

Chapter 7

Sex Selection

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Sex Selection

People intending to conceive may want to select the sex of their children. The reasons for wanting a child of a particular sex include:

- to avoid passing on a serious genetic condition which is associated with, or inherited through, a particular sex, for example, haemophilia, a sex-linked genetic condition which mostly affects males
- to ensure that a child to be born is the opposite sex to existing children in a family, sometimes referred to as 'family balancing'
- to fulfil personal or cultural preferences for a child of a particular sex.

Technology exists that facilitates the possibility of selection of a future child's sex prior to pregnancy. The commission's terms of reference require us to consider the desirability and feasibility of expanding access to any or all forms of ART. Sex selection is one form of ART.

In this chapter, we explain how ART can accomplish sex selection, outline the current law in Victoria, and examine the arguments for and against expanding access to the procedure.

SEX SELECTION TECHNIQUES

The two techniques used to select sex prior to conception are sperm sorting and preimplantation genetic diagnosis (PGD).

Sperm sorting is a process of separating X (female) and Y (male) chromosome-bearing sperm cells. Clinicians sort sperm and then select it for use in an insemination or IVF procedure. The likelihood of conceiving a child of the desired sex using this technique is variable.¹ Sperm sorting is not available in Australia.

The process of gene testing by PGD allows the sex of an embryo to be determined before it is transferred to a woman's body. We discuss PGD in Chapter 3.

CURRENT LAW

Sex selection by PGD is the only type of sex selection procedure permitted under Australian legislation.

The *Infertility Treatment Act 1995* bans treatment procedures which attempt to ensure a child's sex, except where it is necessary 'for the child to be of a particular sex so as to avoid the risk of transmission of a genetic abnormality or a disease to the child'.² The penalty for breach of this section is 240 penalty units (approximately \$26,000) or 2 years imprisonment, or both.³

The National Health and Medical Research Council (NHMRC) ethical guidelines on ART also prohibit sex selection by whatever means, except where it would reduce the risk of transmitting a serious genetic condition.⁴ The guidelines maintain that 'admission to life should not be conditional upon a child being a particular sex'. However, the guidelines acknowledge that 'sex selection is an ethically controversial issue' and issued the prohibition 'pending further community discussion'.⁵

OTHER JURISDICTIONS

Sex selection for non-medical reasons is not permitted in Western Australia⁶ or South Australia.⁷ In all other Australian states and territories, NHMRC ethical guidelines apply. Sex selection for non-medical reasons is prohibited in the United Kingdom,⁸ Canada⁹ and New Zealand,¹⁰ although these prohibitions have been reviewed.¹¹

In 2006, the United Kingdom government published its legislative proposal on sex selection in response to reviews by the Human Fertilisation and Embryology Authority and the House of Commons Science and Technology Committee. The UK government has decided that sex selection for non-medical reasons should continue to be prohibited, basing its decision on the strength of public opinion against sex selection and its possible ramifications, such as a preference for male children. The UK ban is intended to extend to sperm sorting as well as to PGD techniques.¹²

The American Society for Reproductive Medicine Ethics Committee recommends that sex selection for non-medical reasons should not be encouraged, and the initiation of IVF solely for sex selection purposes should be discouraged.¹³ However, sex selection for non-medical reasons is available in some US jurisdictions.¹⁴ In a 2005 survey of 186 US fertility clinics, 42% of clinics reported that they had provided PGD for non-medical sex selection.¹⁵

SUBMISSIONS

The commission received limited response to the issue of sex selection in submissions. A small number argued that sex selection for non-medical reasons should be permitted. Most of these submissions described families with two or more children of the same sex who wished for another child of the opposite sex and argued that sex selection was appropriate for reasons of family balancing. One woman, a mother of four sons said:

I have a desire as a mother and a woman, to also experience having a daughter. I feel this would complete our family and add a dimension that would give us as parents, and also the boys, a balance.¹⁶

SEX SELECTION FOR NON-MEDICAL REASONS

Selecting the sex of a child for non-medical reasons is controversial. Although the commission did not receive a large response to the issue of sex selection, we have considered various perspectives highlighted in recent debates in other jurisdictions to inform our recommendations.

Supporters of sex selection argue that choosing the sex of a child is a matter of reproductive autonomy to be determined by individuals in consultation with their doctors. Drawing on libertarian principles, they argue each person is entitled to live as they choose as long as they do not infringe upon the rights of others. The state may only interfere with these choices to prevent harm to others.¹⁷ There are no long-term studies that have tested whether children born following a sex selection procedure for non-medical reasons have been harmed as a result of their parents' choice.¹⁸ Supporters of non-medical sex selection argue that without evidence of harm there is no valid justification for banning the procedure.

However, some people who support sex selection for non-medical reasons believe that limits on its use are appropriate. Submissions to the commission argued that sex selection is acceptable where a family has one or more child of a particular sex, and would like to have a child of the opposite sex.¹⁹ Supporters say that in this context, many of the harms associated with sex selection are disposed of because family balancing encourages gender balance in the population.

Recent surveys conducted in the United States and Germany suggest that people desire a balance of gender within a family, rather than single sex dominance. Fifty per cent of 1197 respondents to a recent US survey said they desired a family with equal numbers of male and female children, whereas 27% expressed no gender preference.²⁰ A similar study of 1094 people conducted in Germany found that 58% of respondents did not care about the gender composition of their families, whereas 30% expressed a desire for equal numbers of males and females.²¹

These studies also suggest that demand for non-medical sex selection is low. Only 8% of 1197 respondents to the US survey said they would use

- 1 Sperm sorting is available using a variety of methods, at least one of which is part of a clinical trial in the United States. According to one company that offers sperm sorting, the accuracy rate of conception of males is 76% and of females is 91%: Genetics and IVF Institute, 'Microsort Current Results' <www.microsort.com> at 15 June 2006.
- 2 *Infertility Treatment Act 1995* s 50(2).
- 3 *Infertility Treatment Act 1995* s 50(1).
- 4 National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2004), 22.
- 5 *Ibid.*
- 6 Reproductive Technology Council, *Approval for Diagnostic Testing of Embryos* (2004).
- 7 *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 3.
- 8 Human Fertilisation and Embryology Authority, *Code of Practice* (6th ed, 2003), 8.9.
- 9 *Assisted Human Reproduction Act* [S.C. 2004, c.2] s 5(e).
- 10 National Ethics Committee on Assisted Human Reproduction, *Guidelines on Preimplantation Genetic Diagnosis* (2005), para 8.1.
- 11 Eg, Human Fertilisation and Embryology Authority, *Sex Selection: Choice and Responsibility in Human Reproduction* (2002); Human Fertilisation and Embryology Authority, *Sex Selection: Options for Regulation* (2003); House of Commons Science and Technologies Committee, *Human Reproductive Technologies and the Law, Fifth Report of Session 2004–05: Volume 1* (2005); Assisted Human Reproduction Implementation Office, *Issues Related to the Regulation of Pre-Implantation Genetic Diagnosis under the Assisted Human Reproduction Act* (2005).
- 12 Department of Health, *Review of the Human Fertilisation and Embryology Act: Proposals for Revised Legislation (Including Establishment of the Regulatory Authority for Tissues and Embryos)* (December 2006).
- 13 Ethics Committee of the American Society of Reproductive Medicine, 'Sex Selection and Preimplantation Genetic Diagnosis' (1999) 82 (Suppl. 1) *Fertility and Sterility* S245.
- 14 There are no legal restrictions on the types of PGD tests clinics can offer: Genetics and Public Policy Center, *Preimplantation Genetic Diagnosis* (2004), 13.
- 15 Susannah Baruch et al, 'Genetic Testing of Embryos: Practices and perspectives of U.S. IVF Clinics [In Press]' (2006) *Fertility and Sterility* 5.
- 16 Submission PP1 351 (Dr Kimberley Tuohy).
- 17 See eg Edgar Dahl, 'Boy or Girl: Should Parents be able to Select the Sex of their Children' (2005) Cardiff Centre for Ethics Law & Society, available at <www.ccells.cardiff.ac.uk/literature/publications/2005/dahlpaper.html> at 24 April 2005; John Harris, 'Sex Selection and Regulated Hatred' (2005) 31 *Journal of Medical Ethics* 291; Julian Savulescu, 'Sex Selection: The Case for' (1999) 171 *Medical Journal of Australia* 373.
- 18 Some studies have considered the success rates of sex selection procedures such as sperm sorting: E F Fugger et al, 'Births of Normal Daughters after MicroSort Sperm Separation and Intrauterine Insemination, In-Vitro Fertilization, or Intracytoplasmic Sperm Injection' (1998) 13(9) *Human Reproduction* 2367; see also Human Fertilisation and Embryology Authority, *Sex Selection: Options for Regulation* (2003), [120].
- 19 Submissions CP 240 (Rhianna Crosthwaite), CP 242 (Jane Saunders), PP1 9 (Trudie Healey), PP1 351 (Dr Kimberley Tuohy).
- 20 Edgar Dahl et al, 'Preconception Sex Selection Demand and Preference in the United States' (2006) 85(2) *Fertility and Sterility* 468.
- 21 E Dahl et al, 'Preconception Sex Selection for Non-Medical Reasons: A Representative Survey from Germany' (2003) 18(10) *Human Reproduction* 2231.

preconception sex selection methods.²² Similarly, in Germany 92% of respondents reported that they would not use sex selection technology.²³ Patients already undergoing infertility treatment expressed higher levels of interest in using preconception sex selection techniques.²⁴

Opponents of the practice of sex selection argue that its use for non-medical reasons elevates the status of gender in society and contributes to sex discrimination.²⁵ By its very nature, sex selection establishes children's gender as a critical part of their identity. Historically, the performance of sex selection through different techniques demonstrates discrimination against women.²⁶ In countries such as India and China where sex selection technology is used, it reflects a preference for males.²⁷ Opponents of non-medical sex selection also say that entry to life should not be conditional upon being a particular sex, as each human has an inherent dignity that should be respected.²⁸

Another perspective that opposes non-medical sex selection focuses on the rights of the child. Proponents argue that sex selection is incompatible with the belief that the parent-child relationship involves unconditional acceptance.²⁹ Instead, sex selection for non-medical reasons places a burden on a child to fulfil a particular role.

Others argue that the purpose of ART is to help people who cannot otherwise have children or whose children would be disadvantaged without the technology. Sex selection for non-medical reasons does not fit within this criterion, and diverts medical resources to a non-medical purpose. Public funding for non-medical sex selection is difficult to justify.³⁰ However, it is also true that permitting access to genetic technology on a user-pays basis makes it available only to those who can afford it and therefore privileges the wealthy.

A common argument expressed against permitting people to select the sex of their children is that the technology sits at the top of a 'slippery slope' that leads to the selection of embryos for other genetic traits. According to this perspective, there is no principled reason for allowing selection for gender but not for other traits (if and when such technology becomes available). This argument should be balanced against the strict controls placed on the use of PGD, which we discussed in Chapter 3.

CONCLUSION

The commission believes that the current legislative ban on sex selection for non-medical reasons should remain in place.

Under the guiding principles recommended by the commission, the health and wellbeing of a child must be given priority. It is difficult to identify ways in which the best interests of the child are served by permitting sex selection for a non-medical reason. In the absence of available evidence about the likely effects on a child of having been selected for their sex, the commission has adopted a cautionary approach.

The commission did not receive submissions to indicate that there is substantial community support for repealing the ban on non-medical sex selection. Moreover, the submissions that the commission did receive focused on the rights of parents, and not the health and wellbeing of the child to be born.

The commission believes there should be significantly more community discussion and debate about sex selection for non-medical reasons before the ban could be repealed. This view is consistent with NHMRC guidelines³¹ and the UK government position.³²

22 Dahl et al (2006), above n 20.

23 Dahl et al (2003), above n 21.

24 Tarun Jain et al, 'Preimplantation Sex Selection Demand and Preferences in an Infertility Population' (2005) 83(3) *Fertility and Sterility* 649.

25 Ethics Committee of the American Society of Reproductive Medicine (1999), above n 13.

26 The President's Council on Bioethics, *Staff Working Paper* (2003) available at <bioethicsprint.bioethics.gov/background/sex_control.html> at 19 May 2005.

27 United Nations Population Fund, 'The Promise of Equality: Gender Equity, Reproductive Health and the Millennium Development Goals', *State of the World Population 2005* (2005), 67.

28 T Baldwin, 'Reproductive Liberty and Elitist Contempt: Reply to John Harris' (2005) 31 *Journal of Medical Ethics* 288–90.

29 See eg National Health and Medical Research Council (2004), above n 4.

30 Guido Pennings, 'Personal Desires of Patients and Social Obligations of Geneticists: Applying Preimplantation Genetic Diagnosis for Non-Medical Sex Selection' (2002) 22 *Prenatal Diagnosis* 1123.

31 National Health and Medical Research Council (2004), above n 4.

32 Department of Health (2006), above n 12.