Feedback form

Please provide your contact details below.

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If this feedback is on behalf of an organisation, please name the organisation	
Please provide a brief description of the organisation (if applicable)	
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Interest in this topic (eg, user of fertility services, health professional, researcher, member of public)	researchers

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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 [X] 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.

Please give reasons for your views.

We agree with rescinding the biological link policy and celebrate the opportunities that it opens up to facilitate family formation where, for medical or social reasons, a genetic or gestational link to an intended parent is not possible or not desirable. We have long felt unsure that the original justifications for such a policy (which appear to be to prevent commodification and 'made-to-order' children, and to reduce the complications of there being too many potential 'parents' of the child) were valid.

Including a genetic link policy appears inconsistent with the Status of Children Act, which attributes parenthood to the pregnant woman and her partner. This approach specifically disclaims notions of parenthood solely based on the use of genetic material. While gestation forms the basis for the existing legal rule, this is for the purpose of ensuring that the child has at least one identifiable legal parent at birth. This goal is still met in a surrogacy arrangement because the surrogate mother is that legal parent until the adoption application by the intended parent(s) can be finalised.

In addition, a genetic or gestational link between child and parent in surrogacy arrangements has not been considered relevant by the Family Court. For example, in adoption applications (see *Re MSK* [2013] NZFC 2064 and *Re Clifford* [2016] NZFC 1666), there is no indication that the judges saw any relevance in the fact that in each case the applicant was a single woman who shared no genetic or gestational connection to the child(ren) born. (See Wilson, [2016] NZLaw Journal 401).

We agree that the presence or absence of a biological might usefully be a relevant factor for consideration, but disagree with the idea that parties with a lack of a biological link should have to 'justify' this. We are concerned that, whether intended or not, the language of justification contains moral overtones. We also feel that it may be discriminatory (an issue that ACART has rightly pointed out should be an important factor to guard against in designing Guidelines). We would suggest that the preferable (and morally neutral) approach is for 'biological link' to be identified as a relevant factor in all cases of surrogacy. Parties should be asked to supply this information to ECART, and the way in which this information is used should be left to ECART's discretion.

In our research, we have heard stories of people who have felt that they have had no choice but to engage in international surrogacy because they did not think that they would meet the requirements in the ACART Guidelines. In some of these cases, the people appeared to be basing their decision on out-of-date information provided by well-meaning surrogacy support groups (for example, that gay men will never be approved by ECART, when the policy was specifically changed in 2011) or on their reading of the ACART Guidelines as a lay-person. It is clear that international surrogacy arrangements can result in legal issues, and the total costs and time taken to return to New Zealand with their child can be more costly and take longer than the intended parent(s) originally thought. We consider it desirable that the language chosen for the Guidelines takes into account that its readers will not only be ECART, fertility clinics and lawyers (who may understand language nuances and overall purpose of the Guidelines), but also prospective intended parents who may see the language as prohibiting a successful ECART application when this may not be the case. Stating that 'biological link' is a relevant factor only would resolve these concerns, while allowing the presence (or lack of) such a link to be considered by ECART in appropriate cases.

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.

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 [X] No [ ]

Please give reasons for your views.

In general, we see the use of one set of Guidelines as promoting consistency in values and approach, particularly where more than one of these procedures is to be used (for example embryo donation and surrogacy).

We did note, however, as we read the consultation document, that this might create confusion if there were different ethical concerns for different procedures to be addressed in the Guidelines. If these are as simple as Question 8, which proposes legal advice be required for surrogacy but not for other procedures, then this may not be problematic. If, on the other hand it requires different ethical factors be taken in to account in relation to the different procedures, would this create confusion as to why one factor was required to be considered in relation to one procedure but not another?

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 [X]

Please give reasons for your views.

We have some concerns about the wording of this provision, although we understand the intention behind it.

This provision has a very interesting history.

- It started off in the 2007 Guidelines seemingly as a protection against 'surrogacy for convenience'- requiring that "the intending mother" have a medical reason for not gestating the pregnancy herself. There was a separate requirement that one intended parent have a genetic link to the child.
- In the 2013 Guidelines there was a clear change to gender neutral language (as a result of a 2011 complaint) which changed the requirement to 'the proposed surrogacy is the best or only opportunity for an intended parent, or at least one intending parent in a couple, to be the genetic parent of a child…'. This could be seen as responding to the discrimination concern by removing medical issues relating to the mother (because there may not be a female intended parent) and combining this with the genetic link requirement.

In these proposed changes we now see this provision being amended simply by removing the reference to a genetic link, leaving it as 'best or only opportunity for the intended parents to have a child.'

This raises a couple of concerns for us:

1. What does 'best' mean in this new context? 'Best chance to be a genetic parent' makes sense. What does 'best chance to be a parent' mean? Is it objective or subjective, or a bit of both? As an example, from a purely objective point of view, the 'best' chance to be 'a parent' is arguably to adopt a child (ignoring for the purposes of this explanation the declining number of children available for adoption). Adopting an existing child is 'best' for New Zealand as a whole, as an existing kiwi kid becomes part of a new family. It is also, objectively, 'best' for the hopeful parent(s): parenthood is guaranteed, the uncertainty, cost, medical risks and time involved in assisted reproduction is avoided. This does not mean, however, that it is 'best' for the hopeful parents who, at the time of this application have probably already considered adoption and wish to try ART. Further, there may families for which there is no medical impediment but previous trauma-related pregnancy and/or birth combined with fertility issues make surrogacy the 'best' option from their perspective.

2. 'Best' seems to have an unintended element of judgment that we would prefer to avoid.

3. We also wonder about 'social or financial convenience' as a phrase, while again accepting the underlying purpose behind its inclusion. Would 'social convenience' include sexual orientation or religious concerns? As an example we note that some religious groups would see sperm donation as adultery, but would accept embryo donation. Is choosing embryo donation over sperm donation a decision for the 'social convenience' of not having their decisions questioned/frowned upon/condemned by their religious community?

We suggest that the 2013 Guidelines so closely connected the 'best or only opportunity' and the 'genetic link' requirement that that the removal of the latter results in the continued inclusion of the former being unnecessary or empty of content. We would suggest that the removal of 'best or only opportunity' also be removed.

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 [X] No [ ]

Please give reasons for your views.

We suggest that this guideline begins with the phrase "The following only applies to the first donation of an embryo to a recipient couple, and not to any returned surplus embryos." This would clarify exactly the meaning of several of the sentences, which otherwise can be somewhat ambiguous. Also, since this guideline states that gamete donor consent cannot be varied or withdrawn once the embryo is created unless it is clear that the rules in this guideline only apply to the original embryo donation, this would imply that surplus returned embryos could never be re-donated to another couple, as that would presumably require the gamete donors to vary their original specific consent after the embryo is created.

We agree with allowing the couple for whom an embryo is created to withdraw their consent after the embryo is created and before it is transferred to the womb. We understand that the guideline is in place so that the donor cannot vary or withdraw consent once the embryo is created. However, the guideline should indicate what would happen to the embryo in the case that the people for whom the embryo is created either vary or withdraw their consent. Presumably, if consent is withdrawn, the donor can give a new specific use consent for use by a different couple. Allowing the people for whom the embryo is created to vary their consent (i.e. change but not withdraw the consent) should at all times be limited to changes that respect the donor's original specific use consent.

In short, there needs to be clarification around the case of surplus embryos in this guideline, even if it is only to state that all such cases should be guided by question 11.

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 [X] No [ ]

Please give reasons for your views.

We support this as a factor that ECART should be taking into account. We feel strongly that all reasonable steps should be taken to identify coercion or undue influence in order to ensure that the donor/surrogate is making this decision freely and autonomously.

We anticipate that the majority of issues relating to coercion and undue influence are most likely to be identified during the counselling sessions, or during legal advice sessions with lawyers. These professionals will have the benefit of meeting the individuals and seeing how they act individually as well as how they interact with each other in the joint sessions. We would note in relation to this that some of the research our group has carried out has left us with the impression that some individuals give rehearsed answers (or say what they think the counsellors/lawyers/other party wants to hear). This is not to say that this rehearsal of answers is to conceal coercion or undue influence, more likely it is to simply move the process along slightly faster. It may well be that seeing these individuals in person will allow the subtle indications of rehearsal/planned answers to be identified. We would also add that private 'surrogacy support groups' often give explicit information as to what not to say during these sessions. It will again be the counsellors and lawyers who will be most likely to pick up on this.

Having ECART consider coercion or undue influence will be a useful second check for a potential problem, but we would hope that it would not affect counsellors or lawyers considering the same issues.

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.

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 [X] No [ ]

Please give reasons for your views.

We agree that legal advice should continue to be required in relation to surrogacy arrangements. As part of our research project we asked lawyers to complete an online survey about their experience with surrogacy cases. We sent survey requests to approximately 700 family lawyers throughout NZ and received responses from 185. 72 respondents reported having given advice to intended parents or surrogates. When asked about the kind of advice they gave, this ranged from procedural (the ECART process, the adoption process) to legal (who is the parent, payment, risk) to more general questions (contact with the child after the intended parents take custody, child support, inheritance rights). Lawyers also described raising personal queries with their clients (what if it goes wrong, what does your wider family think?).

What was most interesting from the survey was that 5 x the amount of lawyers recommended that intended parents and surrogates enter into a written agreement in relation to the surrogacy. This was the case even though these contracts would not be enforceable. The process of doing this often led to the parties considering and talking through important legal, medical and other issues.

The provision of independent legal advice therefore is an important step in a surrogacy application. It is a chance to clarify legal positions but to also consider broader issues. Given the complicated legal environment in which surrogacy takes place, legal advice is a vital step.

The language of the third bullet point, 'any legal reports show that all affected parties' might be improved on. The phrase 'all affected parties' is vague. Those 'affected' by a surrogacy arrangement may form a very broad class- potential grandparents/other family members or existing children will all be affected by the arrangement in some way. They won't all require legal advice (in the same way that they won't all require counselling). This should be limited to the parties to the agreement (intended parent(s), surrogate and partner). 'All' parties might also suggest that each lawyer submitting a report has met all parties, perhaps involving a joint advice session. We think it is important that parties are advised separately.

We would suggest that the wording in the third bullet point read something like:
"Where an application includes a surrogacy arrangement, ECART should be satisfied that the intended parents and surrogate has received separate independent legal advice which covers the following points:
- relevant provisions of the HART Act
- legal parenthood and how this is transferred from the surrogate to the intended parents
- the legal implications of one or other party changing their mind
- the resolution of potential disputes ..."

In relation to procedures other than surrogacy, the rationale specified for the change in the consultation documents seems reasonable, given that gametes or embryo donation do not entail the same complexities as surrogacy where transferring of parental rights is expected.

Likewise, counselling in accordance to the Fertility Services Standards should provide sufficient information to donors to protect their rights. Hence, legal advice is not always necessary in regard to gamete and embryos donation. Furthermore, if ECART considers that additional legal advice is required, section 19.4 of the HART Act establishes that ECART "must impose any conditions" in order to ensure that the informed consent is given before "1 or more embryos, gametes, or other cells derived from the person are used." In other words, ECART will supervise that informed consent is given by the donors and subsequently the requirement of donor informed consent will not be undermined.

Nevertheless, we observe that the proposal also includes a new provision regarding consent to re-donate embryos, therefore it may be convenient to include the requirement on consent to re-donation of embryos in the Fertility Services Standard to maintain coherence in the system. Otherwise, it splits the actual scheme and might introduce incoherence in the Fertility Services Standard.

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.

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.

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.

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.

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 [X] No [ ]

Please give reasons for your views.

We would support this recommendation. All surrogacy arrangements will benefit from going through the ECART process, particularly through having the counselling and legal advice. While this could not practicably be required in relation to traditional surrogacy which occurs at home, it could be required in relation to a traditional surrogacy arrangement involving a clinic. It seems inconsistent that gestational surrogacy arrangements have these ethics approval steps, but the same is not required for traditional. Traditional surrogates have a particular vulnerability risk due to the genetic link to the child.

Question 14: Any other comments

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

We wonder if it is appropriate to include in the Notes in relation to surrogacy that commercial surrogacy is illegal and contracts are unenforceable. These are matters of law and not ethical guidance, and therefore outside the scope of ACART's role