

M /

Consultation on import and export of gametes and embryos
Meeting with John Kleinsman, Nathaniel Centre (Catholic Bioethics Centre)
12 April 2013

Attendees

Dr John Angus, Chair of ACART

John Kleinsman, director of the Nathaniel Centre

In attendance

Betty-Ann Kelly, ACART Secretariat

Note: In addition to the matters discussed at this meeting, John referred to the Nathaniel Centre's 2007 submission on aspects of assisted reproductive technology. The relevant parts of that submission are attached as an appendix to these meeting notes.

Points noted by John Kleinsman were:

- Clinics are not disinterested parties: if imported gametes and embryos can be used in New Zealand, this would be a business "windfall" for clinics.
- New Zealand has established a set of standards that are included in the regulatory framework e.g. altruistic donation, access to identifying information for people born from donations. Allowing the use of gametes and embryos from other countries with lower standards would compromise the standards established here. Once exceptions are possible, the new norm becomes what is allowed in other countries.
- In general, it would be preferable to hold to the very clear and definable principles/standards that are currently at the heart of ACART while allowing for exceptions on "compassionate grounds" to be made in specific situations, rather than trying to change the regulations to accommodate the range of complex situations.
- While outcomes at the level of an individual or a couple may appear unproblematic, the outcomes at a societal level can be undesirable. The common good is threatened by the commodification of procreation, and making it easier to source gametes and embryos internationally might unintentionally contribute to the commercialisation of human procreation as well as the ongoing exploitation of women.
- There are analogies which may assist in thinking about import and export of gametes and embryos.
 - Organ donation in this country is altruistic. We would not accept the import of commercially sourced organs.
 - Blood donation is also altruistic.
 - New Zealand accepts refugees on a humanitarian basis.
 - We would not tolerate New Zealand drug companies going overseas to carry out clinical trials because it was easier in other countries with lower ethical standards.

- The argument that people may enter New Zealand pregnant anyway as a result of treatment that involved commercially sourced gametes (i.e. it is going to happen anyway) does not constitute an acceptable argument for changing the law in New Zealand. Our regulatory framework takes the position that *in vitro* gametes and embryos are differentiated from pregnancies that do not involve IVF.
- Pragmatism about people's behaviour is not an acceptable ethical argument.
- If a couple has been living overseas before migrating to New Zealand, and has stored embryos, import and use here of the embryos could be acceptable on the basis that the couple has a moral responsibility to see through the process of conception that has already begun.
- Use of overseas gametes or embryos will further fragment the split between the biological/social/gestational aspects of parenthood, and could make it virtually impossible for many children to contact their "family" with potentially significant psychological and emotional consequences.
- Writers whose thinking may contribute to thinking about the broader issues include Michael Sandel, Habermas, and some feminists.

Appendix: Comments re import/export in the Nathaniel Centre's 2007 submission on aspects of assisted reproductive technology

Question 11:

Do you agree that the import and export of donated *in vitro* embryos and gametes should be allowed, provided that the prohibitions and principles of the HART Act are met?

Please give reasons for your views.

We believe that where there is sufficient proof of an **existing and established relationship** between the applicants and donated in vitro embryos and gametes, the importation or exportation of such could be approved in limited circumstances where the applicants, having already undergone IVF treatment in one country and having taken up residence in another country, wish to use the embryos or gametes **for the purposes of having another child that is genetically related.**

Explanation:

We do not approve of the use of IVF. It raises a number of significant ethical and moral issues related to the well-being of children – including the commodification of human life – and, in cases when couples are seeking to use donated eggs, issues related to the exploitation of women.

In general we think that the importation and exportation of in vitro donated gametes or embryos is open to significant abuse and may be difficult to regulate. In many countries, human eggs are readily able to be purchased. Given the well documented stories of exploitation of vulnerable women in order to gain eggs, we are particularly concerned about the importation of donated embryos from those countries where ethical oversight is less robust than it is in New Zealand.

We believe that it will be very difficult in some cases to verify that imported gametes or embryos meet the requirements that are part of the HART Act; for example verifying that the embryos or gametes concerned were truly “donated” and not provided under duress or purchased, and verifying information about donors. Without stringent regulations and adequate ‘policing’ of regulations we could inadvertently bring about the commercialisation of human reproduction in New Zealand in what would be a flagrant breach of the HART Act. We also believe that the importation of gametes and embryos could raise significant bio-security issues.

The comments that follow are made on the assumption that all bio-security needs can be met. They are also made with a view to *restricting* the importation and exportation of embryos and gametes to a very limited set of circumstances.

(1) *In regard to the importation and exportation of donated embryos:*

We believe that this should be limited to cases where there is sufficient proof of an **existing and established relationship** between the applicants and the donated in vitro embryos. More specifically, the importation or exportation of such embryos could be approved in cases where the applicants, having already undergone IVF treatment in one country and having taken up residence in another country, wish to use donated embryos (i) **for the purposes of having another child that is**

genetically related to any existing children, or (ii) for the purposes of having their first child in situations where previous attempts to implant embryos have failed and a number of embryos remain in storage. To allow the importing or exporting of existing embryos that are in storage for the purposes of having another child allows parents to exercise the moral responsibility they have towards the embryos that exist; the option that is most consistent with the unconditional respect due to the embryo.

(2) In regard to the importation and exportation of donated gametes:

We believe that this should be limited to cases where there is sufficient proof of an **existing and established relationship** between the applicants and the donated gametes. More specifically, the importation or exportation of gametes could be approved in cases where the applicants, having already received IVF treatment in one country and having taken up residence in another country, wish to use gametes **for the purposes of having another child that is genetically related to any existing children.** Alternatively, it should be possible for persons who for medical reasons have had their own gametes placed in storage to reclaim these gametes in cases where they now reside in another country.

To broaden the parameters within which donated in vitro gametes and embryos might be imported and exported would take us a step closer towards the commodification of human life and could potentially undermine principles (b), (c), (d), (e) and (g) of the HART Act.

Question 12:

Do you agree that requirements for the import and export of donated *in vitro* embryos or gametes should be set out in guidelines developed by ACART, rather than regulations? ¹

Yes/ No - Please give reasons for your views.

We believe that requirements for the import and export of in vitro embryos and gametes should be set out in regulations.

Explanation:

As explained above, there is a significant potential for people to abuse the right to import and export embryos and gametes. Associated with that, there are difficulties in verifying that imported embryos/gametes meet the requirements that are part of the HART Act. This is especially so in cases where they are sourced from countries where ethical oversight is less robust than it is in New Zealand.

We believe that the seriousness of inherent risks associated with the practice of importation and exportation of embryos and gametes, including the bio-security risks, make it more appropriate for the requirements to be set out in specific regulations rather than guidelines.

¹ Note that at the time of this consultation, there was a mistaken assumption that ACART could issue guidelines to ECART on requirements for the import and export of gametes and embryos.

Maintaining a principled ethical approach in the face of a global fertility market

Introduction

Robust ethical review requires critiquing the underlying and often unexamined assumptions and convictions that shape individual and societal thinking about a particular issue. Following on from the discussion held at **The Nathaniel Centre** in April, we wish to offer the following reflection on the broader context surrounding the debate about the import and export of gametes and embryos. We are particularly concerned that in a society such as ours, questions relating to the common good are too easily subsumed by a distorted focus on individual autonomy. When this occurs, we can too easily fail to take full account of the fact that medical technologies, such as human assisted reproductive technologies “create their own culture of practices, institutions and discourses, and these become a powerful force that inscribes individual bodies to its own specifications.”¹

While we have commented on this debate on a previous occasion, and while many of the ethical questions remain the same, it strikes us that the realities of the global fertility market have introduced a new dynamic into the debate.

A shift in ethical frameworks

A particular feature of contemporary ethical discussions on the use of assisted human reproductive technologies is the way in which the language and thinking of ‘supply and demand’ (the market) is increasingly coming to the fore. This is evident in the various viewpoints that are traversed in the current ACART consultation document. This language indicates a shift, in at least some quarters, towards viewing the creation of human life more and more as part of a framework of thinking (paradigm) that is typically characteristic of economic transactions. At the same time the use of such language confirms and further perpetuates such a shift in other people’s minds.

We accept that to some degree the use of ‘market’ language is understandable (and even unavoidable) in the context of exploring genuine questions relating to the regulation of reproductive technologies in a commercial environment. Nevertheless, we find the uncritical use of such language of great concern. Importantly, it betrays a tendency to think more and more about new human life as a ‘commodity’ that is subject *above all* to the desires, demands and expectations of those ‘paying’ for the service – prospective parents.

This has considerable implications for ethical reflection because the theoretical frameworks we adopt shape the way we look at and think about an issue. In particular, the frames of reference we draw on shape the core ethical questions, bringing particular questions to the fore and obscuring other questions. Our position is that the influence of a market-based paradigm reinforces a particular and impoverished understanding of human freedom, along with the risk of turning parenting into yet another extension of the consumer society. In the words of the philosopher Michael Sandel, human freedom is reduced to little more than “the freedom of the consumer.”²

¹ Lindemann Nelson, Hilde. (1995). Dethroning Choice: Analogy, Personhood, and the New Reproductive Technologies. *Journal of Law, Medicine & Ethics*, 23, 2: 129-35.

² Sandel, M. "The Reith Lectures 2009: Genetics and Morality." *A Common Morality for the Global Age: In Gratitude for What We Are Given* (2009). <http://www.bbc.co.uk/programmes/b00kt7rg> [accessed November 3, 2009].

At the same time, as human procreation becomes increasingly subject to a consumer mentality, there arises an increased sense of ‘entitlement’ to a child. From this flows a lower tolerance for regulatory interference of any kind, especially from the State. Thus, when the question of access to assisted human reproductive technologies arises there are many who ask: “What possible business is it of any ethics committee? Why should they have to apply to a bunch of interfering medicos for permission?”³

The increased sense of entitlement is typically verbalised as a ‘right’ to access whatever ‘means’ are available for bringing about a child. In addition, and perhaps more worryingly, it is also increasingly framed as the right to exert a kind of consumer freedom over our children. What we mean by this is that the so-called right to a child leads people to believe they have a right to a *certain type of child* and therefore the right to exert ever greater degrees of control over the ‘products’ of conception.

There is a need to draw on other frameworks in order to challenge the shift in ethical discourse that is happening in our society. At the same time we need to remain clear about, and committed to, the principles that have given shape to the current New Zealand regulatory framework governing the use of assisted human reproductive technologies. To the extent that we allow a market mentality to shape our thinking it is to be expected that the principles underpinning the HART Act will start to make less sense to some people.

The threats to a principled approach to decision making

In the wake of an increased sense of entitlement, the need to protect the very narrow meaning of ‘consumer freedom’ that Sandel (and others) speak of emerges for many as the primary ethical issue. In other words, the very existence of a set of regulations comes to be seen by many as an unjustified threat to their right to choose, a right that is seen as naturally ordained within an economic paradigm.

This shift has been further exacerbated, we believe, by the increased opportunities that now exist for prospective parents to access assisted human reproductive technologies overseas. Compared with other jurisdictions which lack the robustness of New Zealand’s regulatory system, many people are judging the HART regulatory framework to be unnecessarily and unfairly restrictive. Others who might be less inclined to see it as ‘restrictive’ are perhaps increasingly inclined to see it as espousing an unworkable ideal.

Therefore, even while the ethical dilemmas surrounding the import and export of embryos and gametes remain largely the same as in the past, it is our view that the realities of the global fertility market pose a new and heightened challenge to responsible human procreation. Indeed, we would go so far as to suggest that what is at stake in the present debate about greater (overseas) access to human assisted reproductive technologies is ultimately nothing less than the *continued viability* of the current principled approach to decision making that defines the HART Act.

We understand that already increased numbers of New Zealanders want to travel overseas to source eggs and embryos, a situation exacerbated by the shortage of donated eggs in New Zealand. While the motivation for this may well be largely pragmatic, rather than because of a desire to circumvent the law in New Zealand, the reality is that the eggs or embryos will be, in many if not most cases, commercially sourced. Because this is clearly in breach of what is

³ Michael Laws commenting on a request by a gay couple to be surrogate parents.

allowed in New Zealand, we anticipate this will eventually result in increased pressure to change the Guidelines in favour of allowing commercially sourced gametes and embryos in our own country.

We have previously indicated that we are sympathetic to the idea of allowing couples who have previously conceived embryos overseas to bring them into the country for the purposes of having another child that is genetically related. While our position on this remains the same, we recognise that this also has the potential to lead to increased pressure to loosen the restrictions on what is allowable in New Zealand, particularly when some of these embryos will have been created under standards and principles that fall short of our own.

Furthermore, while there are no legal barriers to couples travelling to countries that allow for embryos to be created in ways that, for good reason, are unacceptable in New Zealand, those without the financial resources will have a case that the ethical standards in New Zealand exist only for those who lack the resources to go overseas.

On all these counts an argument can be made that the status quo, even if unwittingly, fosters a significant degree of *ethical inconsistency* and *unfairness*. It would seem, then, that the claims of those advocating to free up current New Zealand practices are further strengthened on the basis of an appeal to consistency and fairness. There is, in other words, a certain inexorable logic that points towards the further liberalisation of HART law in New Zealand, including the current constraints on using imported material that does not meet current New Zealand standards. In addition, some might argue that such a move is desirable simply on compassionate grounds because it will enable more couples to have the children they want.

In light of this it is our concern that more and more people will, in the future, come to question the viability of the current New Zealand framework including the principles that underpin it.

Managing ethical inconsistency and unfairness

Those who are hesitant about further ‘opening up the market’ for embryos and gametes because of their commitment to the ethical principles upon which the current New Zealand laws are based, find themselves needing to justify a regulatory approach which allows for ever increasing degrees of ‘inconsistency’ and ‘unfairness’. We find ourselves in the latter position and readily admit that maintenance of the status quo will involve living with a degree of ‘inconsistency’ and ‘unfairness’ for individuals/couples. How might this be justified?

The arguments in favour of greater liberalisation, as described above, ignore a vital tension. We would describe the source of this tension as originating in the ethical space that exists between the desires and rights of individuals and the welfare or ‘common good’ of the society in which we live. As noted above, one of the fundamental issues at stake is the robustness of the (economic) paradigm that is increasingly being used by many to make sense of the world in which we live. More specifically we would argue that the language and thinking associated with ‘transactions’ and ‘entitlement’ is at odds with, and has the potential to undermine, the traditional way in which peoples across many cultures and ages have thought of new human life – what we, as well as many secular philosophers and

anthropologists, would describe as an approach centred on 'gift' and 'givenness'.⁴ Of great concern for us is the fact that the shift to view human procreation more and more in terms of the market represents a significant departure from the way in which *society* has long thought about parenting and the role of children.

The very fact that granting individuals increasingly unfettered reproductive freedom will impact on societal understandings surely *demand*s that any changes to the current regulatory system be subject to a 'societal impact risk assessment'. This is what we find lacking in many of the arguments being put forward in favour of leaving assisted reproductive choices more and more in the hands of individuals or couples. Not unsurprisingly, the shift to consider questions about the transmission of human life from a more 'market-based' paradigm makes ethical questions about the societal impact (or common good) seem more and more irrelevant. The issue, as noted above, comes back to the framework being appealed to and its adequacy for assessing the moral landscape.

Concluding comments

For us, the key ethical issue is not about protecting an increasingly impoverished notion of freedom of choice. It is more about protecting a notion of human flourishing that takes into account the effects of the accumulation of individual choices on the society in which we live, including the likely impact on the welfare of the children who are conceived and the institution of parenting. We must be wary of making changes to the current regulatory framework that are premised largely on the value and importance of individual choice. This is especially important when it can be established that such changes are being influenced by the incremental progression of a market-based paradigm into the domain of parenting and families.

We should, of course, limit individual choice only for good reason. One of the challenges we face as a society is that these reasons do not always come to the fore in contemporary debates, not because they are not important but because the particular framework we employ renders them invisible. Such reasons become apparent when we recognise the inadequacy of giving exaggerated emphasis to individual choice and embrace other frameworks of thinking.

Our position is well described by Michael Sandel when he notes:

When science moves faster than moral understanding as it does today, men and women struggle to articulate their unease. In liberal societies, they reach first for the language of autonomy, fairness, and individual rights. But this part of our moral vocabulary does not equip us to address the hardest questions posed by cloning, designer children, and genetic engineering. That is why the genomic revolution has induced a kind of moral vertigo.⁵

And as the New Zealand Bishops have previously stated in an early Submission on the HART Act:

⁴ While the notion of life as a gift is a traditional Christian term, it is also arguably the basis for a common ethic without religious warrants. See, for example, the work of Harvard philosopher Michael Sandel (*The Case against Perfection: Ethics in the Age of Genetic Engineering*. London: The Belknap Press of Harvard University Press, 2007) and French-Canadian anthropologists Godbout and Caillé (*The World of the Gift*. Translated by D. Winkler. Montreal & Kingston: McGill-Queen's University Press, 1998).

⁵ Sandel, M.J. (2007). *The case against perfection*. pp. 9-10.

An over emphasis on the sufficiency of individual informed consent, as has been exemplified by a number of commentators with respect to recent debates in the bioethical area, reflects a failure to acknowledge the wider impact of technological interventions.

Finally, we appeal to ACART, in its reflections on this issue, to continue to take full account of the fact that the questions raised by human assisted reproduction are complex and have the potential for transforming the most basic of human relationships. The context which has given rise to the current debate places in jeopardy key principles at the heart of the HART Act. In particular we see that two principles are at risk; (i) the rights of children who are born to access knowledge of their origins and have a relationship with gamete donors, and (ii) a longstanding commitment to the principle that transactions involving body parts not be commercialised.

The current debate calls for a strong stand in favour of *upholding the principles that underpin the HART Act*. These principles have been debated at length and represent long-held cultural, social, ethical and religious values that promote human flourishing. They are also consistent with general public policy in New Zealand.

This will, in turn, mean saying ‘no’ to certain demands being made by couples or individuals, demands that may well increase as New Zealanders take advantage of the opportunities for having children, not always ethical by our standards, that exist overseas. However, we argue that the current principled approach, along with its growing perception of inconsistencies, can be seen as justified by an ongoing commitment to the common good and, above all, to the dignity and well-being of children. In which case it will become more difficult to align New Zealand ethical standards with those of other countries.

In the face of globally varying ethical standards and competing principles, we would argue that the cause of ethical consistency and the well-being of children, parents and society is best served by New Zealand working with other countries to uphold and promote the key principles that define our current regulatory framework around the use of reproductive technologies. To quote from the Consultation document: “New Zealand should not support or be seen to support, policies and practices in other countries that would be regarded as unethical in this country.”

Staff of **The Nathaniel Centre**

