

21 October 2020

Dr Kathleen Logan
Chair
Advisory Committee on Assisted Reproductive Technology
Wellington

By email: acart@health.govt.nz

Re: Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos – feedback on consultation document

1. Introduction

- 1.1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa welcomes the opportunity to comment on the *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos, Stage Two consultation document 2020*, prepared by the Advisory Committee on Assisted Reproductive Technology (**ACART**).
- 1.2. The Law Society’s submission responds to the consultation document’s questions about whether the Ethics Committee on Assisted Reproductive Technology (**ECART**) should be granted a new power to authorise the retrieval of gametes and reproductive tissue from deceased individuals:

Question 12: Do you agree that ECART should recommend a change to the HART Order 2005 so that it is clear that posthumous retrieval is never an established procedure?

Question 13: Do you agree that subject to the change to the HART Order 2005, ECART could authorise posthumous retrieval?
- 1.3. Other questions in the consultation document deal with public policy issues that are outside the Law Society’s remit and are therefore not addressed in this submission.

2. Legal basis for posthumous retrieval of gametes and reproductive tissue

The current legal framework

- 2.1. The consultation document identifies a number of gaps and areas of uncertainty in the legislative framework for assisted human reproduction, and the Law Society agrees with ACART’s conclusion that New Zealand needs an updated, comprehensive regulatory framework.¹ The Human Assisted Reproductive Technology Act 2004 (**Act**), the Human Assisted Reproductive Technology Order 2005 (**Order**) and the *Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man* (**Guidelines**) are dated and do not reflect recent societal and technological advances – including

¹ *Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos, Stage Two consultation document 2020*, at [4], [13], [16], [43], [49].

technology which now makes it possible to retrieve gametes and reproductive tissue after a person has died. Clearer guidance would foster the purposes and principles of the Act.

- 2.2. Any changes to the Order and the Guidelines must however be made within the bounds of the Act. The consultation document asks whether the Order should be changed to make it explicit that posthumous retrieval of gametes and reproductive tissue is authorised, but as noted below ECART's current statutory functions do not expressly permit it to approve posthumous retrieval.
- 2.3. ECART's functions are set out in section 28 of the Act. Section 28(1)(a) provides that ECART can consider and determine applications for approval for the performance of "*assisted reproductive procedures*". Assisted reproductive procedures are defined in section 5:

“(a) *means a procedure performed for the purposes of assisting human reproduction that involves –*

- (i) *the creation of in vitro human embryo; or*
- (ii) *the storage, manipulation or use of an in vitro human gamete or an in vitro human embryo; or*
- (iii) *the use of cells derived from an in vitro human embryo; or*
- (iv) *the implantation into a human being of human gametes or human embryos; but*

(b) *does not include an established procedure*”. [emphasis added]

- 2.4. "*Established procedures*" are set out in a Schedule to the Order. The established procedures currently listed in the Schedule only relate to scenarios which involve the *use* of gametes and not their *retrieval*.²
- 2.5. The relevant provisions of the Act and Order indicate ECART's functions extend only to the posthumous use – and not the posthumous retrieval – of gametes. The limited scope of ECART's powers and functions was highlighted in *Re Long*,³ where the High Court needed to exercise its inherent jurisdiction to authorise posthumous retrieval of sperm, in the absence of a clear legislative framework. As Heath J noted, the Court was "*filling a legislative gap to provide a means by which sperm can be collected and stored pending a substantive application to the Ethics Committee as to its subsequent use*".⁴

Bridging the legislative gap

- 2.6. In the Law Society's view, for ECART to be permitted to authorise retrieval of gametes or reproductive tissue from a deceased person would require Parliament to consider these issues and to amend both the Act and the Order.⁵ Posthumous retrieval of gametes and reproductive tissue is a significant and contentious issue which should be given due consideration by Parliament.
- 2.7. Alternatively, a new function could be assigned to ECART by written notice from the Minister of Health (as allowed under section 28(1)(e) of the Act). However, making significant additions to

² This distinction is further illustrated in Part 2 of the Schedule which clarifies what is *not* an established procedure. Part 2 does not include any reference to posthumous retrieval of gametes or reproductive tissue, but clarifies that procedures involving the posthumous use of gametes or reproductive tissue are not established procedures.

³ [2017] NZHC 3263.

⁴ [2017] NZHC 3263 at [100].

⁵ Section 28 of the Act, and other relevant sections such as the definition of "*assisted reproductive procedure*" in section 5.

ECART's functions by written notice from the Minister may be ultra vires the statutory functions set out in section 28, and it would be preferable for the relevant provisions of the Act to be expressly amended by Parliament.

- 2.8. The functions of the Act would not be frustrated while ACART considers whether amendment of the Act is required. In the meantime, as demonstrated in the *Re Long* case the High Court is able to exercise its inherent jurisdiction to authorise posthumous retrieval of gametes and reproductive tissue.
- 2.9. The Law Society also recommends that ACART gives careful consideration to the tikanga and te ao Māori implications of posthumous retrieval of gametes and reproductive tissue, when determining whether it is appropriate to expand ECART's functions as described above.

3. Conclusion

- 3.1. If further discussion of these issues would assist, please do not hesitate to contact the Law Society's Health Law Committee convenor, Holly Hedley, via Law Reform Adviser Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Yours faithfully



Jacquie Lethbridge
NZLS Vice-President