Supplementary information to the donation and surrogacy guidelines

Purpose of this information

1. This information is intended to ensure that:
   - fertility services providers understand why the Advisory Committee on Assisted Reproductive Technology (ACART) has revised the guidelines for donations and surrogacy in the way it has
   - all parties know how the consent process works
   - the Ethics Committee on Assisted Reproductive Technology (ECART) understands why ACART has revised the guidelines for donations and surrogacy in the way it has so that ECART can apply the guidelines as ACART intends.

Purposes of the 'social or financial convenience' provision

2. The guidelines contain a provision that "the intending parents are not using the procedures for social or financial convenience or gain." The purposes of this provision are to minimise risks to the offspring and any other parties, and to protect the dignity of future generations.

3. Surrogacy and donor conception involve general risks to offspring in addition to biological (pregnancy) risks of surrogacy to the birth mother. Some examples of these risks are: avoidable poor health (eg, because the chosen donor has a significant inheritable disease); citizenship risks; having no genetic link to parents when that would have been a possibility (and any psychological effects that may have on the offspring, in particular); disputes arising in surrogacy cases that affect the child; and intending parents refusing to adopt the child. These risks should be mitigated by precluding the use of a procedure that would allow the intending parents to prioritise some financial purpose or social purpose over the wellbeing of the offspring.

4. Generally, the use of assisted reproductive technology (ART) brings costs to society and some risks to offspring, so its use needs to be justified. Justifications for its use are that there is some medical need, or a need associated with relationship status (including sexuality). However, when using surrogacy and donor conception, ECART must also consider the motivation of parents to have children if, for example, they are placing all the risks of pregnancy onto others without justification, or are not considering interests of offspring.

5. Social gain could mean avoiding pregnancy for social or career reasons, or using surrogates and/or donor gametes to have children for intending parents who are far beyond the typical upper age at which women can successfully carry pregnancies.

While care must be taken to avoid age discrimination, the interests of the child in having parents able to care for them is a consideration.

6. Financial convenience or gain could include a deliberate decision to use one procedure over another due to costs, such as using a donated embryo rather than in vitro fertilisation (IVF) with one's own gametes. While it is important that cost is not the primary driver of a decision, care must be taken by ECART when considering a decision made due to the affordability of procedures. For many people, a more affordable procedure may be the best or only option for them to have a child.

Purpose of the 'best or only' provision

7. The guidelines also contain a provision that ECART must be satisfied "that the procedure is the best or the only opportunity for intending parents to have a child". The purpose of this provision is to ensure that the benefits and risks from using a particular procedure are justified when compared against the alternative options that may be available.

8. An example where ECART may be required to consider whether a procedure is "best" is where the intending parents have applied for one procedure, when alternative procedures are available to them (for example, applying for embryo donation when the intending parent(s) could use their own gamete(s) for IVF).

9. ACART does not believe that there is a single formula to determine whether a procedure is the "best" opportunity for the intending parents to have a child, but rather it is dependent on the context and individual circumstances of each case. Whether a procedure is "best" should be considered both from the perspectives of the objective observer (ie ECART) and that of the intending parents, balanced against the well-being of the resulting child and risks associated with the procedure.

10. ECART may consider any factor that it believes is relevant to the individual circumstances of the case when determining whether a procedure is "best" for the intending parents. These factors may include the following.

    - The benefits and risks associated with the proposed procedure, compared with available alternatives.
    - The intending parent's rationale for the chosen procedure.
    - The time and/or financial cost of requiring the intending parents to use an alternative procedure.
    - The invasiveness of any alternative procedure.
    - Any implications associated with absence of a biological (genetic) link, and how these implications will be managed (for example, ensuring the resulting child is aware of their genetic origins).

The role of biological (genetic) link

11. Some applicants may wish to undertake a procedure which would result in a child that has no biological (genetic) link to the intending parents, even though the parents could have a child with such a link if a different procedure was used.

12. An example of this may be an application for embryo donation, where one or more of the intending parents could have used their own gametes in IVF to have a biologically (genetically) related child.

13. Under previous versions of the Guidelines, it was mandatory for there to be a biological link to the intending parents. However, this requirement was deliberately removed by ACART in the latest revision, as it was recognised that a mandatory biological link may be unjustifiably discriminatory in certain circumstances.

14. While no longer being mandatory, ACART still recognises that a biological link between the intending parent(s) and the resulting child is an important consideration. The presence of a biological link may contribute to the resulting child's sense of identity, their connectedness to their family, and could have implications for whakapapa Māori. The deliberate absence of a biological link should therefore not be trivial decision.

15. On that basis, ACART recommends that when a procedure, which will not result in biological link, is being proposed over an available procedure which would result in a biological link, then this decision must be specifically addressed in counselling with the intending parents. The purpose of this requirement is to ensure that the intending parents have considered the decision, are aware of the alternatives available to them, and are making an informed and deliberate choice. The rationale for this decision must be recorded.

16. However, recognising that the relevant context in each case could be different, ACART does not believe that there is an exhaustive list of rationale for ECART to use when assessing all cases. There are many factors which may influence a decision to deliberately have a child which is not biologically related to the intending parent(s). ECART must be satisfied that the decision is informed, and does not create any unjustified risks to the resulting child. The decision must also be consistent with the principles of the HART Act, including the requirement for offspring to be made aware of their genetic origins.

17. ECART may therefore consider and approve applications where there is no biological link if the case meets all requirements under the Guidelines, including the requirement the procedure is the best or only opportunity for the intending parents to have a child.

Donations of gametes and embryos, and consenting

18. The removal of the mandatory biological link means gametes and embryos can be donated and used in a wider range of situations than before. For example, single people who are infertile will be able to have surrogates gestate babies to whom they have no genetic connection (ie, both gametes will be donated), as will couples where both partners are infertile.

19. All gamete donors will need to be aware of the range of potential donation scenarios and what rights they will have over their donated gametes, or embryos created from those gametes. Similarly, embryo donors will need to be aware of the various donation possibilities, and what authority they will have (or not have) in the different scenarios.

20. People might have embryos created for themselves and decide to donate any unused embryos — and the recipients of those donated embryos might then choose to donate any surplus embryos if either of these parties has not had children from the embryos. (ACART has kept the policy of limiting full-genetic siblings to only two families).

21. The tables in the final section set out all of the possible embryo donation scenarios, showing who is involved and who must consent in which situation (as explained below).

Counselling will need to cover numerous scenarios and factors

22. It is important that counsellors explain to gamete and embryo donors that donation, re-donation and on-donation are all possible and that the gamete and/or embryo donors should specify conditions about the use of their donation when they donate, if they have any such conditions. For example, gamete donors could specify that any embryos created using their gametes are not to be re-donated or on-donated.

Gamete donors must consider possible embryo donations and can place conditions

23. Some submitters to ACART's consultations asked whether gamete donors would need to have consented to the donation of embryos created from the gametes they provided. Some gamete donors might like to know who could use the embryos created from their gametes, and might be concerned that the intending parents might give surplus embryos to people who are unknown to the donors.

24. Embryo donation (or re-donation or on-donation) is possible in many situations. ACART stresses the importance of counsellors being clear that embryos could be donated (and possibly re-donated or on-donated) and that the gamete donors will have no further say in those donations other than by conditions they might apply when they originally donate their gametes.

25. Gamete donors can place conditions on how their gametes can be used up until an embryo is formed (or their gametes are used for insemination). Once gametes have been used to create an embryo, the gamete donors have no further say. However, if gamete donors had consented before these guidelines were in use, and a new donation is planned that they had never thought of, they must be asked if they consent to the now

planned use. This is the “retrospective rule” (explained below in paragraph 33). Otherwise, and generally, it is important that gamete donors specify any conditions **before** they make their donation.

Authority over embryos usually rests with the original intending parents

26. Recipients of donated embryos must be aware that the authority over those embryos rests with the original intending parents. This is the case now and will continue to be under the new guidelines.

27. The original intending parents might choose to re-donate the embryos to another recipient (providing the two-family limit would not be breached). The recipients of the donated embryos do not have the authority to stop such a re-donation except in cases where they have had children from embryos that would be full-genetic siblings to the children that would be born from the re-donation; this situation is described further in the next section.

Authority over embryos: in one scenario it rests with recipients

28. In most cases, the authority to decide what happens to an embryo rests with the person or couple who had the embryos created for their own use. However, in the particular scenario set out below, the authority over embryos rests with the **recipients** of the donated embryos.

29. Specifically, if the:

    (a) original intending parents did not have a child that would be a genetic sibling to a child born from the donated embryo **and**

    (b) original intending parents did not have any gametes in the embryos **and**

    (c) recipients did have a child that would be so related, **then**

    the authority to consent to the embryo donation rests with these recipients.

Joint agreement needed if recipients had a child and the embryo donors had gametes in the embryos

30. If the recipients of donated embryos have had a child and the embryo donors (who did not have a child) had gametes in the embryos to be donated, then both parties would need to agree to a donation as both parties would have an interest in the consequences of the donation.

The original intending parents might later have a child

31. It is also possible that original intending parents will:

    (a) not have children initially and

    (b) donate surplus embryos to recipients and

    (c) subsequently have a child that would be a full genetic sibling to any child born of the already donated embryos.

32. If this were to happen, and the recipients have had a child, then neither party could make any further donations as the two-family limit for full-genetic siblings would have been reached.

The retrospective rule

33. As is the case now, gamete donors will be able to change or withdraw their consent up to the point the gametes are used to create an embryo.

34. Because rescinding the mandatory biological link has produced new donation scenarios, ACART has introduced a provision to cover the potential retrospective effects of the new guidelines. Specifically, when a person or people had donated gametes or embryos before these new guidelines were issued, and a procedure is now intended that had not been possible under the previous guidelines, the gamete donors must give new consent.

35. This requirement for a new consent applies even when embryos have been created from the donated gametes under the previous guidelines because the gamete donors might not have considered or consented to the use of the embryo that is now intended.

Embryo donors will have no legal rights over the offspring

36. It is particularly important that clinics and counsellors advise embryo donors that they will have no legal rights over the resulting children. The birth mother (and any partner) or the adopting parent(s) in surrogacy cases will be the legal parents of the child and have sole parental rights.

Surrogacy

All parties must consider how their residency will affect relationships in the future

37. With the removal of the mandatory biological link, it is now possible for intending parents to have a child, with no genetic link to them, gestated by a surrogate. Although this enables more people to have children and more women to act as surrogates, it also creates certain risks.

38. Consequently, ACART has introduced the provision that all parties to the surrogacy must have considered the future residency of those parties. This requirement will ensure the parties have plans in place to protect the wellbeing of the offspring and the adult parties. The provision will give ECART the scope to consider whether the residency plans will make such protections available.

39. ACART acknowledges that in surrogacy arrangements involving other countries, it could be more difficult to safeguard the wellbeing of all the parties. Consequently, it is important that ECART elicits as much information as needed to establish that the residency plans are sufficient to ensure the child will not be stateless, and the parties can maintain contact with one another.

40. The guidelines include a mandatory requirement that all parties to a surrogacy must obtain legal advice. ACART anticipates that the legal advice should include information about the rights (or absence of such rights) of the child to be a New Zealand citizen depending on the citizenship of the surrogate (birth mother).

41. Oranga Tamariki's website sets out the matters the Minister of Immigration may consider when deciding whether to grant citizenship to an individual. See: https://www.orangatamariki.govt.nz/assets/Uploads/Adoptions/Surrogacy-and-adoption/2020-Information-Fact-Sheet-International-Surrogacy.pdf

Family gamete donations

42. Gamete donations between certain family members can create a greater potential for one party to exert an undue influence over another. Also, depending on who is donating what to whom, there can be a greater risk of intergenerational complexity than would occur with gametes from a non-family member.

43. ACART therefore strengthened the provision against undue influence by stating that ECART must check specifically for evidence that such influence might have occurred. Similarly, ECART must assess cases involving family gamete donations for intergenerational complexity that could be problematic for the parties involved.

44. ACART has also made a provision that clinics can seek an ethical review from ECART if they have a case that they believe would benefit from additional expert consideration.

Who consents to donation of gametes and embryos and in what circumstances

Embryos

- Embryos will have been created for the original intending parents.
- In theory, re-donations and on-donations can keep being made. In practice, this is unlikely to happen often and might never happen at all.
- In cases of re-donation or on-donation, the “first” recipients can be referred to as the “prior” recipients.
- Original intending parents consent to initial and any **re**-donation of embryos. Recipients consent to **on**-donations.
- Re-donations are allowed in all but “scenario 1” in the tables below, assuming other conditions are met (such as conditions placed by the gamete donors and that full genetic siblings can only be born in a maximum of two families). On-donations are allowed in only one scenario (scenario C.3).
- The ability to donate, re-donate or on-donate embryos is based on some combination of:
  (a) who the embryos were created for
  (b) whose gametes were used
  (c) the two-family limit for full-genetic siblings not being breached
  (d) whose family any existing full-genetic siblings are in
  (e) whose family the new full-genetic sibling would be raised in.
- Having a surrogate gestate a child does not change who has the authority over a donation (unless the surrogate keeps the baby, in which case the relevant family is the surrogate’s family).

Gametes

- Gamete donors consent to a use when they donate their gametes, or up until such time as an embryo is created.
- Once an embryo has been created, the gamete donors do not have a say in the use of the embryo; they need to know this beforehand and place any conditions accordingly before the embryo is created. So, in the scenarios below, the gamete donors will have consented to a use (and possible other uses: namely other donations) and do not need to be approached again to consent to the embryo donations that are being considered (unless the retrospective rule applies).

A. The original intending parents (IPs) use *both their own* gametes

Scenario 1	Scenario 2	Scenario 3	Scenario 4
Original IPs have a child.	Original IPs have a child. Consent	Original IPs do **not** have a child. Consent	Original IPs do **not** have a child. Consent
First recipients have a child.	First recipients do **not** have a child.	First recipients have a child. Consent	First recipients do **not** have a child.
Subsequent recipient **not allowed.***	Subsequent recipient allowed.	Subsequent recipient allowed.	Subsequent recipient allowed.

* Because of the two-family limit.

- In scenario 3, **both** the original IPs and the recipients who have had a child using the embryos must consent to any subsequent donation. This is because the original IPs have a genetic interest, and had the embryos created for themselves, and the recipient family will have a full genetic sibling if the embryo is donated and results in a living child.

B. The original intending parents use *one of their own gametes and one from a donor*

Scenario 1	Scenario 2	Scenario 3	Scenario 4
Original IPs have a child.	Original IPs have a child. Consent	Original IPs do **not** have a child. Consent	Original IPs do **not** have a child. Consent
First recipients have a child.	First recipients do **not** have a child.	First recipients have a child. Consent	First recipients do **not** have a child.
Subsequent recipient **not allowed.**	Subsequent recipient allowed.	Subsequent recipient allowed.	Subsequent recipient allowed.

- In scenario 3, **both** the original IPs and the recipients who have had a child using the embryos must consent to any subsequent donation. This is because the original IPs have a (partial) genetic interest, and had the embryos created for themselves, and the recipient family will have a full genetic sibling if the embryo is donated and results in a living child.

C. The original intending parents use *two donated gametes*

Scenario 1	Scenario 2	Scenario 3	Scenario 4
Original IP(s) have a child.	Original IPs have a child. Consent	Original IPs do **not** have a child.	Original IPs do **not** have a child. Consent
First recipient(s) have a child.	First recipients do **not** have a child.	First recipients have a child. Consent *This is the "on-donation"*	First recipients do **not** have a child.
Subsequent recipient **not allowed.**	Subsequent recipient allowed.	Subsequent recipient allowed.	Subsequent recipient allowed.

- In scenario 3, the recipients can **on**-donate surplus embryos because they have had a child that would be born from the embryos that are to be donated and because the original intending parents did not have a child, nor do the original intending parents have gametes in the embryos. This means the original intending parents are considered to have less of a connection to the embryos. Since the original intending parents have not had a child using the embryos, there is no full-genetic sibling connection either.
- These provisions for consent do not prevent original intending parents from placing conditions on their original embryo donation. For example, if they wish they may consent to embryo donation subject to them not being on-donated.

Risks to manage

- Surrogacy and donor conception involve some risks to offspring and the birth mother. Some examples of these risks are:
  - poor health of the offspring (eg, because the donor has a significant inheritable disease)
  - citizenship risks
  - having no genetic link to parents when that would have been a possibility (and any psychological effects that may have on the offspring)
  - disputes arising in surrogacy cases that affect the child
  - intending parents refusing to adopt the child.
- These risks should be mitigated by precluding the use of a procedure that would allow the intending parents to prioritise some financial purpose or social purpose over the wellbeing of the offspring.
- The use of assisted reproductive technology (ART) can bring costs to society and risks to offspring, so its use needs to be justified. Justifications for its use are that there is a medical need, or a need associated with relationship status (including sexuality). However, when using surrogacy and donor conception, ECART must also consider the motivation of parents to have children if, for example, they are placing all the risks of pregnancy onto others without justification, or are not considering interests of offspring.