

Feedback on ACART's *Proposed Donation Guidelines: for family gamete donation, embryo donation, use of donated eggs with donated sperm and surrogacy*

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Interest in this topic: I am a postgraduate student. I am currently writing a dissertation reviewing the regulatory framework for embryo donation as a part of a Master of Bioethics and Health Law which will be completed mid-February 2018. One of the questions I will be addressing is whether there is a need for a case-by-case approval process for embryo donation.

Question 4: Justification to use a procedure

The requirement that *ECART should be satisfied that the procedure is the best or only opportunity for the intending parents to have a child* essentially creates a hierarchy of assisted reproductive procedures. This is problematic because it gives ECART authority to request justification for the use of one assisted reproductive procedure over another and the power to judge the merits, or otherwise, of individuals' reproductive decision-making. If an individual, or couple, has made an informed choice to use a certain assisted reproductive procedure why must they satisfy ECART that this is their best or only opportunity to have a child? Why is it not enough that it is their preferred choice of procedure?

In order to justify this restriction on individuals' reproductive liberty ACART should be able to identify the harm that is avoided by the imposition of this requirement. The reference to complexity of resulting relationships is insufficient. If one were to argue, for example, that IVF with donated sperm results in less complicated relationships than embryo donation and should therefore be the preferred procedure, then the question that must be asked is: who is the subject of concern? If individuals are aware of the potential complexities of the resulting relationships that stem from their choice of assisted reproductive procedure, and have exercised informed choice, what is gained by ECART judging the reasoning behind their decision?

If we assume that the applicants are making an informed choice, then the objective of this requirement is presumably to minimise harm to the resulting child. However, ACART cannot establish that the use of one procedure over another is less harmful to the resulting child because the child that results from a donated embryo will be a different child to the child that results from donated sperm or egg. Any action that is a precondition of a child's existence cannot be considered to be harmful to him or her.

It is concerning that ECART could potentially refuse an application for a certain procedure on the paternalistic grounds that it believes there is a more appropriate form of assisted reproductive technology that the applicant(s) should use in order to attempt to have a child.

Similarly, the requirement that *the intending parents are not using the procedure for social or financial convenience or gain* is troubling in that it gives ECART the authority to judge the reasoning and rationales behind individual reproductive decision-making. Certain assisted reproductive procedures might be more socially convenient than traditional methods of conceiving or carrying a child. Why is social convenience in itself wrong? The outcomes of using an assisted reproductive procedure for social convenience or gain are unlikely to be harmful enough to justify preventing someone from using the procedure.

A certain procedure might be more financially convenient for a couple, for example embryo donation might be less expensive than attempting rounds of IVF with donated sperm or eggs. This does not make the choice to use the more affordable procedure, over the other, morally wrong. Applicants' desire to save money, or incur less debt, does not necessarily correlate to less favourable outcomes for applicants and their families. Why should people not be allowed to choose an assisted reproductive procedure that is more financially convenient for them?

Applicants have an interest in maintaining the privacy of their personal and family lives. Any attempt to ascertain if applicants are motivated by social or financial convenience or gain in their desire to use a procedure would require intrusive examination into applicants' private lives, and this is in itself undesirable.

Question 5: Consent by gamete and embryo donors where the procedure will involve the use of a donated embryo

The current framework for embryo donation encourages donors to exercise a certain degree of responsibility for the outcomes of their embryos through the selection / approval of recipients. The research on embryo donation in New Zealand reveals that many donors view their embryos as potential children and feel a sense of responsibility for their fate due to the genetic link. Genetically unrelated donors may not be as emotionally invested in the embryos, particularly those donors who have no familial relation to the embryos through their own children (either because embryo donation was unsuccessful or they decided not to use the embryos).

My concern is that in relation to donors with no familial or genetic link to an embryo, the legal authority to donate is potentially detached from the sense of moral responsibility for the embryo. The decision to donate might be made more lightly, and with less emotional investment in the outcomes for the resulting child.

A child born from a donated embryo created from donated gametes has potential relationships with four different families - the sperm donor's, the egg donor's, the donor family (where he or she may have full genetic siblings) and his or her social family. This increases the likelihood of relationships going wrong, and is arguably too emotionally complicated for a child to be expected to navigate.

The potential harm to the child born as a result of a donated embryo created from donated gametes is that he or she is less likely to have contact, or a relationship, with his or her genetic parents than a child born from an embryo

created by the donors' gametes. One reason that this lack of contact is problematic is because individuals born as a result of embryo donation are dependent on their parents disclosing this fact in order for their legal right to access information about the donation to have any real meaning. Where there is the expectation of ongoing future contact between donor and recipient families the concern about disclosure of genetic identity is reduced.

Question 8: Legal advice

Informed decision-making is integral to the embryo donation process. How will ECART ensure informed consent without the provision of mandatory legal advice? In leaving it up to the applicants to consider whether or not to seek independent legal advice there is the expectation that prospective donors and recipients will somehow 'know what they do not know' about the embryo donation process. The minutes of ECART meetings reveal a degree of uncertainty on the part of some applicants as to the legal implications of the embryo donation process.

Donors are compelled by law to make a decision about the disposition of their surplus embryos. Often the decision to donate is the least bad of two undesirable options (donation or disposal). The context in which the decision to donate embryos is made means it is critical that donors make well-informed choices and provide informed consent to the process. Uninformed decisions could have long-term and far-reaching consequences for all the parties involved. Informed decision-making on the part of donors and recipients is the best way of ensuring the health and well-being of the resulting child.

The mandatory legal advice requirement for embryo donation should not be removed without some mechanism to ensure that donors are fully aware that they will have no legal rights or interests in relation to any resulting child, regardless of any sense of ongoing responsibility that they might feel for the child.