identity also arises in the context of scientific testing to determine parentage in civil proceedings, which is provided for in Part VII of the Status of Children Act 1987 ('1987 Act'), and which the 2015 Bill will amend. The Status of Children Act 1987 provides that a court 'may give a direction for the use of blood tests for the purpose of assisting the court to determine whether a person … is or is not the parent of the person whose parentage is in question'.[40] The 1987 Act provides that a blood sample shall not be taken from a person without his consent.[41] Where a person fails to provide a sample, the court may draw inferences as to the parentage; however, there is no further penalty and no stronger onus on a person to provide a sample for scientific testing where parentage is in question.

---

[36] See: UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (United Nations, 2007) 'Siblings, grandparents and other relatives can be as, or more, important to the child's sense of identity are his or her parents are', at p. 114. In addition, the Committee on the Rights of the Child has observed 'Due consideration of the child's best interests implies that children have […] the opportunity to access information about their biological family, in accordance with the legal and professional regulations of the given country' – *General Comment No. 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration*, at para. 56.

[37] See *Olsson v Sweden (No. 1)* (No. 10465/83); *Boughanemi v France* (No. 22070/93).

[38] Section 33(1) of the 2015 Bill in respect of information about a donor and section 35(1) of the 2015 Bill in respect of information about a donor-conceived sibling.

[39] Ombudsman for Children (2014) *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014*, at para. 3.17.

[40] Section 38 of the Status of Children Act 1987.

[41] Section 39(1) of the Status of Children Act 1987. (Subsection 2 provides for consent in a case where the person from whom the sample is to be taken is a minor or is of full age but incapable of understanding the nature and purpose of blood tests, but these provisions do not affect the underlying point the Commission makes in these observations.)

The 2015 Bill updates the 1987 Act in two respects:

(a) by replacing the requirement for 'blood samples' to be used with the possibility of a number of less invasive 'bodily samples' and by providing for the use of 'DNA testing' (which has developed significantly since the 1987 Act was originally drafted) instead of 'blood tests';[42]

(b) by amending the wording of the 1987 Act to apply to a person who provided a gamete under donor-assisted human reproduction.[43]

Although the amendments to the 1987 Act take account of both the scientific changes since 1987 and the new recognition that the 2015 Bill will provide to a range of types of family situations, the 2015 Bill does not take full account of developments in human rights law in relation to a person's right to information concerning their identity.[44] As the Ombudsman for Children noted in her submission on the first heads of the Bill,[45] the European Court of Human Rights has found in cases where a putative father failed to co-operate with scientific testing to establish parentage, that the child's right to identity was not respected because the State's laws did not sufficiently ensure the co-operation of the father.[46] In the case of *Mikulić v Croatia*,[47] a father failed to attend for an appointment for DNA testing that had been ordered by the Croatian court, and this failure to attend for testing was repeated six times over a period of 11 months. The European Court stated that it 'considers, however, that under such a system the interests of the individual seeking the establishment of paternity must be secured when paternity cannot be established by means of DNA testing'.[48] In that case, the European Court found that the lack of any procedural measure to compel the alleged father to comply with the Croatian court order is only in conformity with the principle of proportionality if it provides alternative means enabling an independent authority to determine the paternity claim speedily.[49] This raises questions of the balance of rights, between the person who wishes to establish parentage and the right to refuse to undertake a test. The Commission is of the view that, in light of the jurisprudence of the European Court of Human Rights, in the context of the 2015 Bill the Government may wish to consider the compatibility of the proposed amendments with Article 8 of the ECHR.

Recommendation 5: The Commission recommends that the provisions in the 2015 Bill concerning DNA testing are examined for compatibility with Article 8 of the European Convention on Human Rights, in light of the developments in jurisprudence of the European Court of Human Rights.

4. The Views of the Child

Generally, the 2015 Bill provides that a child shall have the opportunity to give their view in legal proceedings that affect her or him, and requires the courts, variously, to 'have regard to' or to 'take into account', those views.[50] This is an important development in ensuring that Irish law comes

[42] Sections 76–82 of the 2015 Bill.
[43] Section 76 of the 2015 Bill.
[44] *Mikulić v Croatia* (No. 53176/99); *A.M.M. v Romania* (No. 2151/10).
[45] Ombudsman for Children (2014) *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014*, at para. 2.14 and at paras 6.9 and 6.10.
[46] *Mikulić v Croatia* (No. 53176/99), at paras. 64 & 65; *A.M.M. v Romania* (No. 2151/10).
[47] *Mikulić v Croatia* (No. 53176/99).
[48] At para. 64.
[49] At para. 64.
[50] Primarily in sections 9, 45 and 51.

closer to conformity with Article 12 of the UNCRC.[51] Furthermore, Article 12 is the subject of a General Comment by the Committee on the Rights of the Child, which provides interpretative guidance on how Article 12 should be complied with in domestic law.[52] While welcoming the range of provisions in the 2015 Bill that will give effect to this right, the Commission nevertheless identifies three aspects where the 2015 Bill should be improved in order to more fully reflect the principles of the UNCRC, in particular the right of the child to participate in all decisions that affect him or her, subject to evolving capacity.

First, the 2015 Bill will insert a new section 11E into the Guardianship of Infants Act 1964, which will enable relatives and certain other persons to apply for custody of a child.[53] The Commission is concerned that the new section 11E omits any reference to the court obtaining and considering the views of a child affected by the decision it will make on custody. The Commission notes that the UN Committee on the Rights of the Child, in its General Comment on the application of Article 12 of the UNCRC, specifically identifies custody proceedings as coming within the scope of the right contained in paragraph 2 of Article 12.[54] The Commission also notes that this was identified by the Ombudsman for Children in her submission on the first heads of the 2015 Bill.[55] The Ombudsman for Children also noted[56] that custody is named in the new Article 42A.4 of the Constitution, which if implemented will provide, among other things, that views of the child shall be heard in proceedings that affect them.[57]

Recommendation 6: The Commission recommends that the new Section 11E of the Guardianship of Infants Act 1964 be amended to require, as with other court proceedings provided for in the 2015 Bill, that a court shall provide a child the opportunity to give their view in custody proceedings.

Second, the 2015 Bill will insert a new Part into the Guardianship of Infants Act 1964.[58] This provision establishes how a court is to determine the best interests of a child in proceedings under the Guardianship of Infants Act. The new section 31(1) provides that a court shall have regard to factors and circumstances 'that it regards as relevant'. The new section 31(2) lists eleven factors and

[51] Article 12 provides:

> '1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

[52] Committee on the Rights of the Child (2009) *General Comment No. 12 (2009) The right of the child to be heard*, CRC/C/GC/12.

[53] Section 53 of the 2015 Bill.

[54] *General Comment No. 12 (2009) The right of the child to be heard*, at para. 36.

[55] Ombudsman for Children (2014) *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014*, at para. 2.10.

[56] At page 24, in footnote 66.

[57] The Bill to amend the Constitution was put to a vote of the people in November 2012, but it has not been signed into law by the President because the conduct of the referendum is the subject of a challenge. The High Court has issued its judgment, and that judgement has been appealed to the Supreme Court which, at the time these observations are being prepared, has not yet decided on the matter: *Jordan v Minister for Children and Youth Affairs & Ors* ([2014] IEHC 327).

[58] Section 58 of the 2015 Bill.

circumstances that this provision applies to. The Commission is of the view that, as a guide to a court, the factors and circumstances listed in the new section 31(2) are a useful and valuable reminder to a court of the breadth of issues that should be considered when the best interests of the child are to be determined. Among the factors and circumstances listed is 'the ascertainable views of the child concerned'.[59] However, the Commission is concerned that the wording of the new section 31(1) could have the effect of weakening the requirement on a court to afford a child the opportunity to offer her or his views on a matter affecting her or him. The concern arises because the new section 31(1) specifies that the factors and circumstances which the court shall have regard to are those 'that it regards as relevant'.[60] This would appear to be contrary to the provision in Article 12 of the UNCRC that a child has a *right* to express her or his views on matters affecting her. In this context, it is noteworthy that the Committee on the Rights of the Child has stated that, in relation to the right of a child to be heard, States 'are under strict obligation' to take appropriate measures to fully implement this right.[61]

Recommendation 7: The Commission recommends that Section 58 of the 2015 Bill be amended to eliminate the possibility that a court could inappropriately exclude the opportunity of a child to provide her or his views.

Third, the Commission notes two standards on how the court shall deal with the views of a child are set out in different sections, without any apparent reason for different standards to apply. For example, in section 19(8), the court is required to 'have regard' to the views of the child, but in section 56 (in the new section 18A(5) of the Guardian of Infants Act), the standard is 'take into account' the views of the child.

Recommendation 8: The Commission recommends that all provisions in the 2015 Bill that a court 'shall have regard' to the views of a child be amended to state that the court 'shall take into account' the views of the child.

5. Status of Unmarried, Non-cohabiting Fathers

In general, under Irish law a father who has not married a child's mother is not automatically recognised as the child's father.[62] The 2015 Bill amends the Guardianship of Infants Act 1964 by, among other things, providing that where an unmarried (different-sex) couple has cohabited for 12 months, at least three of which both have lived with the child, the father shall, in effect, be automatically recognised as the father.[63] The 2015 Bill makes no new provisions for unmarried fathers who are not living with the mother and child around the time of the child's birth. Although it is possible for such a father to be recognised as the child's father and secure rights as a parent, this is

[59] This will become section 31(2)(b) of the Guardianship of Infants Act 1964.
[60] The full text of the new section 31(1) is: 'In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.'
[61] *General Comment No. 12 (2009) The right of the child to be heard*, at para. 19.
[62] See section 2 of the Guardianship of Infants Act 1964 (as amended).
[63] Section 40(b) of the 2015 Bill, which inserts a new subsection 4A into section 2 of the Guardianship of Infants Act 1964.

not automatic and requires the consent of the mother or a decision of a court.[64] The Law Reform Commission has considered the question of the rights and responsibilities of non-martial fathers.[65] Specifically, the Law Reform Commission considered the application of two principles in this field: (a) the rights and best interests of the child and (b) equality, in particular in relation to gender and marital status.[66] In its assessment of the rights and best interests of the child, it noted that Article 18 of the UNCRC provides that 'both parents have common responsibilities for the upbringing and developments of the child'.[67] Based on those considerations, the Law Reform Commission recommended that Irish law should provide for automatic joint guardianship of both the mother and father of any child and that this should be linked to compulsory joint registration of the birth of a child.[68] As noted by the Ombudsman for Children in her advice on the (first) General Scheme of the Children and Family Relationships Bill in May 2014,[69] human rights jurisprudence under the ECHR has established that family life can exist between parents and their children regardless of the parents' living arrangements.[70] The requirement for consent of the mother, or for cohabitation by the father, or for recourse to the courts to secure legal recognition of his status as his child's father may not fully meet the requirements of the ECHR in relation to the recognition of the right to family life.

Recommendation 9: In line with the recommendations of the Ombudsman for Children and the Law Reform Commission, the Commission recommends that the 2015 Bill be amended to provide automatic registration of both parents and automatic joint guardianship.

6. Costs of Reports

Section 58 of the 2015 Bill will amend the Guardianship of Infants Act 1964 by inserting two new sections concerning the best interests of the child. In accordance with the new provisions, an expert may be appointed by a court to determine the views of the child in a range of proceedings.[71] The proposed section 32(9) of the 1964 Act will provide that the court may determine that the fees and expenses of the expert, who is to be appointed by the court, shall be paid by the parties to the proceedings. The Commission is of the view that this may impose a significant financial burden on families and may also introduce delays where disputes arise concerning how the fees and expenses are to be divided. Both of these matters have implications for the right of access to justice. For example, the Working Group on a Courts Commission noted in 1998 in the context of a similar (but uncommenced) provision[72] in the Guardianship of Infants Act 1964: '[g]iven the difficulty that already arises for non-legally aided persons in paying for the services of experts who carry out

[64] See section 3, 4 and 6A of the Guardianship of Infants Act 1964.
[65] Law Reform Commission (2010) *Report: Legal Aspects of Family Relationships* (LRC 101 – 2010), in Chapter 2.
[66] At paras. 2.04 and 2.05 (best interests) and 2.06 (equality).
[67] At para. 2.05, quoting article 18 of the UNCRC.
[68] *Report: Legal Aspects of Family Relationships* (LRC 101 – 2010) at para. 2.12.
[69] See para. 2.14, fourth bullet.
[70] *L. v The Netherlands* (No. 45582/99).
[71] The proceedings to which this applies are those that relate to the guardianship, custody or upbringing of or access to a child. These are provided for in a newly worded section 3(1)(a) of the Guardianship of Infants Act 1964, which is to be inserted by Section 41 of the 2015 Bill.
[72] Section 28, which was inserted into the Guardianship of Infants Act 1964 by the Children Act 1997. As of June 2014, that provision had not become operational as a commencement order had not been signed. (See annotation no. F54 in the restatement of the Guardianship of Infants Act 1964 prepared by the Law Reform Commission.)

assessments of children it is hard to see how parties will be able to meet the additional expense of a guardian ad litem and separate representation.'[73] Hogan and Kelly have noted that for similar reports under section 47 of the Family Law Act 1995 '[t]he costs of such reports may be enormous … and the fees involved may go far beyond the means of some families.'[74] In light of this, the Ombudsman for Children, in her observations on the first general scheme of the bill, recommended that the cost of preparing reports should not be borne by parties of limited financial means.[75]

Recommendation 10: The Commission recommends that section 58 of the 2015 Bill be amended to specify (a) that in making a determination on costs under the new section 32(9) of the 1964 Act a court shall take account of the best interests of the child and, in particular, the possible impact of costs for parties of limited means and the possible impact of delays that may arise and, (b) in light of this if the best interests of the child require it, that the court may determine that costs are to be borne by the State.

[73] Working Group on a Courts Commission (1998) *Sixth Report* (Dublin: Government Publications, 1998), at p. 68.

[74] C. Hogan and S. Kelly, 'Section 47 reports in family law proceedings: Purpose, evidential weight and proposal for reform' (2011) 2 *Irish Journal of Family Law* 27, at para. 4.1.

[75] *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014*, at paras.5.23 to 5.27.