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Our fertility laws can criminalize people trying to start a family. It's time for an overhaul

In addition to being paternalistic, misguided and unnecessary, our antiquated criminal prohibitions hurt the very people that the law was designed to protect

An employee arranges a test tube in a container used to freeze human eggs in a laboratory for In Vitro Fertilisation (IVF).Kostas Tsironis/Bloomberg

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On March 27 we held a press conference in Ottawa. Surrounded by fertility doctors, lawyers, agencies, surrogates and intended parents we announced plans to put forward a Private Member's Bill to decriminalize compensation for sperm and egg donors and surrogates. Currently, the Assisted Human Reproduction Act (the "AHRA"), prohibits compensating or

offering to compensate a surrogate for her services (s. 6(1)), paying or accepting consideration for arranging the services of a surrogate mother (s. 6(2) and 6(3)), and purchasing ova or sperm from a donor or a person acting on behalf of a donor (s. 7(1)). Violations are punishable by up to 10 years in jail and/or a $500,000 fine.

These activities should not be subject to criminal penalties. In addition to being paternalistic, misguided and unnecessary, these criminal prohibitions hurt the very people that the law was designed to protect – the children conceived through the use of third party reproduction, the donors, and the surrogates themselves.

It also causes roadblocks and difficulties for parents who cannot conceive a child and require assistance from others. Prior to the AHRA coming into force in 2004, there were about 20 sperm banks across the country. There is currently only one truly national sperm bank, and it has 20 to 40 sperm donors any given year to service the reproductive needs of the entire country. Canadian sperm banks have found it almost impossible to attract more donors without compensating them. About 95 per cent of the sperm used in Canada is imported from the United States, where compensation is permitted. Reliance on imports makes it all but impossible for the provinces to create a meaningful registry to keep track of health issues or maintain other important information for Canadian children conceived through the use of donor sperm. Moreover, as the U.S. practices favour anonymous donors, Canadians frequently have little choice but to use anonymous donors rather than known donors. Canadian law can require certain testing requirements are met for sperm imported into Canada, it is practically impossible to ensure that U.S. sperm donors have not lied on questionnaires as to their health or identity. Canadians are reliant on a system they cannot control or meaningfully influence.

Advancing technology has now also enabled use of cryopreserved ova, which Canadians are also importing. The challenges here are similar. Canadians are now importing ova from donors who were compensated in jurisdictions outside of Canada where such compensation is legal. Canada cannot guarantee that the donors had appropriate follow-up care or health insurance available to them, track how many times ova from the same donor are being used within our population, or how many retrievals the donors undergo.

Finally, it is also important to note that Canadian patients are often advised to travel to other jurisdictions to engage in ova donation because compensated ova donation is prohibited in Canada. In such circumstances, Canadian patients undergoing health services abroad may be endangered.

A small but vocal group of academics oppose decriminalization, asserting either that gamete donation and surrogacy itself should not exist or that compensating a donor or surrogate for their and risk is adverse to Canadian values. It is noteworthy that this community has not been involved in discussions with those most involved, such as the surrogates and intended parents themselves, or others with frequent, on-the-ground involvement with surrogacy such as fertility doctors and lawyers. These academics fail to acknowledge the issues caused by the law such as lack of gamete donors and the fears and uncertainty caused to intended parents and surrogates throughout a pregnancy and offer no solutions.

Adults in Canada are able to make rational choices as to what to do with their own bodies and do not need criminal prohibitions to protect them. Our laws have created an underground surrogacy market in Canada. Some surrogates feel they cannot be honest with their own

doctor or lawyer, and if wronged, feel they have no recourse. Parents who can afford navigating the surrogacy process without the threat of criminal sanctions go to the United States. Those less financially able tend to stay in Canada.

Perhaps less frequently discussed is that sections 6(2) and 6(3) of the AHRA criminalizes accepting consideration or paying someone to arrange for the services of a surrogate mother. This criminal prohibition is extremely problematic for a number of reasons. Various surrogacy consultancies exist across Canada. When done well, these consultancies play an important role in educating and supporting all parties. Just like an adoption agency, though, these organizations ought to be licensed and regulated. The provinces cannot step in and offer such protection when it seems these organizations are potentially illegal.
While the Private Member's Bill would decriminalize these matters, health regulations should be developed, including ensuring that a donor registry is in place to track the number of times sperm and ova are used in our population and to track any health issues. Provinces could create a framework for compensation, including limits if the province believed such limit was appropriate.

Nobody in this country should fear jail time because they want to be a parent, or because they want to help someone build a family. That's why we're working to update our laws.

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