

Feedback form

Please provide your contact details below.

Name	Name withheld 2
If this feedback is on behalf of an organisation, please name the organisation	N/A (I am a member of Adoption Action, but am submitting as an individual.)
Please provide a brief description of the organisation (if applicable)	
Address/email	
Interest in this topic (eg, user of fertility services, health professional, researcher, member of public)	Historian and researcher in all areas concerning children's genetic/biological origins and relationships in relation to parenting by others.

Privacy

We may publish all submissions, or a summary of submissions on the Ministry's website. If you are submitting as an individual, we will automatically remove your personal details and any identifiable information.

If you do not want your submission published on the Ministry's website, please tick this box:

☐ Do not publish this submission.

Your submission will be subject to requests made under the Official Information Act. If you want your personal details removed from your submission, please tick this box:

☐ Remove my personal details from responses to Official Information Act requests.

[Sorry, had trouble ticking this box – but I do want my personal details removed from such responses, please.]

If your submission contains commercially sensitive information, please tick this box:

☐ This submission contains commercially sensitive information.

Question 1: Rescinding the biological link policy

Refer to section 3.

ACART is proposing that:

- the guidelines should no longer require intending parents to have a genetic or gestational link to a resulting child

- instead the guidelines should require ECART to be satisfied that where intending parents will have neither a genetic nor a gestational link to a resulting child, the lack of such links is justified.

(a) Do you agree? Yes ☐ No ☒

(b) Do you believe there are cultural implications associated with the proposed removal of the biological link policy? Yes ☒ No ☐

If so, please describe these implications.

The term “cultural” is perhaps misleading. In my view, the need for the fullest possible knowledge of biological connections and family history, and of one’s own personal birth circumstances, is linked with deep-seated emotions, and does not depend on “culture”. Instead it is inextricably intertwined with human identity, involving all groups in societies such as ours. The proposed change would in practice amount to permitting a process intended to deliberately create a child with two or three biological parents, in some cases with absolutely no connections to or knowledge of each other, for adoption by another unrelated person or persons. This is a very different proposition from setting out to create a child with whom at least one intending parent has genetic and/or gestational links.

Please give reasons for your views.

The modern history of adoption (based on the views of adult offspring in particular, together with those of many biological and legal parents) demonstrates very clearly that, as outlined above, origins matter. They also show that successfully “matching” unrelated parents and newborn children can be an extremely fraught undertaking, regardless of the best intentions. Despite counselling, adoptive parents may be poorly prepared for the reality of raising a biologically unrelated child, even one they have “commissioned”, as it were. Historical experience indicates strongly that best practice mandates the fullest possible knowledge and transparency in terms of all concerned, avoiding any kind of “family secrets”. (This becomes particularly clear in relation to Māori, for whom whakapapa is the basis of community existence; see, e.g., Else, 1991); Haenga-Collins & Gibbs, 2015.)

In my view the proposed change would therefore be feasible **only if genuinely informed consent and full transparency were not only strongly supported by the Guidelines and associated practice, but also consistently embedded in law and legal practice.** At present this is far from the case. Successive governments have refused to update long outdated adoption law, which is seriously deficient in these areas (see Adoption Action, 2016). There are also major inconsistencies in the laws on donation, surrogacy and adoption in terms of consent, knowledge, contact and access. While some of the other changes proposed in this document would improve the situation as far as clinic practice is concerned, they are not able to deal fully with the legal issues (for example, in terms of birth certificates). No matter how carefully ECART is required to ensure that the intended creation of a child with no biological links to the intending parents is justified, the confused, anomalous and potentially harmful legal situation in relation to that child and all its parents remains. Post-birth counselling when difficulties arise for any of the parties is also very difficult to access. Under these circumstances, the proposal for rescinding the biological link policy should not be approved.

Question 2: Access to information held on birth certificates

Refer to section 3.

ACART is interested in hearing views about potential strategies to strengthen a donor offspring’s access to information about their origins, which is held on their birth certificate.

Do you have suggestions?

Yes ☒ No ☐

Please give reasons for your views.

Individuals have the right to access accurate information about their origins. The key to transparency and knowledge in relation to a child's parenthood, genetic, biological and legal, is a truthful birth certificate. Because children born through surrogacy are adopted, their original birth certificate identifies the birth mother, but does not say whether she is also the genetic mother. Children born through egg, sperm or embryo donation need to have access to an original certificate which records the identities of the donors. A child's birth certificate should truthfully record all those involved as genetic, biological and legal parents. This issue highlights the need for a thorough overhaul of ALL law relating to recording children's origins (see, e.g., Else, 1995; Adoption Action vs Attorney-General [2016]). In the interim, the Guidelines should strongly support the fullest knowledge possible being shared among all involved, as well as thorough and accessible recording. However, legal changes would also be required.

Question 3: Format of the proposed guidelines

Refer to section 4.1.

ACART is proposing to issue one set of guidelines to ECART that encompass family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic-assisted surrogacy.

Do you agree with the format of the proposed guidelines?

Yes ☒ No ☐

Please give reasons for your views.

Though the effort, commitment and risk involved varies greatly, providers of sperm, eggs or embryos, and those prepared to become surrogates, are all acting as donors, and are all biological progenitors, offering the chance for others to acquire a child. Issues such as ensuring informed consent and access to information are common regardless of the actual procedures. Having one set of guidelines encompassing all such procedures recognises the common aspects for all kinds of donors, including surrogates, and makes excellent sense. (I am aware that the HART Act explicitly excludes surrogates from the definition of donors, although they are in fact making the most significant donation of all, even when their own egg is not involved. Combined guidelines would help to offset this misleading exclusion.)

Question 4: Justification to use a procedure

Refer to section 4.2.

ACART is proposing that ECART should be satisfied the proposed procedure is the best or only opportunity for intending parents to have a child and the intending parents are not using the procedures for social or financial convenience or gain.

Do you agree?

Yes ☒ No ☐

Please give reasons for your views.

In relation to currently approved procedures, this offsets any concerns that children may be produced as commodities, or seen as commodities. However, it does not cover my objections to the first proposal on no longer requiring a biological link (see Question 1 above). No one has an absolute right to acquire a child by any means technically or legally available.

Question 5: Consent by gamete and embryo donors

Refer to section 4.3.

ACART is proposing that, where a procedure will involve the use of an embryo created from donated eggs and/or donated sperm, the gamete donor(s) must have given consent to the specific use of their gametes:

- at the time of donation; or
- when a procedure using such an embryo is contemplated.

In either case, the affected parties should receive counselling on the implications of using gametes before the gamete donor gives specific consent.

If consent is given, the gamete donor can vary or withdraw their consent only up until an embryo is created (in cases where consent is given before the embryo is created).

In addition, where a procedure will involve the use of a donated embryo, the person(s) for whom the embryo was created must give consent to the specific use of the donated embryo:

- at the time of donation; or
- when a procedure using such a donated embryo is contemplated.

Once an embryo is created, the decision to vary or withdraw consent up to the time the embryo is transferred to the womb should remain with the people for whom the embryos were created.

Do you agree?

Yes

☒

No

☐

Please give reasons for your views.

How the envisaged sequence of donation and consent would work in practice is a little difficult to follow; but even if sperm and eggs donors are not required to give specific consent to specific uses of their gametes, whereas embryo donors are so required, the fullest possible information needs to be available to all parties – including, of course, offspring in the future.

Question 6: Taking account of potential coercion

Refer to section 4.4.

ACART is proposing that ECART should take account of any factors in a relationship that might give rise to coercion or unduly influence a donor's or surrogate's consent to take part in a procedure.

Do you agree?

Yes

☒

No

☐

Please give reasons for your views.

Coercion is not always easy to deduce. It is extremely important that ECART understand all the possible factors that might give rise to coercion, and ensure that consent is in no way coerced or unduly influenced. Being required to specifically address this risk would be a very helpful aspect of the Guidelines.

Question 7: Limit to number of families with full genetic siblings

Refer to section 4.5.

ACART is proposing that full genetic siblings should continue to be limited to no more than two families.

Do you agree?

Yes

☒

No

☐

Please give reasons for your views.

New Zealand's relatively small population makes this provision particularly important. It would in fact also be sensible to provide for limits to the number of children that can be created from the gametes of any one donor, regardless of the fact that gamete donation is an established procedure.

Question 8: Legal advice

Refer to section 4.6.

ACART is proposing that ECART must be satisfied that:

- where an application includes a surrogacy arrangement, each affected party has received independent legal advice
- where an application does not include a surrogacy arrangement, each affected party has considered seeking independent legal advice
- any legal reports show that all affected parties understand the legal implications of the procedure(s).

Do you agree?

Yes

☒

No

☐

Please give reasons for your views.

In the case of potential surrogacy, it is essential that ECART must be satisfied that each affected party – particularly the potential surrogate herself - has received independent legal advice, but also that this is received early on, BEFORE counselling (which does not appear to be currently the case – see Fertility Associates timeline (<https://www.fertilityassociates.co.nz/media/1053/vii-06surrogacy.pdf>)). This is the only way to ensure that informed consent is based on full understanding of the legal implications. It also guards against the counselling process, and meeting the intending parents, leading a potential surrogate to feel that she is already committed, well before she has received legal advice. (This used to be, and in some cases may still be, the norm in adoption, with legal advice given just prior to signing consent). In addition, every relevant consent form should include a declaration by the person giving consent that he/she has received and understood the full legal implications (rather than this being simply stated by the lawyer, as is still specified in adoption law).

Question 9: Regulation of all family gamete donations

Refer to section 5.

ACART is of the view that all family gamete donations through a fertility services provider should be regulated by guidelines and thus require ECART approval.

Do you agree?

Yes

☒

No

☐

Please give reasons for your views.

This is important, because the same ethical considerations apply to all such donations. The fact that some such donations are regarded as established procedures is not a good reason to exclude them, any more than it is a good reason to exclude some forms of surrogacy (see below).

Question 10: Donation of embryos created from donated gametes

Refer to section 6.1.

ACART is proposing that the guidelines should enable ECART to approve the donation of embryos created from donated eggs and/or donated sperm, provided ECART takes account of the potential complexity of resulting relationships and the gamete donors have given specific consent to the procedure.

Do you agree?

Yes

☒

No

☐

Please give reasons for your views.

The provision for specific consent protects both donors and offspring, and the provision limiting the number of genetic siblings created would presumably also apply (should that arise from this type of embryo creation).

Question 11: Embryo on-donation and re-donation

Refer to section 6.2.

ACART is proposing that surplus donated embryos:

- should not be able to be on-donated by the recipients
- but can be returned to the donors, in accordance with any agreement between the parties, for re-donation to another party, subject to a new approval by ECART.

Do you agree?

Yes

☒

No

☐

Please give reasons for your views.

The additional complexity which on-donation by recipients would create is not sensible or desirable. The original progenitors of the embryos should retain control of what happens to them. This would presumably apply to embryos created as outlined in Question 11 above.

Question 12: Clarification of the status of embryo donation in the regulatory framework

Refer to section 6.3.

ACART is of the view that the regulatory framework should clarify that:

- all embryo donation cases are regulated by guidelines and thus require approval by ECART
- embryo donation does not include cases where an embryo created for a couple is used by one of the couple in a new relationship with the informed consent of the previous partner.

Do you agree?

Yes ☒ No ☐

Please give reasons for your views.

This proposal would provide welcome clarity and oversight for what is an always humanly complex aspect of ART, and one which is, in essence (like all forms of surrogacy), a social arrangement making a clinical procedure possible.

Question 13: Regulation of all clinic-assisted surrogacies by guidelines

Refer to section 8.

ACART proposes to recommend that all clinic-assisted surrogacy cases be regulated by guidelines and thus require ECART approval.

Do you agree?

Yes ☒ No ☐

Please give reasons for your views.

This very welcome proposal would do away with the current anomaly whereby what can be seen as the **most** humanly complex form of surrogacy, involving the surrogate as both genetic and biological mother, does not require approval, because it is seen as simply an established procedure. There is no reason to exclude any form of clinic-assisted surrogacy from regulation and approval by ECART. Ideally, all forms of intended surrogacy should require approval, even where clinics are not involved.

Question 14: Any other comments

Do you have any other comments about the proposals in this document?

As highlighted in my comments on rescinding the biological link policy (the only proposed change with which I do not agree), these proposals highlight one major problem affecting ART in terms of donation and surrogacy: the fact that it is legally governed by a number of Acts of Parliament which are now outdated (sometimes markedly so), do not accord with modern understandings and attitudes, are sometimes unclear and often inconsistent or even conflicting, and do not have the best interests of children (or potential children) as their central principle. Changes to the Guidelines alone cannot remedy this situation. As noted above, it requires a thorough, long overdue overhaul of all legislation relating to the care and protection of children and to children's rights, as well as to the rights of all adults involved in ART procedures.

Nevertheless, with the exception of the first proposal to rescind the biological link policy, in my view the other proposals would contribute considerably to ensuring that all those primarily involved in ART, including any resulting children, are as well protected as possible in human, social and cultural terms, given the current legal circumstances, and I would like to congratulate ACART on their work to date.

One final concern: these proposals, if accepted, seem likely to increase ECART's workload considerably. It appears likely that ECART is already not sufficiently well resourced to deal with its current workload (for example, the 201/2012 Annual Report is the most recent available, and no minutes have yet appeared for 2017). Additional resourcing would seem essential for these proposals to be fully implemented by ECART.

References:

Adoption Action (2016). Chronology of moves to reform adoption laws, available at:

<http://adoptionaction.co.nz/wp-content/uploads/2016/04/Chronology.pdf>

Adoption Action vs Attorney-General [2016] NZHRRT 6, available at:

<http://adoptionaction.co.nz/wp-content/uploads/2016/04/2016-NZHRRT-9-Adoption-Action-Inc-v-Attorney-General-OPTIMISED.pdf>

Else, A. (1991). 'Aureretanga – The outcry of the people', in *A Question of Adoption: Closed Stranger Adoption in New Zealand 1944-1974*. Wellington: Bridget Williams Books, pp.172-196.

Else, A. (1995). 'Legal Fictions: Women and New Zealand Law on Adoption and Assisted Reproductive Technologies.' *The Australian Feminist Law Journal* 5 (1995): 65-80.

Haenga-Collins, M. & Gibbs, A. (2015). "'Walking Between Worlds": The experiences of New Zealand Māori cross-cultural adoptees.' *Adoption & Fostering*, 39(1), 62-75.