

TRADING THE GOLDEN EGG: UNDERSTANDING THE DIFFERENCES BETWEEN COMPENSATION, REIMBURSEMENT AND INDUCEMENTS FOR EGG DONATION IN AUSTRALIA

NEERA BHATIA* AND JULIAN KOPLIN**

There is a shortage of donor eggs in Australia, driven (inter alia) by age-related infertility, the family creation needs of same-sex couples, and the emerging needs for donor eggs in the context of mitochondrial donation. We explore the ethical, legal and social implications of different strategies to promote egg donation, focusing particularly on strategies that involve payment. We distinguish between three distinct approaches to offering payment – reimbursement, compensation and inducement – that are often conflated. We explain how these categories relate to Australian laws and regulations, and determine how various proposals for increasing supply should be categorised. We close by making some concrete proposals for how payments can be used to promote egg donation while avoiding financial inducements.

I INTRODUCTION

The demand for egg donors has grown globally since the birth of the first baby using donated eggs almost four decades ago.¹ This demand has increased in part due to the number of same-sex male couples seeking to create families using donated eggs and age-related infertility in women.² In Australia, the demand for donor eggs is currently unmet.³ We note two specific circumstances where the shortage of donor eggs is expected to impact individuals or couples. The first, and

* Associate Professor, Deakin University, Geelong, Australia, School of Law, Faculty of Business and Law, Director of Law, Health and Society Research Unit: neera.bhatia@deakin.edu.au.

** Dr Julian Koplin, Lecturer, Monash Bioethics Centre, Monash University, Australia: julian.koplin@monash.edu.

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1 Rosemarie G Hogan et al, “‘Battery Hens’ or ‘Nuggets of Gold’: A Qualitative Study on the Barriers and Enablers for Altruistic Egg Donation” (2022) 25(4) *Human Fertility* 688, 688 <<https://doi.org/10.1080/14647273.2021.1873430>>.

2 Ibid; Centers for Disease Control and Prevention, *Assisted Reproductive Technology Fertility Clinic and National Summary Report 2019* (Annual Report, 2019) 26; Jade E Newman, Repon C Paul and Georgina M Chambers, *Assisted Reproductive Technology in Australia and New Zealand 2021* (Report, September 2023) 30.

3 See Alex Polyakov and Genia Rozen, ‘Social Egg Freezing and Donation: Waste Not, Want Not’ (2021) 47(12) *Journal of Medical Ethics* e73:1–6.

most likely, reason for seeking the use of donor eggs is for embryo and subsequent family creation. The shortage of donor eggs for this purpose requires further discussion and action by fertility clinics and scholars alike.⁴ It has also attracted the attention of the mainstream media.⁵ We suggest that a second, emerging reason for seeking the use of donor eggs is for mitochondrial donation and the use of assisted reproductive techniques to assist women diagnosed with mitochondrial DNA disease to create a healthy embryo.⁶

A Aims and Structure of This Article

In this article, we critique some of the approaches that are fundamental to the discourse on strategies to increase egg donation in Australia and we explore some of the practices currently being undertaken in the United Kingdom ('UK') and the United States ('US'). More specifically, we focus on three broad strategies that could be employed to increase egg donation rates namely: (i) reimbursement; (ii) compensation; (iii) financial inducements (or 'incentivisation'); with some further discussion of (iv) rewards (or 'rewarded gifting'). We argue that it is important to clearly distinguish between these strategies as they raise distinct ethical and legal issues. At present, however, these terms are being applied loosely and often inaccurately. We argue that there must be a clear understanding of the nuances and differences between these four terms to be able to have a meaningful societal discussion about ways to increase egg donation for family creation and in the context of mitochondrial donation. We attempt to address this issue in this article, and in so doing, attempt to bring some much needed clarity and precision to discussions of egg donation and various strategies for increasing donation rates. While many of our suggestions are relevant across Australia (and indeed internationally), much

4 See also Hogan et al (n 1). It should be noted that the Victorian Government has recently introduced a public sperm and egg bank and has invested millions of dollars towards making fertility treatment more accessible to Victorians. We discuss this later in the article.

5 See Karin Hammarberg et al, 'We Asked People Why They Don't Donate Their Eggs or Sperm. Their Responses Could Help Us Attract More Donors', *The Conversation* (online, 21 November 2022) <<https://theconversation.com/we-asked-people-why-they-dont-donate-their-eggs-or-sperm-their-responses-could-help-us-attract-more-donors-193386>>; See also Edwina Storie, 'Agnes Donated Her Embryo in a Coparenting Agreement. Now That She Sees the Child Being Raised, She Regrets It', *SBS News* (online, 9 May 2024) <<https://www.sbs.com.au/news/the-feed/article/agnes-donated-an-embryo-and-is-now-watching-her-child-grow-up-from-afar-she-regrets-it/pkdjfoswy>>.

6 We discuss this in more detail in Part I(B) below. This involves removing the nuclear DNA from the woman's egg that contains the faulty mitochondria and inserting it into a healthy donor egg that has had its nuclear removed. This technique allows the woman to retain unique genetic information because the nuclear DNA is retained, and the defective mitochondria no longer exists. Mitochondrial disease is a group of conditions caused by mutations in either mitochondrial DNA or nuclear DNA. Severe mitochondrial disease can have a devastating effect on families, including: the premature death of children; painful, debilitating and disabling suffering; long-term ill health; poor quality of life. In Australia, between one in 5,000 and one in 10,000 people develop severe mitochondrial disease during their lifetime. Around one child per week is born with a severe form of the disease. See Andy Greenfield, 'Use of Mitochondrial Donation' in Botros Rizk and Yakoub Khalaf (eds), *Controversies in Assisted Reproduction* (CRC Press, 2020) 116. See generally Marie A Dziadek and Carolyn M Sue, 'Mitochondrial Donation: Is Australia Ready?' (2022) 216(3) *Medical Journal of Australia* 118 <<https://doi.org/10.5694/mja2.51309>>.

of this article focuses on the Victorian jurisdiction. The reason for this is because we refer to the recommendations made in the *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* ('Gorton Report'), a thorough and relatively recent investigation of egg donation law and ethics that is especially valuable and relevant.⁷

In Part II, we briefly discuss the process of egg donation and its importance and explore the motivations and experiences of egg donors and those seeking eggs. Part III considers the legal and regulatory landscape in Australia in the context of the donation of eggs and consider the concept of 'reasonable expenses' that are provided to egg donors. We turn to critique the three strategies that form the main focus of this article, namely: (i) reimbursement; (ii) compensation; and (iii) financial inducements/incentives to overcome the current shortage of eggs in Part IV of this article. In Part V, we explore some specific approaches and proposals that might alleviate some of the current donor egg shortages that do not sit squarely within our discussions in Part IV. These include a discussion about egg-sharing schemes and variable payments based on income (amongst others). We make some recommendations in Part VI and the concluding remarks follow. First, we set out the issues of shortage of eggs, possible reasons for the shortage and strategies to increase supply.

B Donor Egg Shortage for Family Creation

The *Gorton Report* noted a scarcity of donor eggs for assisted reproduction (not related to mitochondrial disease).⁸ It highlighted that due to the current shortages of gametes, including sperm available in regulated fertility clinics, individuals and couples might turn to using informal unregulated systems such as the internet or social media sites to source gametes, including eggs.⁹ This raises several ethical, legal and social concerns that have been discussed elsewhere by one of the authors of this article and reported extensively in the media recently.¹⁰ The report also documented a number of other contributing factors that might deter individuals or couples from seeking to source donor eggs from regulated fertility clinics. These included the associated costs, delays and limitations in sourcing donor eggs

7 Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Report, May 2019) 90 ('Gorton Report').

8 Ibid 90.

9 See Anita Stuhmcke, Jenni Millbank and Isabel Karpin, 'Assisted Reproductive Technologies, the Internet and Information Seeking: A Case Study of Australian Women Using Peer Online Forums to Seek Donor Eggs across Borders' (2020) 24(2) *Gender, Technology and Development* 155 <<https://doi.org/10.1080/09718524.2020.1719597>>.

10 See Neera Bhatia and Lily Porceddu, 'Donors and Dads Online: Emerging Trends and Legal Implications Involving the Internet in the Creation of Non-traditional Families in Australia' (2022) 43(2) *Adelaide Law Review* 912. See also Maani Truu, 'Inside the Facebook Group where Australian Women Subvert the System and Go Looking for Sperm', *ABC News* (online, 28 July 2024) <<https://www.abc.net.au/news/2024-07-28/inside-the-growing-online-sperm-marketplace/104103648>>; Henrietta Cook and Farrah Tomazin, 'Sperm Drought Fuels Unregulated Online Market and Sex Assault Concerns', *The Age* (online, 22 May 2021) <<https://www.theage.com.au/national/victoria/sperm-drought-fuels-unregulated-online-market-and-sex-assault-concerns-20210521-p57u0s.html>>.

through regulated clinics. For these reasons, some people may elect to seek donor eggs through friends or other known networks. However, in some cases choosing to find an egg donor using this informal avenue results in low quality eggs and overall outcomes are also poorer.¹¹ Other concerns raised by stakeholders¹² during the consultation and later published in the *Gorton Report* included lack of public awareness and information about the need for donors and donor programs, limited scope for financial ‘compensation’ of donors and restrictions on advertising and barriers to the importation of gametes (lengthy formal process).¹³ Further, the need for a more robust and proactive approach to addressing these issues was discussed, including active recruitment of potential donors – enabling better access to treatment for people who need donor gametes or embryos to create a family.¹⁴

It has also been suggested that the high demand for and shortage of Australian donor gametes (sperm and eggs) for family creation has been exacerbated by the global COVID-19 pandemic.¹⁵ During the peak pandemic period, potential donors (primarily sperm) were unable to donate to fertility clinics due to several lockdowns and restrictions on movement.¹⁶ Simultaneously, there was a surge in single women and same-sex couples wishing to conceive a child using donor gametes and seeking access to assisted reproductive treatment (‘ART’) through regulated fertility clinics.¹⁷ This resulted in an increase in waitlists for donor gametes. One Victorian fertility clinic noted a 90% fall in sperm donation inquiries.¹⁸ In 2020, one fertility clinic reported an average waiting period of twelve months for donor

11 *Gorton Report* (n 7) 90.

12 These stakeholders included but were not limited to fertility clinics, health practitioners, lawyers, regulators, parents and intended parents, donors, surrogates and donor-conceived people.

13 See recommendation 56 in the *Gorton Report* (n 7) xxvii. The Victorian Assisted Reproductive Treatment Authority (‘VARTA’) suspended the importation of donor materials from Ukraine in 2022 due to the current conflict and the potential for exploitation of donors. The *Gorton Report* recommended simpler streamlined processes to approve the importation of donor gametes in Victoria. However, this recommendation has not been implemented. Under section 36 of the *Assisted Reproductive Treatment Act 2008* (Vic), importation of donor materials into Victoria requires approval from VARTA. The legislation pertaining to importation does not specify the determining factors for VARTA to consider when approving donor gamete or embryo applications.

14 *Gorton Report* (n 7) 90–1.

15 Jaya Keane and Tessa Moll, ‘Fertility Care in the Era of COVID-19’ (2020) 1(6) *ADI Policy Briefing Papers* 1, 5; Sam Everingham and Andrea Whittaker, ‘The Impact of Covid-19 on Gamete Shipping by Australian and New Zealand Patients’ (2023) 63(1) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 105 <<https://doi.org/10.1111/ajo.13623>>.

16 This was especially pertinent in Victoria, where six lockdowns occurred, comprising one of the longest aggregate periods of *strict lockdown* in the world. See also Hassan Vally and Catherine Bennett, ‘COVID in Victoria: 262 Days in Lockdown, 3 Stunning Successes and 4 Avoidable Failures’, *The Conversation* (online, 17 December 2021) <<https://theconversation.com/covid-in-victoria-262-days-in-lockdown-3-stunning-successes-and-4-avoidable-failures-172408>>.

17 Shona Hendley, ‘Too Many Women, Not Enough Sperm: The Victorian Donor Dilemma’, *The Sydney Morning Herald* (online, 17 September 2022) <<https://www.smh.com.au/lifestyle/health-and-wellness/too-many-women-not-enough-sperm-the-victorian-donor-dilemma-20220906-p5bfqy.html>>.

18 *Ibid.*

eggs from its Australian egg bank, before partnering with an American egg bank in an attempt to relieve some of the wait time pressure.¹⁹

Recently, the Victorian Government began the rollout of public fertility services.²⁰ Thus far, the government has invested \$120 million in the delivery of the program to enable up to 5,000 Victorians to annually access fertility services, including up to 3,375 treatment cycles.²¹ The program is operating from several partner health services that are delivering a range of fertility services.²² The services are also accepting sperm and egg donations with specific eligibility for access to free public fertility services.²³ For a person to be able to access the services they must meet certain criteria, including: being a resident of Victoria, holding a Medicare card and having a specialist or GP referral.²⁴ Further, eligibility criteria state that at the time of treatment, the person must be a maximum age of 42 years old, and there is a lifetime cycle limit of two in vitro fertilisation ('IVF') or intra-cytoplasmic sperm injection cycles per person.²⁵

For some hopeful individuals or couples, this might assist in creating a family; however, these criteria will exclude many who have an interest in fertility treatment, especially in cases where fertility treatments are used by those over the age of 42 years or where there is a need for several cycles of fertility treatment due to fertility issues or, indeed, simply bad luck. Despite the eligibility restrictions, since the operation of the program, one baby has been born and more than 2,800 Victorians have commenced their fertility treatment. Additionally, 140 women have become pregnant. The Labor Government invested a further \$2 million in its 2024/2025 budget to the program.²⁶

The criteria for donation are also restrictive, not just for recipients of gametes. The public sperm and egg bank operating from the Victorian Royal Women's Hospital stipulates a range of criteria for those wishing to donate sperm or eggs.²⁷ For those seeking to donate eggs, the donor must not have had a baby within 12 months of wishing to donate, must not be undertaking fertility treatment at the time

19 'Donor Eggs Available Now with No Waiting Periods (QLD and NSW Only)', *City Fertility* (Web Page, 20 October 2020) <<https://www.cityfertility.com.au/partnership-with-the-world-egg-bank-reduces-one-year-waiting-list-for-donor-eggs/>>.

20 'Public Fertility Care', *Department of Health* (Web Page, 25 March 2025) <<https://www.health.vic.gov.au/public-health/public-fertility-care>> ('Public Fertility Care').

21 'One Year of Fairer and More Affordable Fertility Care', *Premier of Victoria: Hon Jacinta Allan MP* (Web Page, 12 November 2023) <<https://www.premier.vic.gov.au/one-year-fairer-and-more-affordable-fertility-care>> ('Fairer Fertility Care').

22 The following partner health services are now delivering a range of fertility services: Royal Women's Hospital, Monash Health, Mercy Health, Northern Health – Epping Hospital, Mildura Base Public Hospital, Bendigo Health, Southwest Healthcare – Warrnambool, Barwon Health – Geelong, Goulburn Valley Health – Shepparton, Grampians Health – Ballarat, and Western Health – Sunshine: see 'Public Fertility Care' (n 20).

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 'Fairer Fertility Care' (n 21).

27 'Donor Egg and Sperm Program', *The Women's: The Royal Women's Hospital* (Web Page, 6 December 2024) <<https://www.thewomens.org.au/patients-visitors/clinics-and-services/fertility-genetics/donor-egg-sperm-program>>.

of wishing to donate, or have a partner who is pregnant at the time that they wish to donate.²⁸ In Victoria, no donors (sperm or egg) can be paid for the donation of gametes and must be prepared for their identifying information to be registered with the statutory body – the Victorian Assisted Reproductive Treatment Authority (‘VARTA’).²⁹ The procedures for the registration of births from donated gametes, and the provisions regarding access to identifying information about gamete donors’ identity vary across states and territories.

C Donor Egg Shortage for Mitochondrial Donation

On 1 October 2022, the *Mitochondrial Donation Law Reform (Maeve’s Law) Act 2022* (Cth) (‘*Maeve’s Law*’) came into effect. The culmination of several years of advocacy by those impacted by mitochondrial DNA disease, their families and scientists marked a historic moment for this polarising and controversial Federal legislation to pass the Senate after a conscience vote and eventually become law.³⁰ The passing of *Maeve’s Law* casts fresh urgency on Australia’s egg shortage. In our discussion earlier, we speculate that the current and more notably future shortfall in available donor eggs might be attributed to the recently passed legislation permitting the use of eggs in the creation of non-defective embryos.³¹ This important legislation amends the law relating to human cloning and research involving human embryos (and related purposes). Mitochondrial donation therapy is a type of assisted reproductive technology that can assist women in circumventing the transmission of (certain types of) mitochondrial disease to their biological children.

This is achieved by several methods that can ensure that only healthy mitochondria are passed to the embryo, resulting in a healthy live birth. The two techniques that are legally permitted (with a license) during the trial phase of mitochondrial donation are maternal spindle transfer and pronuclear transfer. The first involves the transfer of the ‘maternal spindle’ (a structure containing chromosomes) from the intending parent’s egg into a donor egg. The second involves the fertilisation of two eggs (the first from the intending mother and the second from an egg donor), followed by the transfer of the pronuclei (a structure

28 Ibid.

29 Notably, VARTA ceased operation at the end of 2024 and its responsibilities were transferred to the Victorian Department of Health. Any further reference in this article to VARTA is in the former tense, not the present.

30 Jemima W Allen et al, ‘The Parliamentary Inquiry into Mitochondrial Donation Law Reform (Maeve’s Law) Bill 2021 in Australia: A Qualitative Analysis’ (2024) 21(1) *Journal of Bioethical Inquiry* 67 <<https://doi.org/10.1007/s11673-023-10257-4>>. See also Myrisha S Lewis, ‘Segmented Innovation in the Legalization of Mitochondrial Transfer: Lessons from Australia and the United Kingdom’ (2022) 22(1) *Houston Journal of Health Law and Policy* 227; Julian Koplin et al, ‘Ethical Implementation of Mitochondrial Donation in Australia’ (2022) 62(6) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 921 <<https://doi.org/10.1111/ajo.13603>>.

31 *Mitochondrial Donation Law Reform (Maeve’s Law) Act 2022* (Cth). It is now lawful for partial DNA donations, allowing women to give birth without passing on a genetic disease. The former bill amended the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) (‘*Cth Human Cloning Act*’) and the *Research Involving Human Embryos Act 2002* (Cth) which was subject to a conscience vote. The treatment involves replacing mitochondrial DNA from the mother with healthy mitochondrial DNA from the egg of a woman who is a donor. We discuss this in more detail later in this article.

containing nuclear DNA) from the first early embryo into the second. The success of mitochondrial donation thus relies on the availability of donor eggs.³² Since these techniques are experimental, they might indeed require more donor eggs than other, more established forms of assisted reproduction.

We foresee a potential shortage of donor eggs that might be used as ‘mitochondria donors’ in both research and future clinical practice for mitochondrial donation therapy and further research in this emerging area.³³ The importance and critical urgency of this issue is highlighted by the \$15 million Australian Government investment in 2023 into a university-led project to conduct a pilot program for mitochondrial donation – mitoHOPE. The project includes a clinical trial to ensure the safety, efficacy and feasibility of implementing mitochondrial donation in clinical practice settings. Further, research will be conducted to refine and improve the techniques available – all of which require the use of donor eggs.³⁴

D Strategies to Increase the Supply of Donor Eggs

There has been legal, bioethical and philosophical consideration of approaches to broadly ameliorate the shortfall of donor eggs, many of which involve the exchange of money.³⁵ These have included methods that promote compensation, reimbursement, incentivisation and more radical solutions such as open markets for donor eggs – where donors might be willing to sell their eggs to recipients who are willing to pay for them.³⁶ There is also ongoing discussion in Australia and overseas jurisdictions about strategies to promote and increase the supply of donor eggs.³⁷ Some of the debate has surrounded egg sharing programs (within which

32 Koplín et al (n 30) 922.

33 Ibid. See generally Angela Ballantyne and Sheryl de Lacey, ‘Wanted: Egg Donors for Research’ (2008) 1(2) *International Journal of Feminist Approaches to Bioethics* 145.

34 ‘What is Mitochondrial Donation?’, *Mito Foundation* (Web Page) <<https://www.mito.org.au/mitochondrial-donation/>>.

35 Nancy J Kenney and Michelle L McGowan, ‘Egg Donation Compensation: Ethical and Legal Challenges’ (2014) 4(4) *Medicolegal and Bioethics* 15 <<https://doi.org/10.2147/MB.S51328>>; Bonnie Steinbock, ‘Payment for Egg Donation and Surrogacy’ (2004) 71(4) *Mount Sinai Journal of Medicine* 255.

36 Payments beyond reimbursement have been discussed favourably in Saylor S Soinski, ‘Paid Donation: Reconciling Altruism and Compensation in Oocyte Transfer’ (2022) 20(2) *Yale Journal of Health Policy, Law, and Ethics* 514 (which argues that financial motivations for egg donations are legitimate); C Samorinha et al, ‘Payment to Gamete Donors: Equality, Gender Equity, or Solidarity?’ (2020) 37(1) *Journal of Assisted Reproduction and Genetics* 133 <<https://doi.org/10.1007/s10815-019-01625-4>> (which defends compensation for discomfort); Alex Polyakov et al, ‘Providers’ Attitudes Towards Payment to Egg Donors: An International Survey’ (2023) 26(6) *Human Fertility* 1439 <<https://doi.org/10.1080/14647273.2023.2265151>> (which finds widespread support among fertility professionals for regulated set payments beyond compensation). Cf Sonja Goedeke, Daniel Shepherd and Iolanda S Rodino, ‘Support for Recognition and Payment Options for Egg and Sperm Donation in New Zealand and Australia’ (2020) 35(1) *Human Reproduction* 117 <<https://doi.org/10.1093/humrep/dez257>>, which found limited support among fertility industry professionals or the public for payments beyond reimbursement of expenses, and in many cases ethical discomfort with financial rewards.

37 For example, Virtus Health is one the world’s top providers of assisted reproductive services in the world including Australia. They created an innovative online donor campaign – ‘Life. Pass It On.’ – to promote and encourage altruistic donations for the creation of families: see ‘Virtus Health: Donor’, *The Open Arms* (Web Page) <<https://www.theopenarms.com.au/our-work/virtus-health-donor-life-pass-it-on-5ya72>>. There has been considerable focus on egg disposition and making surplus frozen eggs available

egg donors receive discounted fertility treatment), greater facilitation of altruistic donations, and methods to improve the reimbursement of donors.³⁸

A recent study led by Molly Johnston investigated the use and outcome of frozen unused eggs over ten years.³⁹ The researchers found that ‘3,082 cycles resulted in egg freezing with 2,800 eggs discarded, donated or exported to another clinic. In total, 645 egg thaw cycles were performed, which translated to less than 13 per cent of patients with eggs in storage returning each year’.⁴⁰ Further, ‘of those patients who removed their eggs from storage, very few elected to donate their surplus eggs to others for reproductive purposes (23/151, 15%)’.⁴¹ They noted that no surplus eggs were donated to research throughout the study period. This was due to a legislative requirement that a clinic be running an active research project to accept eggs, a condition that was not met by any of the clinics included in the study.⁴² The researchers observed that fertility clinics in Australia do not store eggs prospectively for future research. The study highlighted that surplus eggs are not commonly donated to research or for reproduction. Later in this article, we consider whether compensation or financial incentives could or should be used to encourage such donations.

The shortage of donor eggs in Australia is a contemporary and live issue that demands the attention of public health, law and policymakers to assist in family creation and better understanding of critical health conditions.

II WHAT IS EGG DONATION AND WHY IS IT IMPORTANT?

The use of donor eggs varies among women. Some might elect to use donor eggs due to menopause or attempt to use donor eggs rather than their own where donor eggs might result in an increased chance of a successful pregnancy.⁴³ This is especially relevant in cases of advanced or advancing maternal age and associated declining fertility.⁴⁴ In other circumstances, women who have survived serious

to those in need. We discuss this later in this article. Polyakov and Rozen noted in 2021, 4,048 women in Victoria had eggs in storage, an increase of almost 30% since 2019. However, of those, only 159 (3.9%) women sought to access their eggs to use them in the last year: see also Polyakov and Rozen (n 3).

38 See *Gorton Report* (n 7) 103 [8.1]. We discuss reimbursement in more detail in Parts IV and V below.

39 Molly Johnston et al, ‘Storage Trends, Usage and Disposition Outcomes following Egg Freezing’ (2024) 48(4) *Reproductive BioMedicine Online* 103728:1–8 <<https://doi.org/10.1016/j.rbmo.2023.103728>>.

40 ‘New Research Provides Fresh Insights into Egg Usage, Donation and Disposal after Egg Freezing’, *Monash University* (Web Page, 28 December 2023) <<https://www.monash.edu/news/articles/new-research-provides-fresh-insights-into-egg-usage,-donation-and-disposal-after-egg-freezing>> (‘New Research’), discussing Johnston et al (n 39).

41 Johnston et al (n 39) 5.

42 ‘New Research’ (n 40).

43 Caitlin Dunne, ‘Donor Eggs for the Treatment of Infertility’ (2020) 62(9) *BC Medical Journal* 328.

44 The findings from a study conducted by Hogan found that women aged <40 were five times more likely to conceive a child using donor eggs than using their own. Additionally, where women used donor eggs from a donor <35 years of age there was a statistically higher live birth rate chance than using donor eggs from a donor <35 years of age. Notably, women in the age 40 range who were undergoing ART however still largely used their own eggs despite the minimal chance of a resulting birth: see Rosemarie G Hogan, ‘Egg Donation and Having a Baby in Australia’ (PhD Thesis, University of Technology Sydney, June 2020).

illnesses such as cancer, or cannot use their eggs due to genetic reasons, might opt to use donated eggs. For some, the use of donor eggs might be necessary as part of a surrogacy process.⁴⁵

In Australia and New Zealand in 2021, '[t]he average age of females donating oocytes/embryos was 32 years, with 39.3% of cycles in females aged 35 or older'.⁴⁶ A 'donation cycle' is defined as an ART treatment cycle in which a woman intends to donate or donates her oocytes to another woman.⁴⁷ Further:

There were 689 (54.8%) donation cycles where the recipients were female-male intending parents followed by 284 (22.6%) donation cycles where the recipients were female-female intending parents ... There were 53 donation cycles where the recipients were single male or male-male intending parents, for use with a surrogate gestational carrier and 59 cycles where oocytes were donated but no intending parents had been assigned to receive the oocytes at the time of the donation cycle.⁴⁸

The nuances and multifaceted governance processes to access donor eggs are likely to contribute to the current shortfall of eggs in Australia.⁴⁹ Egg donation is only permitted altruistically – where eggs are gifted and cannot be sold. The same prohibition applies to donated sperm. However, recently there has been a surge in people sourcing sperm via unregulated systems through the internet and social media sites such as Facebook groups. Online sperm donors are readily accessible online and have been providing sperm for artificial insemination at home or in some cases natural insemination via sexual intercourse. This unregulated practice is a controversial live issue of debate amongst scholars and regulated fertility clinic providers and has captured widespread media attention.⁵⁰ Despite the risks involved with the practice, women and couples are using informal sperm donation to circumvent waitlists and costs involved with regulated fertility clinics.

The same, however, does not easily apply to those seeking donor eggs. While women and couples seeking donor eggs might use the internet, social media platforms or other informal advertising methods⁵¹ to seek donors or those interested in donating, for example, existing surplus eggs stored in fertility clinics – the process of extracting or harvesting eggs requires medical intervention and pre-egg collection medication and monitoring.⁵² It is arguably also physically, psychologically, financially demanding and significantly time intensive.⁵³ Egg donation is not a process that can be undertaken in the comfort of a person's

45 See Catherine Pesce, 'Donor Egg, Surrogacy, and Adoption for Breast Cancer Survivors' (2023) 15 *Current Breast Cancer Reports* 24 <<https://doi.org/10.1007/s12609-023-00477-3>>. See generally Anika L Nelson, 'Sorting the "Good Eggs" from the "Bad Eggs": Exploitation and Discrimination in Surrogacy and Egg Donations' (2024) 45(3–4) *Women's Rights Law Reporter* 194.

46 Newman, Paul and Chambers (n 2) 30.

47 Ibid 29.

48 Ibid 30.

49 We discuss the legal landscape in Part II below.

50 See Bhatia and Porceddu (n 10).

51 See, eg, online forums such as 'About Me and My Website', *Egg Donor Angels* (Web Page) <<http://www.eggdonorangels.com.au/>>. See also Stuhmcke, Millbank and Karpin (n 9).

52 Chris Russell, 'Your Guide to a Successful Egg Collection', *NewLife IVF* (Web Page, 20 October 2023) <<https://www.newlifeivf.com.au/your-guide-to-a-successful-egg-collection/>>.

53 Linsay B Gezinski et al, 'Exploring Motivations, Awareness of Side Effects, and Attitudes among Potential Egg Donors' (2016) 41(2) *Health and Social Work* 75, 75 <<https://doi.org/10.1093/hsw/hlw005>>.

home or other location where there is a simple requirement of privacy and storage equipment for the donation. Further, the quality and quantity of eggs collected are dependent on the age of the woman from whom the eggs are being extracted.⁵⁴

A Egg Donation: Process and Procedure

Most egg donors in Australia are not anonymous. Instead, most donors are women donating eggs to a close friend, relative or acquaintance. Where anonymous egg donation does take place, donors tend to be recruited through fertility clinics or online forums.⁵⁵ Regardless of how a (potential) donor is sourced, as noted earlier, donation must be altruistic (in the sense of being unpaid). Some requirements must be met for a woman to become a donor when arranged through a fertility clinic including psychological counselling for both donor and recipient, it is preferable that the donor has completed her own family, has had successful pregnancies and is between 25–38 years of age.⁵⁶

During counselling the potential donor and recipient will be required to consider a range of social, ethical and legal implications about the decision to donate or receive donor eggs. These might include matters such as: whether the donor might seek to contact any child born to the recipient in the future, how the donor might feel about a child born using donated eggs, how the donor's relationship might shift with the recipient (if at all) if the recipient and donor are known to one another.⁵⁷ Similarly, the potential recipient of donor eggs will be required to consider questions such as: whether they will inform any child born to them about their conception story, if the recipient has allowed themselves time to prepare and come to terms with connecting/bonding with a child that does not have a genetic connection to them, how they might feel about a child seeking information about their egg donor in the future – where the egg donor is anonymous and unknown to the them.⁵⁸

The egg retrieval process briefly discussed earlier, requires medical intervention and consultation and can be time and cost-consuming. Prior to egg retrieval the egg donor will be requested to disclose medical and family histories and blood and genetic screenings for a variety of different conditions such as HIV, Hepatitis B, Hepatitis C, the Sickle Cell trait and others. Daily hormone injections are required to stimulate the ovaries with the aim of obtaining more eggs from the follicles. The hormone injection period can last up to 14 days, with regular transvaginal

Susanna Graham et al, 'Being an Identity-Release Donor: A Qualitative Study Exploring the Motivations, Experiences and Future Expectations of Current UK Egg Donors' (2016) 19(4) *Human Fertility* 230.

54 Virtus Health, 'Egg Freezing Success Rates', *IVF Australia* (Web Page, 6 October 2023) <<https://www.ivf.com.au/blog/tas-egg-freezing-success-rates>>.

55 Stuhmcke, Millbank and Karpin (n 9); 'Finding Your Perfect Match: Egg and Embryo Donation in Victoria', *VARTA: Victorian Assisted Reproductive Treatment Authority* (Web Page, January 2020) <<https://www.varta.org.au/resources/news-and-blogs/finding-your-perfect-match-egg-and-embryo-donation-victoria>>.

56 Access Australia, 'Donor Oocyte' (Fact Sheet No 8, March 2011) 1 <<https://access.org.au/wp-content/uploads/2010/01/8-donor-oocyte.pdf>>.

57 Ibid 3.

58 Ibid.

ultrasound scans (and internal examinations) and blood tests to check the growth of the follicles and ovarian maturation. When deemed medically appropriate, the eggs are retrieved while the egg donor is under general anaesthetic and sedated usually in a day procedure. The retrieval is made using a fine needle inserted into the vagina to locate and identify follicles to retrieve the eggs.

There is usually some discomfort and minimal bleeding after the egg retrieval. However, like any medical procedure, there are risks involved that can present in some cases. Some mild complications can include nausea, water retention and hot flushes. More serious complications can include hyperstimulation which can require hospitalisation, development of cysts on the ovaries, or in some rare cases pelvic infection.⁵⁹ Likewise, there might be risks to recipients of donor eggs such as infection, multiple pregnancies from a single embryo transfer and genetic diseases affecting offspring (despite donor screening during egg retrieval).⁶⁰ The costs involved in egg retrieval vary across Australian clinics.⁶¹ Some fertility clinics have dedicated egg donation programs to assist donors and recipients. Given the invasive nature of egg retrieval, it is useful to have some understanding of the motivations and experiences of egg donors. A better insight into this might also assist in how to increase donation rates. We briefly explore some of the reasons why women donate below.

B Egg Donation: Motivation and Experiences

A study was conducted by Rosemarie G Hogan et al about the motivations of egg donors in Australia. Of the 18 women who had donated their eggs, eight donated to a known recipient (friend/relative), and the others donated to someone they did not know but had connected with in the online space or via a third party.⁶² Only two of the donors had not had children before making an egg donation. Interestingly, none of the study participants had significant knowledge about egg donation until they had a personal experience of knowing someone who had suffered fertility issues or until they were exposed to egg donation via the media. Thus, discussion of egg donation appeared not to be a common or everyday discussion point in social parlance – rather a nuanced and particular public and health concern with a narrow purview for those experiencing fertility issues and for those around them. The study found that almost half of the participants became aware of egg donation after being approached by a friend or relative experiencing fertility issues, who requested their help by asking for a donation.⁶³ Others learned about egg donation from reading or hearing about it in traditional and social media. A common driver for donating was a desire to help others. This was especially pertinent in cases where being asked

59 Ibid 2.

60 See generally Michail Pargianas et al, 'Complications in Oocyte Retrieval' in Antonio Malvasi and Domenico Baldini (eds), *Pick Up and Oocyte Management* (Springer, 2020) 305. An extreme case can be found here: Swati Tyagi, Asit Ranjan Mridha and Chittaranjan Behera, 'Sudden Death of an Egg Donor during Oocyte Retrieval Due to Ovarian Hyperstimulation Syndrome' (2022) 12 *Autopsy and Case Reports* e2021385:1–7 <<http://dx.doi.org/10.4322/acr.2021.385>>.

61 Monash IVF is one example: see 'Using Donor Eggs', *Monash IVF* (Web Page) <<https://monashivf.com/services/fertility-treatment-options/donor-eggs/>>.

62 Hogan et al (n 1) 691.

63 Ibid 691–2.

to be a donor by a friend or relative experiencing fertility problems. Linked to this, was a desire to help others experience motherhood/parenthood by becoming an egg donor and helping a potential egg recipient realise their dream of having a family.⁶⁴

Jordan P Duncan, Lucy E Caughey and Katherine M White found that donors were more likely to donate to friends or family members, followed closely by donating to research. Additionally, women were less likely to want to donate to fertility clinics and even less likely to couples online. Some women may be deterred by the idea of having their genetically linked child raised in an unknown family.⁶⁵ The findings from the Australian study are similar to those of studies conducted overseas. Others have found that a desire to help others was a strong motivator to donate eggs in countries such as the UK, Finland, Greece, Poland, Spain and Portugal (amongst others).⁶⁶

Recent research by Caughey et al noted that ‘oocyte disposition decisions are dynamic and complex for women, exacerbated by a general lack of understanding of these options’.⁶⁷ The final decision is framed by ‘whether women achieved motherhood, dealing with grief if they did not achieve motherhood, and considering the complexities of donating to others. Additional decision support through counselling, decision aids and early consideration of disposition when eggs are initially stored may help women make informed decisions.’⁶⁸

Conversely, Stephen Whyte et al, have highlighted a range of barriers to donation. In a survey conducted of 1,035 people, only a stark eight people had donated gametes (eggs or sperm).⁶⁹ Along with a physical impossibility to donate due to a vasectomy or infertility, other reasons for lack of willingness to donate included: a conscientious objection to donation, a willingness to donate if there were certain conditions that were met, and some participants had never given donation any thought as they were never ‘asked’ about it.⁷⁰ Arguably, much work is needed to raise social and educational awareness about egg donation. We aim to raise better awareness and a clearer understanding of *four* approaches that are used to increase donation rates via payments. Namely: (i) reimbursement; (ii) compensation; (iii) inducement/incentivisation; and (iv) rewards, and how they

64 Ibid 692.

65 Jordan P Duncan, Lucy E Caughey and Katherine M White, ‘Examining Willingness to Donate Frozen Oocytes among Women of Reproductive Age’ (2023) 47(5) *Reproductive BioMedicine Online* 103294:1–9, 6 <<https://doi.org/10.1016/j.rbmo.2023.103294>>.

66 See Sonja Goedeke, Heather Gamble and Rebecca Thurlow, ‘Motivations for Egg Donation to Previously Unknown Recipients: Donation as a Personal, Relational Act of Giving’ (2023) 26(2) *Human Fertility* 226 <<https://doi.org/10.1080/14647273.2021.2005263>>; Michiel De Proost, Nicky Hudson and Veerle Provoost, ‘“Nothing Will Stop Me from Giving the Gift of Life”: A Qualitative Analysis of Egg Donor Forum Posts’ (2021) 23(5) *Culture, Health and Sexuality* 690, 696–7 <<https://doi.org/10.1080/13691058.2020.1722242>>.

67 Lucy E Caughey et al, ‘Elective Egg Freezers’ Disposition Decisions: A Qualitative Study’ (2023) 120(1) *Fertility and Sterility* 145, 145 <<https://doi.org/10.1016/j.fertnstert.2023.02.022>>.

68 Ibid.

69 Stephen Whyte et al, ‘Understanding the Reasons Why Men and Women Do Not Donate Gametes’ (2023) 30(5) *Reproductive Sciences* 1651, 1652–3 <<https://doi.org/10.1007/s43032-022-01112-9>>. These included things such as willingness to donate to friends or relatives, more information about donation; if the potential donor has completed their own family creation; and if they were paid to donate.

70 Hammarberg et al (n 5).

should be applied in the context of egg donation in Australia with the aim of improving donation. Before we turn to examine these, we first consider the legal landscape concerning egg donation in Australia.

III EGG DONATION: THE LEGAL AND REGULATORY LANDSCAPE

The law in Australia is clear concerning any commercial trade in human gametes – it is strictly prohibited. This prohibition is clearly articulated in Federal and State legislation.⁷¹ The *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) (*Cth Human Cloning Act*) states in section 21(1) that ‘[a] person commits an offence if the person intentionally gives or offers valuable consideration to another person for the supply of a human egg, human sperm or a human embryo’. The term ‘valuable consideration’ is defined as ‘any inducement, discount or priority in the provision of a service to the person, but does not include the payment of reasonable expenses incurred by the person in connection with the supply’.⁷²

It is unambiguous in the legislation that the donation of eggs or sperm must be altruistic, whereby the donor is not ‘induced’ or provided with any payment – other than ‘reasonable expenses’ that they might incur in fulfilling the supply of the service. Here, for example, reasonable expenses that an egg donor might incur and are permissible include collection, storage and transport of the eggs.⁷³ It would, presumably instance, not include a lump sum payment of a large amount of money, for example, \$30,000 for the *act* of becoming an egg donor. The penalty for a breach of section 21 of *Cth Human Cloning Act* is 15 years’ imprisonment.⁷⁴

A What Are ‘Reasonable Expenses’?

In Australia, ‘reasonable expenses’ can legally be paid to the donor. However, exactly what expenses fall within the category of ‘reasonable expenses’ is deeply ambiguous. A 2011 Parliament of Australia Legal and Constitutional References Committee’s report (‘References Committee Report’) noted that:

While there is a prohibition on commercial trading in human gametes and embryos, ‘reasonable expenses’ are able to be paid to donors for costs incurred in making a donation. However, the term ‘reasonable expenses’ is not defined, and this appears to have created confusion in practical terms.⁷⁵

71 See *Human Cloning and Embryo Research Act 2004* (ACT) s 19; *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW) s 16; *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003* (Qld) s 17; *Prohibition of Human Cloning for Reproduction Act 2003* (SA) s 16; *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (Tas) s 20; *Prohibition of Human Cloning for Reproduction Act 2008* (Vic) s 17; *Human Reproductive Technology Act 1991* (WA) s 53Q. See also National Health and Medical Research Council, ‘Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research’ (Guidelines, 2023) 77 [13.23.3] (‘NHMRC Ethical Guidelines’).

72 *Cth Human Cloning Act* (n 31) s 21(3).

73 We discuss this later in this article.

74 *Cth Human Cloning Act* (n 31) s 21.

75 Senate Legal and Constitutional References Committee, Parliament of Australia, *Donor Conception Practices in Australia* (Final Report, February 2011) 53 [4.2].

The References Committee Report further noted one submission suggesting that there was a difference between ‘reasonable expenses’ that were paid to men for sperm donations and to women for oocyte donations.⁷⁶ In some cases, this ‘reimbursement’ took the form of small, fixed payments of, for example, \$200 (without egg donors being required to prove that they had in fact incurred these expenses).⁷⁷ Other submissions claimed that the amounts provided to donors did not take into account the inherent difficulties in harvesting oocytes from women.⁷⁸

Among other ambiguities, the References Committee Report noted that various contributors to the inquiry held that ‘reasonable expenses’ eligible for reimbursement should be considered to include only travel expenses, both travel and medical expenses, and in one case the ‘time commitment’ of donors.⁷⁹ *Gorton Report* has likewise noted that Australia lacks ‘clear guidance on what is fair, non-commercial reimbursement’, with different ART providers paying differing amounts.⁸⁰

Inconsistency also applies in guidance from industry bodies. The Reproductive Technology Accreditation Committee (‘RTAC’) of the Fertility Society of Australia has advised, in a technical bulletin, that ‘reasonable expenses’ should be understood to include medical, travel and accommodation costs, as well as any legal advice associated with donation. They hold that reimbursement should occur only if donors can provide verification of the expenses (for example, via receipts), except for small expenses below the value of \$50.⁸¹ The VARTA adopts a slightly different understanding of ‘reasonable expenses’. Like RTAC, they include medical and travel expenses. However, unlike RTAC, they exclude legal expenses but include counselling expenses and loss of earnings.⁸² The National Health and Medical Research Council (‘NHMRC’) Guidelines offer yet another list. In common with RTAC and VARTA, the NHMRC holds that it is reasonable to reimburse verifiable medical and counselling costs, travel and accommodation costs, loss of earnings and legal costs. It also additionally permits reimbursement of insurance costs and childcare costs associated with donation.⁸³

Given this context, different fertility clinics interpret ‘reasonable expenses’ in different ways. For example, Monash IVF specifies that it will reimburse *any* costs that directly result from donation, as well as providing certain additional benefits – such as providing donors with their genetic screening results free of charge.⁸⁴ By contrast, Melbourne IVF considers the Victorian legislation to allow

76 Ibid.

77 Ibid 55 [4.9].

78 See, eg, ibid 53–4 [4.5].

79 Ibid 59 [4.23].

80 *Gorton Report* (n 7) xxv.

81 John Peek, ‘Donor Issues’ (Technical Bulletin No 3, RTAC, April 2011) [3] <<https://web.archive.org/web/20160229100241/https://www.fertilitysociety.com.au/wp-content/uploads/20110506-technical-bulletin-number-3.pdf>>.

82 ‘Becoming a Donor’, VARTA: *Victorian Assisted Reproductive Treatment Authority* (Web Page) <<https://www.varta.org.au/understanding-donor-conception/becoming-donor/>>.

83 ‘NHMRC Ethical Guidelines’ (n 71) 32 [5.4.1].

84 ‘Become an Egg Donor’, *Monash IVF* (Web Page) <<https://monashivf.com/services/donor-surrogacy/become-an-egg-donor/>>.

reimbursement for reasonable expenses such as travel and parking, but not for loss of work earnings.⁸⁵ Others explicitly argue that ‘time off work’ is covered by the category of reasonable expenses.⁸⁶

The ‘reasonable expenses’ threshold has also, controversially, been thought by some to cover substantial payments to egg donors, without any requirement to verify that these costs have been incurred. In 2015, the IVF chain City Fertility Centre offered women a fixed \$5,000 payment ostensibly to cover ‘reasonable expenses,’ though this offer was removed from the webpage after a media backlash and associated uncertainty regarding whether this offer complies with the relevant legislation and regulations.⁸⁷ To our knowledge, however, the question of whether a \$5,000 fixed payment is consistent with Australian regulations remains unsettled. Indeed, alongside calling for more explicit guidance on acceptable ‘reimbursement amounts’ for donors,⁸⁸ the *Gorton Report* suggests that one option is to publish a global fixed ‘reimbursement amount’ available to all donors,⁸⁹ with additional reimbursement possible to ‘recognise additional costs in exceptional cases’⁹⁰ – a suggestion that to some extent resembles City Fertility Centre’s strategy, and that seems to have been treated as consistent with the current legislation in Victoria.

We argue that there is a need for legal clarity and consistency as to what should be deemed as ‘reasonable expenses’ for egg donation, and that there should be uniformity across all states and territories.

The *Gorton Report*’s suggestion has international precedent. In the UK, a settled figure exists for expenses related to egg donation, regardless of where a person donates or their particular circumstances.⁹¹ The *Gorton Report* recommends following the practice in the UK. However, this suggestion is not without difficulties. As the controversy surrounding City Fertility’s \$5,000 fixed ‘compensation’ amount demonstrates, it is unclear whether offering substantial fixed sums falls within the remit of existing laws. As we illustrate below, the notion that a substantial fixed payment (modelled on the UK system) would constitute ‘reimbursement’ is open to challenge. Indeed, we suggest below that a substantial fixed payment is better characterised as compensation, or even in some cases as an inducement, depending on the amount of the payment and the circumstances of the donor.

For ease of reference please see Table 1 below which highlights how various jurisdictions regulate the role of payments in egg donation. Guidelines in each jurisdiction aim to limit egg donor payments to ‘reimbursement’ or ‘compensation’

85 Melbourne IVF, *Egg Donation Patient Information: Becoming or Using an Egg Donor* (Booklet, 29 June 2016) 3 <https://www.mivf.com.au/sites/mivf/files/2019-11/miv_20ppa5_eggdonationbooklet_webformat_0_0.pdf>.

86 ‘Egg Donors: Legalities and Requirements’, *Associate Professor Alex Polyakov* (Web Page, 9 August 2024) <<https://dralexpolyakov.com.au/egg-donors-legalities-and-requirements/>>.

87 Craig Butt, ‘Government Investigates Fertility Clinic over \$5000 Egg Donor Reimbursement’ *The Age* (online, 22 April 2015) <<https://www.theage.com.au/national/victoria/government-investigates-fertility-clinic-over-5000-egg-donor-reimbursement-20150422-1mq1v0.html>>.

88 See recommendation 52 in the *Gorton Report* (n 7) 104–5.

89 *Ibid.*

90 *Ibid.* 104.

91 ‘Using Donated Eggs, Sperm or Embryos in Treatment’, *Human Fertilisation and Embryology Authority* (Web Page) <<https://www.hfea.gov.uk/treatments/explore-all-treatments/using-donated-eggs-sperm-or-embryos-in-treatment/>>.

(understood in varying ways) but draws the line between ‘compensation’ and ‘inducement’ in sometimes very different places.

Table 1: Comparative Regulation of Egg Donor Compensation and Reimbursement

Australia	Donors can be reimbursed for ‘reasonable expenses’; however, what constitutes a reasonable expense is arguably open to interpretation.
UK	The Human Fertilisation and Embryology Authority (‘HFEA’) sets guidelines for ‘reimbursement’, comprising a set sum (£985 pounds) intended to cover expenses (eg, travel and time taken off work), with the possibility to claim more if expenses incurred as a result of donation are higher than this. ⁹² Women undergoing IVF are able to receive free or discounted treatment in exchange for donating some of their eggs as part of ‘egg sharing’ schemes. Financial ‘compensation’ associated with egg sharing can far exceed the set sum for HFEA reimbursement, with a single cycle of IVF costing £5,000. ⁹³
European Union (‘EU’)	The EU <i>Tissues and Cells Directive</i> requires donation to be ‘voluntary’ and ‘unpaid’ but permits reimbursement ‘strictly limited to making good the expenses and inconveniences related to the donation’. ⁹⁴
US	Payments are managed through industry self-regulation. 2021 Guidelines from the American Society for Reproductive Medicine recommend compensating donors an amount that ‘reflect[s] the time, inconvenience, and physical and emotional demands associated with participating in oocyte donation’. ⁹⁵ No specific sum is mentioned, but a previous iteration of the guidelines suggested that sums of up to \$5,000 are appropriate, that sums above \$5,000 require justification, and that sums above \$10,000 are inappropriate. ⁹⁶ There is evidence that ‘compensation’ often exceeds recommended levels. ⁹⁷ In practice, donation is often framed as a form of ‘work’; requests for egg donors are frequently listed online as job ads, and ‘compensation’ is considered taxable income. ⁹⁸
Canada	The purchase of gametes is illegal. Donors may be reimbursed for out-of-pocket expenses (eg, travel costs, childcare), but must supply supporting documentation. ⁹⁹

92 ‘Donating Your Eggs’, *Human Fertilisation and Embryology Authority* (Web Page) <<https://www.hfea.gov.uk/donation/donors/donating-your-eggs/>> (‘Donating Your Eggs’).

93 ‘In Vitro Fertilisation (IVF)’, *Human Fertilisation and Embryology Authority* (Web Page) <<https://www.hfea.gov.uk/treatments/explore-all-treatments/in-vitro-fertilisation-ivf/>>.

94 See *Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on Setting Standards of Quality and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage and Distribution of Human Tissues and Cells* [2004] OJ L 102/48 (‘*Tissues and Cells Directive*’).

95 Ethics Committee of the American Society for Reproductive Medicine, ‘Financial Compensation of Oocyte Donors: An Ethics Committee Opinion’ (2021) 116(2) *Fertility and Sterility* 319, 322 <<https://doi.org/10.1016/j.fertnstert.2021.03.040>> (‘ASRM 2021 Opinion’).

96 Ethics Committee of the American Society for Reproductive Medicine, ‘Financial Compensation of Oocyte Donors’ (2007) 88(2) *Fertility and Sterility* 305, 308 <[doi:10.1016/j.fertnstert.2007.01.104](https://doi.org/10.1016/j.fertnstert.2007.01.104)>.

97 Aaron D Levine, ‘Self-Regulation, Compensation, and the Ethical Recruitment of Oocyte Donors’ (2010) 40(2) *Hastings Center Report* 25 <<https://doi.org/10.1353/hcr.0.0245>>.

98 Anna E Hartman and Erica Coslor, ‘Thinking about Using Donated Eggs to Start a Family?’, *Pursuit* (online, 7 February 2020) <<https://pursuit.unimelb.edu.au/articles/thinking-about-using-donated-eggs-to-start-a-family>>.

99 ‘Reimbursing a Sperm or Ova (Egg) Donor or a Surrogate for Expenditures Related to Donation or Surrogacy’, *Government of Canada* (Web Page, 9 June 2020) <<https://www.canada.ca/en/health-canada/services/drugs-health-products/compliance-enforcement/information-health-product/reimbursing-surrogacy-donor-expenditures.html#a2>>.

IV CONCEPTUAL CATEGORIES AND PAYMENT FOR EGG ‘DONATION’

As noted earlier, there is a significant and growing shortage of eggs in Australia. This has led to a discussion of a variety of different strategies to overcome the current shortage. Many of these strategies involve the exchange of money in some form or another, although the quantity, size and circumstances of such payments vary considerably between proposals.

The options available in Australia are presumably constrained by the requirement that payment does not exceed the threshold of ‘reasonable expenses’. However, as mentioned above, precisely where this threshold falls is ambiguous. It is also questionable whether limiting payment to ‘reasonable expenses’ is itself justifiable; it could be argued (and, indeed, many do argue) that there is, in principle, no moral problem with offering egg donors much larger payments, including something akin to a market price.¹⁰⁰ Indeed, money can play a very different role in different contexts, depending on how and the purpose for which it is deployed. Its exchange can be mapped according to the following conceptual categories.¹⁰¹

A Financial Inducements

Providing a *new reason* to take a course of action, by offering to make the target of the incentive better off than they would otherwise be. To be effective, financial inducement incentives need to provide financial benefits that outweigh any drawbacks of the course of action they are incentivising. (Financial) incentives are examples of financial inducements. So are market payments; as Smith famously wrote, ‘[i]t is not from the benevolence of the butcher [sic] the brewer, or the baker that we expect our dinner, but from their regard to their own interest’.¹⁰²

B Reimbursement

Unlike inducements, reimbursement aims to reduce or eliminate the *financial costs* associated with a course of action (eg, travel expenses and/or lost wages). At most, reimbursement can render an act financially neutral; by definition, it cannot make one financially better off.

C Compensation

Counteracting the *disadvantages* of doing something – including, eg, time, effort and suffering. Compensation can leave somebody *financially* better off but should not constitute an incentive to take a course of action. The benefits of

100 See, eg, Janet Radcliffe Richards, ‘Selling Organs, Gametes, and Surrogacy Services’ in Rosamond Rhodes, Leslie P Francis and Anita Silvers (eds), *The Blackwell Guide to Medical Ethics* (Blackwell Publishing, 2007) 254.

101 See Ruth W Grant, *Strings Attached: Untangling the Ethics of Incentives* (Princeton University Press, 2011).

102 Adam Smith, *An Inquiry into the Nature and Causes of Wealth of Nations* (Oxford University Press, 1976) 9.

payment should not outweigh the drawbacks that they aim to compensate for, but instead aim to return the compensated party to their former baseline of wellbeing.

D Rewards

Recognising service, effort or achievement. While rewards can have financial value, they are not meant to operate as a financial incentive per se; for example, the cash award associated with winning the Nobel prize is meant to help recognise the contribution that the winner has made, not to (directly) incentivise attempts to win the prize. In the discussion that follows we examine how these categories can be distinguished from each other and which we think deserve further consideration.

1 Financial Inducement

We will be taking for granted that the exchange of eggs should *not* involve financial inducement. Organ and tissue donation in Australia (and most of the world) is governed according to a ‘gift paradigm’, whereby bodily parts and products are neither sold for financial gain nor treated like a market commodity.¹⁰³ This is not just the case for eggs, but also for blood, solid organs and sperm. It is even partly the case for human milk, a ‘product’ that is not explicitly regulated in Australia, but which informal Australian milk-sharing networks nonetheless insist should be exchanged altruistically rather than for cash.¹⁰⁴ Perhaps unsurprisingly, given this backdrop, qualitative research with potential egg donors has found a significant degree of resistance to the possible use of cash payments to incentivise donation.¹⁰⁵

To be consistent with the gift paradigm, payments to egg donors must not *induce* women to donate. Inducements are payments designed to encourage people to ‘donate’ (or, perhaps more accurately, sell) something by offering to make them better off, on balance, than they would have been otherwise. Inducement is inconsistent with the norms that currently underpin organ and tissue donation in Australia, regardless of whether these inducements constitute direct financial incentives (like cash payments) or indirect financial incentives (which could include tax credits, discounts on health insurance, educational scholarships and other offers to provide donors with something of significant financial value). Both kinds of incentives seek to introduce new reasons to donate – this is why it makes

103 In Australia, health sociologists have described blood and organ donation following a ‘gift template’ modelled after ‘gift relationships’, with ideas about organ donation representing a ‘gift of life’ having played a crucial role in legitimising organ exchanges. See Kieran Healy, *Last Best Gifts: Altruism and the Market for Human Blood and Organs* (University of Chicago Press, 2006). Organ donation is routinely described as a ‘gift of life’: see, eg, ‘The Gift of Life: What It’s Like to Receive an Organ Donation in Australia’, *ABC Listen* (ABC Radio National, 29 July 2024) <<https://www.abc.net.au/listen/programs/radionational-drive/organ-donation-donate-life-register-australia/104156530>>.

104 Neera Bhatia, Julian Koplin and Ainslee Spadaro, ‘White Gold on the Black Market: The Need for Regulation of Banking and Donation of Human Milk in Australia’ (2022) 48(2) *Australian Feminist Law Journal* 165 <<https://doi.org/10.1080/13200968.2022.2138187>>.

105 Catherine Waldby et al, ‘From Altruism to Monetisation: Australian Women’s Ideas about Money, Ethics and Research Eggs’ (2013) 94 *Social Science and Medicine* 34 <<https://doi.org/10.1016/j.socscimed.2013.05.034>>.

sense to describe them as ‘incentives’ – and hence are incompatible with the gift ethos that currently underpins organ and tissue donation in Australia.

There might be a case for rethinking this ‘gift paradigm’ and treating bodily parts and services akin to commodities. Some scholars have made the case for financial incentives for organ donation,¹⁰⁶ and others for paying egg donors in both research and assisted reproduction contexts.¹⁰⁷ There may be good reasons for Australia to consider such a change. Such an approach would, however, involve a significant change to the norms that currently underpin organ and tissue donation in Australia, require changes to both federal and state legislation, and raise serious ethical concerns and related issues such as commodification, exploitation and ‘undue inducement’.¹⁰⁸ This is an ambitious undertaking, and while it may be worth attempting, we will not assess the case for doing so here. Instead, we will consider a range of possible strategies that do *not* involve financial inducement.

Perhaps surprisingly, the rejection of financial *inducements* leaves open a broad range of alternative strategies. Regardless of what might be thought about financial inducements for egg donation, there is value in exploring these (potentially more practical) alternatives.

2 Reimbursement

On the definitions we are using, reimbursement involves *counteracting financial costs associated with egg donation*.¹⁰⁹ Although money changes hands, by our definition any money received as part of reimbursement *cannot* make a person financially better off than they would have been otherwise; otherwise, it would cease to be reimbursement.¹¹⁰ Instead, reimbursement can cover direct costs (such as the costs of the egg retrieval treatment cycle) and/or indirect costs associated with donation (such as travel costs or lost income).

Reimbursement does not provide any new incentives to donate; it merely mitigates some of the (financial) disincentives that might otherwise have dissuaded some women from donating. It is thus compatible even with the most thoroughgoing possible rejection of financial inducements.

106 James Stacey Taylor, *Stakes and Kidneys: Why Markets in Human Body Parts Are Morally Imperative* (Routledge, 2005).

107 Insoo Hyun, ‘Fair Payment or Undue Inducement?’ (2006) 442 *Nature* 629 <<https://doi.org/10.1038/442629a>>; Daniel B Shapiro, ‘Payment to Egg Donors Is the Best Way to Ensure Supply Meets Demand’ (2018) 53 *Best Practice and Research Clinical Obstetrics and Gynaecology* 73 <<https://doi.org/10.1016/j.bpobgyn.2018.07.009>>; Anna Curtis, ‘Giving ‘Til It Hurts: Egg Donation and the Costs of Altruism’ (2010) 22(2) *Feminist Formations* 80 <<https://doi.org/10.1353/ff.2010.0009>>.

108 See generally Declaration of Istanbul Custodian Group, *The Declaration of Istanbul on Organ Trafficking and Transplant Tourism*, 2008.

109 Grant (n 101) 37.

110 Consistent with the characterisation of reimbursement by NHMRC regarding the payment of participants in research as ‘[m]oney that is paid to participants toward their recovery of any expenses incurred as a result of participation in research (e.g. travel, accommodation, meals)’; National Health and Medical Research Council, ‘Payment of Participations in Research: Information for Researchers, HRECs and Other Ethics Review Bodies’ (Guideline, 2019) 1. Consistent also with the language of the Council for International Organizations of Medical Sciences and World Health Organization, ‘International Ethical Guidelines for Health-Related Research Involving Humans’ (Guidelines, 2016) 53.

There are both pragmatic and ethical reasons in favour of reimbursing egg donors. Pragmatically, the more that is done to dissolve *disincentives* to donation, the more likely it is that those interested in becoming an egg donor will follow through. Ethically, it seems reasonable to help people act on a desire to help others, without forcing them to take on financial burdens in addition to the inconveniences and risks associated with egg donation. On both grounds, payments that cover as many of the costs associated with donation as possible seem desirable.

3 Compensation

Reimbursement aims to avoid creating an *inducement* to donate by preventing donors from becoming better off financially. However, there is a middle-ground between reimbursement and inducement, in which donors may end up better off financially without being incentivised to donate. Financial compensation can serve as a kind of *recompense* for (non-financial) losses without spilling over into the category of an incentive.¹¹¹ Consider, for example, workplace injury compensation. While it is possible to receive a substantial payment for losing a limb on a job site, this payment serves to *reduce* or *repair* the (non-financial) losses experienced by the worker; it is quite obviously not intended to increase workplace injury rates by providing a new incentive for workers to lose limbs.¹¹²

Thus, not all payments that leave recipients better off *financially* necessarily constitute inducements. They can, instead, constitute compensation insofar as they serve to repair the inconveniences and losses experienced by the donor. Notably, some opponents of *markets* in body parts nonetheless defend compensation, so understood. For example, in relation to surrogacy, Anne Phillips calls for ‘compensation for actual costs, combined with some monetary recognition of the generosity of the donor; but not a market-driven payment reflecting overall supply and demand’.¹¹³ A similar claim could be made about egg donation. So long as the payment does not become so large that it provides a *new incentive* to donate, compensation is morally akin to reimbursement. (And if payment *were* to become so large that it provides a new incentive to donate, it would cease to *be* compensation and instead become a financial inducement.)

Compensation, then, is compatible with the current altruistic, unpaid system of organ and tissue donation – though compensation for time, effort, inconvenience,

111 We are here following the usage of this term by Grant. ‘Compensation means “rendering equal,” a “recompense or equivalent,” “payment for value received or service rendered,” or something that “makes up for a loss” ... Compensation in all of its forms equalizes or redresses a balance’: Grant (n 101) 37.

This is consistent with the *Tissues and Cells Directive*, which limits compensation to ‘making good the expenses and inconveniences related to donation’: *Tissues and Cells Directive* (n 94).

112 Workplace injury compensation has been variously conceptualised as a form of social insurance, a no-fault substitute for tort liability, and as a tool for managing workplace disability and facilitating return to work: Emily A Spieler, ‘(Re)Assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017’ (2017) 69(3) *Rutgers University Law Review* 891. The possibility that workers’ compensation might promote risky workplace behaviours is sometimes treated as a ‘moral hazard’, or possible undesirable side-effect, of such schemes: Allard E Dembe and Leslie I Boden, ‘Moral Hazard: A Question of Morality?’ (2000) 10(3) *New Solutions* 257 <<https://doi.org/10.2190/1GU8-EQN8-02J6-2RXX>>.

113 Anne Phillips, ‘It’s My Body and I’ll Do What I Like With It: Bodies as Objects and Property’ (2011) 39(6) *Political Theory* 724, 735 <<https://doi.org/10.1177/0090591711419322>>.

discomfort and risk does go beyond mere reimbursement and seems to fall outside the remit of ‘reasonable expenses’, since these ‘costs’ are not monetary expenses. Even if compensation is accepted in principle, any compensation beyond proven expenses must be carefully implemented. Compensation must avoid being so generous that it motivates donors who would not be interested in donating in the absence of these entitlements.

4 *Reward*

For the sake of completeness, we want to flag one additional role that payments (or other things with monetary function) could play – as a reward, which is distinct from reimbursement, compensation or inducement. There are efforts underway to create new rewards and honours for organ and tissue donors. To our awareness, however, no efforts are currently underway to explore gifts in relation to egg donation, and we are unsure how effective they would be.

A recent Australian example of a ‘rewards’ program can be found in the Australian Red Cross, which is trialling a program whereby donors can receive gifts such as t-shirts, mugs and socks following donations.¹¹⁴ Such gifts do, strictly speaking, have financial value; receiving gift socks might very slightly defray a person’s financial outlay on future clothing purchases, for example.

However, there are two reasons why it seems appropriate to distinguish such *rewards* from *inducements*. First, because t-shirts, mugs and socks are not of significant financial value and hence the opportunity of receiving a t-shirt, mug or even a pair of socks is unlikely to motivate any donors who would not otherwise wish to donate.

Secondly, because the main value of these goods is independent of, and indeed would be destroyed by, their exchange for cash. The significance of a Red Cross-themed reward is enmeshed with what they represent, much like the significance of a Nobel Prize is enmeshed with what *it* represents. A blood donation milestone t-shirt or a Nobel Prize statue purchased in a store, without any screening for eligibility, would not have the same meaning as the version given in recognition of a person’s efforts; a market would, to use Sandel’s terminology, ‘corrupt’ the good in question and diminish its value relative to the uncommodified version of these goods.¹¹⁵ These goods are valuable not primarily because of the financial value of the t-shirt or the statue itself, but because of the achievements and sacrifices that they honour. Exchanging these goods for cash destroys this symbolic value that they would otherwise hold.

Rewards, then, are not necessarily incompatible with the rejection of financial inducements. However, they will need to be implemented carefully to ensure that any rewards of significant financial monetary value do not constitute an incentive.

114 ‘Lifblood Gifts Program to Boost Donations’ *Australian Red Cross Lifblood* (Web Page, 28 November 2022) <<https://www.lifblood.com.au/news-and-stories/media-centre/media-releases/lifblood-gifts-program-boost-donations>>.

115 Michael J Sandel, *What Money Can’t Buy: The Moral Limits of Markets* (Penguin Press, 2013) 110.

5 Terminological Confusion

The definitions we have provided here do not neatly map into how these terms are used in practice. This is unavoidable since terms like ‘reimbursement’, ‘compensation’, ‘payment’, ‘markets’ and ‘financial incentives’ are used in a wide variety of ways, and often in ways that are inconsistent with each other. This is common not just in the literature on egg donation, but also in other health law and bioethics literature on organ transplantation and surrogacy. Some of the contradictory ways that the term ‘compensation’ has been used are documented in Table 2 below.

Table 2: Interpretations of ‘Compensation’ in Egg Donation Policy and Ethics Literature

UK HFEA	‘Compensation’ includes egg sharing schemes, wherein women undergoing IVF can donate some of their eggs to women in need of donor eggs in exchange for reduced or free IVF treatment. ¹¹⁶
Ethics Committee of the American Society for Reproductive Medicine (‘ASRM Ethics Committee’)	‘Compensation’ is treated as synonymous with ‘remuneration’; ‘high levels of compensation’ are described as potentially posing an ‘undue inducement’ to donate. ¹¹⁷
Meredith Nash	‘Compensation’ includes paying up to \$5,000 ‘in a carefully regulated market’ to ‘recognise the inconveniences associated with donation and make it worthwhile for egg donors’. ¹¹⁸
Hogan et al	Compensation is described in terms of ‘recompense’; ‘countries with an altruistic model of egg donation allow egg donors to be compensated for costs incurred’. ¹¹⁹ However, compensation is also described in terms that include financial incentives; ‘[a]s an incentive to increase the number of egg donors in Australia, the introduction of financial compensation for the risk and personal time invested in the donation process, similar to the UK model, is currently being debated’. ¹²⁰
Malinda Lee et al	Compensation is described both as an incentive and as a means of offsetting risks and inconveniences associated with donation. ¹²¹

116 Human Fertilisation and Embryology Authority, ‘Donation Review: Compensation of Donors and Benefits in Kind’ (Meeting Paper No 612, 19 October 2011) 6 (‘Donation Review’); Eric Blyth and Berenice Golding, ‘Egg Sharing: A Practical and Ethical Option in IVF?’ (2008) 3(4) *Expert Review of Obstetrics and Gynecology* 465 <<https://doi.org/10.1586/17474108.3.4.465>>.

117 ‘ASRM 2021 Opinion’ (n 95).

118 Meredith Nash, ‘Women Who Donate Their Eggs Deserve Compensation: Here’s Why’, *The Conversation* (online, 9 November 2012) <<https://theconversation.com/women-who-donate-their-eggs-deserve-compensation-heres-why-10515>>.

119 Hogan et al (n 1) 689.

120 Ibid.

121 Malinda S Lee et al, ‘Limitations on the Compensation of Gamete Donors: A Public Opinion Survey’ (2017) 107(6) *Fertility and Sterility* 1355 <<https://doi.org/10.1016/j.fertnstert.2017.03.001>>.

Phillips	Compensation is treated as distinct from market payment: money as compensation serves to recognise the work and generosity of donors. ¹²²
Anna Curtis	Advocates compensation in the sense of substantial payment: 'If we are going to allow gamete transfer in the United States, women should be well paid for it, because it is time-consuming, uncomfortable, risky, and potentially life-threatening.' ¹²³
Michelle J Bayefsky, Alan H DeCherney and Benjamin E Berkman	The terms 'reimbursement', 'compensation' and 'reward' are all used to refer to payments that may induce donors to donate. ¹²⁴

Proposals that would meet our criteria for a financial inducement have been framed as 'rewarded gifting',¹²⁵ 'donor compensation',¹²⁶ or a mechanism to 'offer a symbolic reward for the gesture of donation'.¹²⁷ On the other end of the spectrum, some theorists of commodification hold that *any* exchanges involving cash – including very small sums of cash offered merely as a symbolic gesture – can be described as a market.¹²⁸ This, too, is misleading, since (as mentioned above) market exchanges typically involve *financial* motivations.

Still others use distinct terms interchangeably. For example, the ASRM Ethics Committee holds that 'high levels of compensation' could pose an 'undue inducement' to donate,¹²⁹ thus blurring together what we treat as two distinct categories ('compensation' and 'inducement'). In the Australian context, Nash has proposed 'compensation' that comprises payment of up to \$5,000 'in a carefully regulated market' to 'recognise the inconveniences associated with donation and *make it worthwhile* [emphasis added] for egg donors' – the last part of which strongly suggests that the payment is at least partly intended as an inducement or incentive.¹³⁰ The term 'compensation', then, seems to be employed in (sometimes radically) different ways by different commentators and across different socio-legal contexts.

122 Phillips (n 113) 735.

123 Curtis (n 107) 94.

124 Michelle J Bayefsky, Alan H DeCherney and Benjamin E Berkman, 'Compensation for Egg Donation: A Zero-Sum Game' (2016) 105(5) *Fertility and Sterility* 1153 <<https://doi.org/10.1016/j.fertnstert.2016.01.019>>.

125 B Larjani, F Zahedi and S Ghafouri-Fard, 'Rewarded Gift for Living Renal Donors' (2004) 36(9) *Transplantation Proceedings* 2539 <<https://doi.org/10.1016/j.transproceed.2004.11.013>>.

126 Jack W Harbell and Amit K Mathur, 'Financial Compensation for Organ Donors' (2019) 24(2) *Current Opinion in Organ Transplantation* 182 <<https://doi.org/10.1097/mot.0000000000000617>>; Curtis (n 107); Nash (n 118).

127 Mélanie Levy, 'State Incentives to Promote Organ Donation: Honouring the Principles of Reciprocity and Solidarity Inherent in the Gift Relationship' (2018) 5(2) *Journal of Law and the Biosciences* 398, 414 <<https://doi.org/10.1093/jlb/lisy009>>.

128 Julian J Koplin, 'Commodification and Human Interests' (2018) 15(3) *Journal of Bioethical Inquiry* 429 <<https://doi.org/10.1007/s11673-018-9857-6>>.

129 'ASRM 2021 Opinion' (n 95) 320.

130 Nash (n 118).

6 Terms Such as ‘Reimbursement’ Are No Less Slippery

The *Gorton Report* notes that some stakeholders felt that ‘the current model for reimbursement does not sufficiently acknowledge the time, inconvenience, risk and discomfort associated with donation’.¹³¹ By implication, an alternative model of ‘reimbursement’ might cover these non-financial costs. However, on our understanding of these terms, any payment model that uses money to offset donors’ risks, discomforts and inconveniences is no longer a model of *reimbursement*, since the scope of payment is no longer limited to helping donors break even, financially. (It may, however, constitute a type of *compensation* or *inducement*, depending on how substantial the payments are).

It is questionable what weight, consideration and explanation should be given to such terminological confusion. One possibility is that the terms have not yet been sharply defined. Another, though more cynical, possibility might be that at least some authors seek to make their proposals seem more palatable by describing inducements as ‘compensation’ instead, thus downplaying the difference between current practice and what is being proposed. Regardless of the cause, terminological confusion is an obstacle to understanding what is at stake in any specific proposal to pay egg donors. Therefore, to assess these proposals, it is important to be able to describe – concisely – their most relevant features.

In the following section, we examine what inducement, reward, compensation and reimbursement *should* mean in the context of egg donation and make suggestions about their applicability to various proposals to improve egg donation rates.

V APPLICATION TO ‘EGG DONATION’ PROPOSALS

For the purposes of this article, we have rejected financial inducements, welcomed reimbursement and cautiously endorsed compensation and rewards – though we have raised worries about identifying where the line between compensation and inducement lies. We now turn to assess some specific proposals and practices where it is not obvious which category they belong to. In doing so, we hope to offer some constructive suggestions to improve egg donation in Australia.

A Financial Neutrality

One possible approach is to limit payment to strict reimbursement, ie, to pay only enough to offset financial expenses that donors have incurred as a result of a donation. These might include travel expenses or reimbursement for lost wages if time is taken off work. This appears to align with at least some current practices in Australia, as well as the gift model for organ and tissue transplantation operating in our country.

It is questionable how extensive such reimbursement should then be. One possibility, widely endorsed in relation to live organ donation, is to aim for *financial neutrality*, leaving donors no worse off, financially, than they would have been had

131 *Gorton Report* (n 7) 104.

they not decided to donate.¹³² Financial neutrality seems to us to be a reasonable goal, arguably, donors should not be expected to make further financial sacrifices beyond the inconveniences, discomfort and risks associated with donation. Financial neutrality also promises to indirectly promote the number of egg donors by erasing one important set of *disincentives* to donation (ie, the financial costs).

There has been some objection, however, that precisely *because* donation involves nontrivial sacrifices on the part of donors, they ought to receive payments that go beyond mere reimbursement. For example, the ASRM Ethics Committee argued in 2016 that failing to provide financial benefits to donors might ‘demean their significant contribution’.¹³³ Similarly, Curtis has argued that ‘[i]f we are going to allow gamete transfer ... women should be well paid for it, because it is time-consuming, uncomfortable, risky, and potentially life-threatening’.¹³⁴

But is this a reasonable objection? If egg donation *is* conceived as a market transaction, there is a sense in which it might be thought unfair to receive a low wage for such onerous and dangerous work. But the underlying question is whether egg donation *should* be conceived of as a market transaction – and the risks and discomfort involved do not help establish whether egg donation should be seen this way. If eggs are instead seen as a gift (as they currently are in Australia), then insisting on a financial benefit seems misguided; gifts are characteristically provided *without* an expectation of receiving financial benefit in return.¹³⁵

From the standpoint of the gift paradigm, we suggest that financial neutrality is a useful benchmark for morally appropriate reimbursement. It would ensure that the sacrifices of donating a woman’s eggs are no greater than they need to be and removes one important set of disincentives to donation. It should thus be welcomed both on the grounds of fairness and out of the pragmatic hope that eliminating financial disincentives may indirectly increase donation rates.

B Fixed Payments

Although payments to Australian egg donors should theoretically follow the ‘gift model’ discussed above, some fertility clinics have offered substantial lump sum payments ostensibly as a form of reimbursement. For example, a 2015 news article describes City Fertility Centre offering a lump sum of \$5,000 intended to cover the ‘reasonable expenses’ of egg donors. These included ‘consultations and counselling, transport to the hospital, time off work for both the woman and her partner and follow up visits’ as well as “[p]otential adverse events” leading

132 Dominique E Martin et al, ‘Strengthening Global Efforts to Combat Organ Trafficking and Transplant Tourism: Implications of the 2018 Edition of the Declaration of Istanbul’ (2019) 5(3) *Transplantation Direct* e433:1–13 <<https://doi.org/10.1097/TXD.0000000000000872>>.

133 Ethics Committee of the American Society for Reproductive Medicine, ‘Financial Compensation of Oocyte Donors: An Ethics Committee Opinion’ (2016) 106(7) *Fertility and Sterility* e15, e17 <<http://dx.doi.org/10.1016/j.fertnstert.2016.09.040>>.

134 Curtis (n 107) 94.

135 Again, it could be the case that an overhaul of altruistic norms in organ and tissue donation is appropriate. But an argument to this effect needs to show why this is, not just point out that blood and kidneys are worth less under an altruistic model than a commercial model.

to two days off work or more'. At least six women ultimately received this 'reimbursement'.¹³⁶

Whether such a lump sum does, in fact, constitute 'reimbursement' is questionable; this would be the case only if the actual expenses of egg donors consistently fell below the \$5,000 payment provided. If (as seems likely) the expenses of at least some donors would fall below this threshold, the term 'reimbursement' is inappropriate. For the term to apply, payment should match expenses that are actually incurred in individual cases.

In this case, a \$5,000 lump payment might be considered an example of an 'inducement'. However, we note that this might not be the case per se. However much financial benefit remains after genuine expenses have been covered would presumably not be very large – and hence might not pose a strong enough incentive to induce anybody to donate. The excess could, then, perhaps be framed as *compensation* for the inconveniences and efforts undertaken by the donor. However, there would be *some* value at which the payment would tip over into an inducement. We contend, that if a lump sum is to be offered it needs to be set at a value that is sufficiently low that it would not provide a meaningful incentive to 'donate'. One suggestion here might be to set variable payment amounts, based on the donor's income; we explore this option in more detail below.

1 Variable Payment Based on Income

The value at which 'compensation' (for non-financial costs) would spill over into 'inducement' will vary between individual cases. A key factor is the donor's financial situation. For instance, \$1,000 might be an insignificant amount of money to a high-income earner, but to somebody in a dire financial situation, an opportunity to earn \$1,000 might be very compelling. We suggest that one possibility might be to tether the size of the payment to the financial situation of the donor, on the grounds that this can help ensure that payment rates intended to compensate donors do not result in providing an inducement to others.

At first glance, this approach may appear inconsistent with international guidance on monetary compensation. The ASRM Ethics Committee Guidelines caution that providing different levels of compensation to women with specific characteristics may be morally objectionable, since doing so arguably constitutes a form of eugenics and might convey the message that oocytes are commodifiable.¹³⁷ However, those concerns are specifically aimed at selecting donors with 'desirable' traits – such as higher education or specific ethnicities – not at calibrating payments according to income. Indeed, anchoring compensation to financial need arguably reduces commodification, since it avoids market-style incentives and helps maintain the framing of donation as a gift. In any case, Australia is not bound by the ASRM Ethics Committee Guidelines.

136 Craig Butt, 'Egg Donor Money: Fertility Clinic Offers Women \$5000', *The Sydney Morning Herald* (online, 12 April 2015) <<https://www.smh.com.au/national/egg-donor-money-fertility-clinic-offers-women-5000-20150411-1miw9h.html>>.

137 'ASRM 2021 Opinion' (n 95) 321.

Another issue that is worthy of consideration is the ethical appropriateness of variable compensation. We note one main objection to the practice, which resembles the objection to financial neutrality considered earlier. Intuitively, it seems unfair for some women to receive significantly larger payments for their eggs than others. This objection seems all the more powerful when the poorest women stand to receive the least and the wealthiest women the most. Such an arrangement seems inegalitarian in the extreme.

Nonetheless, the problem we foresee with this objection is that the charge of unfairness makes sense *only* insofar as the payment is intended to make donors better off. If the aim is to help women meet their financial needs, then clearly it would be wrongheaded to provide those with the greatest need with the least cash. Financial compensation, however, aims not to benefit donors, but to restore them to some former baseline of wellbeing; it is a form of recompense for past losses, not an attempt to confer some advantage or benefit. The amount of money required to meet the donor's prior baseline of wellbeing will depend, *inter alia*, on the donor's existing financial situation. The threshold at which a payment moves from compensation to an inducement will *also* depend crucially on one's financial need. From the standpoint of the 'gift model', variable compensation does not raise concerns about fairness; on the contrary, equal payments raise concerns about 'compensation' bleeding into the category of 'inducement' for those with little income.

We recommend that if compensation beyond financial neutrality is implemented, any such 'compensation' should be tailored as carefully as possible to avoid unwittingly constituting an incentive. Adjusting any payments that go beyond financial neutrality according to the donor's financial situation may be one strategy for ensuring that compensation remains compensation and not an inducement. This strategy should not be dismissed out of hand.

C 'Egg-Sharing' Schemes

Egg-sharing schemes, which currently operate in the UK, are programs where women undergoing IVF can donate surplus eggs in return for discounted or free IVF treatment.¹³⁸ This arrangement helps reduce the cost of IVF for the donor and to increase the availability of donor eggs for recipients. Egg sharing appears to be widely endorsed by donors and recipients in the UK, with the caveat that some egg sharers who are ultimately unsuccessful in their attempts to conceive regret their participation.¹³⁹ It is considered by the HFEA to constitute a form of compensation.¹⁴⁰ Whether this categorisation is correct, however, is open to question.

138 See Timothy Bracewell-Milnes et al, 'Exploring the Knowledge and Attitudes of Women of Reproductive Age from the General Public towards Egg Donation and Egg Sharing: A UK-Based Study' (2021) 36(8) *Human Reproduction* 2189 <<https://doi.org/10.1093/humrep/deab157>>.

139 Zeynep B Gürtin, Kamal K Ahuja and Susan Golombok, 'Egg-Sharing, Consent and Exploitation: Examining Donors' and Recipients' Circumstances and Retrospective Reflections' (2012) 24(7) *Reproductive Biomedicine Online* 698 <<https://doi.org/10.1016/j.rbmo.2012.02.008>>. Any consideration of egg sharing should consider the consequences of egg sharing for all stakeholders, including possible psychological ramifications for women who failed to conceive and learn that the recipients of their eggs did conceive.

140 'Donation Review' (n 116) 6; Blyth and Golding (n 116).

Like other forms of egg donor ‘compensation’, the key question for our purposes is at what value this payment would tip over into becoming an inducement to donate. This value might actually be *lower* than for egg donors that are not already undergoing IVF, since IVF patients would already be undergoing many of the inconveniences, risks and discomforts associated with egg collection. The idea that payment provides recompense for these harms and risks makes less sense when donors would experience these effects anyway and are not experiencing them solely in order to donate their eggs.¹⁴¹ What this means is that whatever value is appropriate for compensation for egg donation *in general* might not be the same value as is appropriate for egg donation *in the context of egg-sharing schemes*, where smaller compensatory amounts might be appropriate.

Interestingly, however, the degree of financial compensation provided to egg sharers via discounted IVF treatment tends instead to greatly exceed that available to egg donors outside of IVF contexts. Compensation for egg donors usually amounts to £985 or less,¹⁴² whereas the discounts to IVF treatment provided to egg sharers can amount to £2,500–£5,000 per cycle (with multiple discounted cycles sometimes provided).¹⁴³ The financial benefits to egg sharers can thus greatly exceed those to egg donors.

Is there some reason why offering payment *outside* the context of IVF would constitute a lesser inducement than offering payment *inside* of it? We are unclear as to why this would be the case. A £2,500 discount on IVF treatment leaves egg sharers £2,500 better off, just as surely as a £2,500 payment would. It is inconsistent to offer more generous payments to egg ‘sharers’ than to egg ‘donors’; egg-sharing should be subjected to the same standards as other forms of compensation. We reject egg-sharing schemes as a viable option. In our view, such schemes carry the potential for disguising inducements as ‘compensation’ and involve a double standard with traditional egg donation that is difficult to justify.

VI PAYMENT FOR EGGS IN THE CONTEXT OF EGG DISPOSITION

In our introductory section, we briefly discussed the issue of egg disposition. This is a live issue that has received attention recently. In Australia, storage periods for eggs, sperm or embryos vary from 10–15 years between states.¹⁴⁴ In the UK storage of eggs, sperm and embryos was extended to up to 55 years from 1 July

141 Admittedly, there would presumably be some cases in which egg sharers are required to undergo additional treatments when the eggs remaining to them do not allow them to meet their reproductive goals; however, the drawbacks of egg donation would be experienced by *all* egg donors outside of egg sharing schemes without any compensatory benefits.

142 ‘Donating Your Eggs’ (n 92).

143 Stephen Wilkinson, ‘Is the HFEA’s Policy on Compensating Egg Donors and Egg Sharers Defensible?’ (2013) 21(2) *Medical Law Review* 173, 179 <<https://doi.org/10.1093/medlaw/fws027>>.

144 For storage ranges between states, see Eloise Chandler and Anita Stuhmcke, ‘Storage Limits of Gametes and Embryos: Regulation in Search of Policy Justification’ (2014) 22(1) *Journal of Law and Medicine* 121.

2022, on the proviso that a person reconsents every ten years. If a person does not renew their consent for storage their gametes will be removed from storage and disposed of as they will no longer be considered to be lawfully stored.¹⁴⁵ This significant extension in storage time raises certain ethical concerns that go beyond the remit of this article.¹⁴⁶

There has been an increase in the number of women freezing their eggs and embryos in Australia. Notably, one clinic reported 674 developing eggs in storage in 2013. Ten years later in 2023 that number increased by a factor of 34.¹⁴⁷ Anthony Marren has explored the implications of this, largely concerning a lack of fertility clinic's storage capacity for frozen eggs, with roughly 80% in storage and not being used. Further, Johnston noted that between 2011–21 egg-freezing in Australia and New Zealand rose by 1,500%.¹⁴⁸ Women are freezing their eggs for a variety of reasons – choosing to postpone pregnancy for career progression or as a 'backup plan' for future fertility. Others are compelled to freeze their eggs at an early age, in some cases due to the commencement of chemotherapy treatment.

We do not comment here on whether egg freezing is, on balance, a justifiable strategy – particularly in cases of 'social' egg freezing, where egg freezing is undertaken for non-medical reasons to extend women's reproductive options into the future. As Emily Jackson points out, the current paucity of data on the success of this strategy means that we do not yet know whether it constitutes a 'sensible precautionary step, or a physically invasive waste of money'.¹⁴⁹ Some critics further worry that social egg freezing is subtly shaped by a commercial conflict of interest between medical professionals and the interests of women considering this option.¹⁵⁰ For our purposes, however, the key takeaway is that the use of egg freezing is increasing (whether or not this is ultimately desirable).

145 'Egg Freezing', *Human Fertilisation and Embryology Authority* (Web Page) <<https://www.hfea.gov.uk/treatments/fertility-preservation/egg-freezing/>>.

146 For example, one issue to consider is that if a person donates sperm at the age of 35 years and their gametes are stored for 55 years, children might be born from that donation when the donor is 90 years old. This also means that the children born from that person's donation might have donor siblings who are older than their parents. Donor-conceived people should be aware of the possibility that their donor might be a very elderly person, deceased and that they may have donor siblings, and possibly other older relatives. See also Caroline AB Redhead et al, 'Eggs and Sperm Can Now Be Stored for Up to 55 Years: Here's What That Means for Donors and People Seeking Fertility Treatment', *The Conversation* (online, 4 July 2022) <<https://theconversation.com/eggs-and-sperm-can-now-be-stored-for-up-to-55-years-heres-what-that-means-for-donors-and-people-seeking-fertility-treatment-186087>>. See also Panagiota Nakou, 'Women's Reproductive Choice and (Elective) Egg Freezing: Is an Extension of the Storage Limit Missing a Bigger Issue?' (2024) 30(1) *New Bioethics* 11 <<https://doi.org/10.1080/20502877.2023.2300233>>.

147 Sophie Kesteven, 'More People Are Freezing Their Eggs to Preserve Their Fertility but Some IVF Clinics are Struggling to Keep Up with Storage', *ABC News* (online, 11 July 2024) <<https://www.abc.net.au/news/2024-07-11/ivf-fertility-egg-freezing-storage-australia-issues/103868746>>.

148 *Ibid.*

149 Emily Jackson, 'The Ambiguities of "Social" Egg Freezing and the Challenges of Informed Consent' (2018) 13(1) *Biosocieties* 21, 23 <<https://doi.org/10.1057/s41292-017-0044-5>>.

150 Christopher Mayes, Jane Williams and Wendy Lipworth, 'Conflicted Hope: Social Egg Freezing and Clinical Conflicts of Interest' (2018) 27(1) *Health Sociology Review* 45 <<https://doi.org/10.1080/14461242.2017.1349545>>.

Many women have kept their eggs frozen for over a decade and many do not return to use their eggs that have been stored because they have been able to conceive a child without the need for IVF assistance. It has been noted that approximately 10% of women return to use eggs that have been frozen and stored. Further, the quality of frozen eggs cannot be guaranteed and some eggs do not survive the thawing process.¹⁵¹ A study conducted in the UK found that only 21% of a cohort of 129 women who returned to use eggs that had been frozen over ten years were successful in conceiving a child.¹⁵² The *Gorton Report* recommends better education delivery and awareness programs community-wide about the need for donors and proactive recruitment. Further, the report makes a valuable suggestion about having early discussions with women about the ‘value of egg donations’ at the time of egg freezing procedures and close to egg storage limit expiry in the hope that this might boost egg donation.¹⁵³

Thus, surplus eggs, or those in storage that will not be used by women or couples, will eventually be discarded. As Alex Polyakov and others have argued, this provides benefit neither to women who have stored eggs nor to anyone else.¹⁵⁴ These stored eggs offer the potential for another solution to the donor egg shortage.¹⁵⁵

One option might be to request that women or couples with surplus eggs donate them altruistically, without payment. Another strategy would be to offer payment for the eggs to be used by someone in need. What role, then, should money play in egg disposition decisions? In this context, payment could operate very differently from the others we have discussed. It makes little sense to describe such payment as ‘compensation’ or ‘reimbursement’ since the ‘work’ associated with egg donation has already been performed (with the original intention being for this to support the donor’s own purposes), and no additional costs are being borne by signing over the eggs for reproductive use. Instead, payment would seem to constitute an ‘inducement’ and should be treated as such.

If considered carefully, payments to potential egg donors at the end of their storage life have the potential to benefit those seeking donor eggs and to ameliorate storage issues (and the cost of storing eggs). However, it is worth noting that – like the other forms of inducement discussed above – such payments would depart from the gift model that currently underpins Australian organ and tissue donation. It also might be counter-productive; while money can be an effective incentive, it can also ‘crowd out’ altruism in some contexts, such as blood donation.¹⁵⁶ Many women might be motivated to donate stored eggs in order to help others achieve their family-making goals. If offering payments deters those who would otherwise

151 Johnston et al (n 39).

152 Zeynep Gurtin, ‘More and More Women Are Freezing Their Eggs: But Only 21% of Those Who Use Them Have Become Mothers’, *The Conversation* (online, 23 May 2019) <<https://theconversation.com/more-and-more-women-are-freezing-their-eggs-but-only-21-of-those-who-use-them-have-become-mothers-117028>>.

153 See recommendation 48 in the *Gorton Report* (n 7) 99.

154 Polyakov and Rozen (n 3).

155 Johnston et al (n 39).

156 Peter Singer, ‘Altruism and Commerce: A Defense of Titmuss against Arrow’ (1973) 2(3) *Philosophy and Public Affairs* 312.

donate from altruistic motivations (or, more precisely, from a desire to help others struggling with fertility), they might backfire, reducing overall supply.¹⁵⁷ Any proposals to incentivise the donation of stored eggs would thus need to carefully consider the legal, regulatory and ethical issues, and carefully investigate whether incentives would in fact have the desired effect.

VII RECOMMENDATIONS

Two distinct sets of recommendations can be drawn from our discussion in this article. The first deals with the language used in the discourse regarding egg donation and the second deals with practical measures to increase the availability of donor eggs. We discuss each in turn below.

A Careful Use of Language and Terminology

First, we recommend that proposals for new strategies to increase donation rates should use more careful language to describe what their proposal consists of. At present, terms such as ‘reimbursement’, ‘compensation’, ‘payment’ and ‘incentivisation’ are used more or less interchangeably, despite the significant differences between these practices and their distinct legal, regulatory and ethical implications. Calls to offer money to egg donors – whether in the guise of financial neutrality, egg sharing, compensation or incentivisation – should use terminology that best represents the role that money would play in the proposal and how it might affect donors’ motivations. While we have not rejected the case for financial inducements outright, we think that any proposals to incentivise egg donation should be argued for directly, rather than presented in the guise of ‘compensation’. Terminology related to payments in egg donation should be used with care and consistency in order to ensure that academics, lawmakers, policymakers and the public properly understand exactly what is being proposed.

B Egg Donation Promotion Strategies and Uniform Definition of ‘Reasonable Expenses’

Secondly, we suggest that there are several potential strategies for promoting egg donation that deserve serious consideration and others that we have found less promising. We consider that ‘financial neutrality’ provides a useful guide for appropriate reimbursement of egg donors, on both ethical and pragmatic grounds. Egg donors should not face financial costs in addition to the inconveniences, risks and discomforts of the process, and some potential donors might be more willing to come forward were the financial disincentives removed. While we do not have a principal objection to ‘compensation’ in excess of what is required to achieve financial neutrality, we have argued that it will be difficult to ensure such payments do not (at least for some donors) result in constituting inducements. We have also raised concerns about ‘egg sharing’ schemes and that they might,

157 Sandel (n 115) 100.

despite their name, provide a disguised inducement to donate, and we have argued against their adoption in Australia. Finally, we have highlighted that the many frozen eggs currently nearing their storage time limits present another opportunity to significantly increase the supply of human eggs, and we have suggested that the most appropriate strategy for utilising this resource likely involves unpaid, altruistic donation.

A meaningful and appropriate exploration of these options also requires a concrete understanding of what is permitted by law. Therefore, there is a need for clarity regarding a precise definition of ‘reasonable expenses’ (and, perhaps, the replacement of the term ‘reasonable’ expenses with one that is more precise), and we recommend that it should be adopted uniformly across each state and territory. The framework we have provided – and the distinctions we have drawn between reimbursement, compensation, inducements and rewards – provides one way of navigating this uncertainty; financial neutrality, at least, seems to fit squarely within the boundaries of ‘reasonable expenses’, and is thus a particularly promising option that can be explored even while clarity on the ‘reasonable expenses’ threshold is still forthcoming.

VIII CONCLUSION

In this article, we have explored four strategies that are commonly used to increase egg donation rates: namely, (i) compensation; (ii) reimbursement; (iii) inducements; and (iv) payment for eggs to boost egg donation rates. We have critically examined these nuanced strategies and the use of language and terminology related to egg donation, with a particular focus on the ethical and legal distinctions between compensation, reimbursement, inducements and rewards. Our analysis has highlighted the need for clearer and more consistent use of terminology to facilitate meaningful discourse and policymaking related to egg donation.

We have underscored the importance of achieving financial neutrality for egg donors, advocating for a system where donors are reimbursed for their direct expenses without crossing into the territory of financial inducements. This approach aligns with the ‘gift model’ of organ and tissue donation operating in Australia and can potentially increase donor participation without compromising the integrity of the donation process. Moreover, we have explored various strategies for promoting egg donation, including the reconsideration of existing ‘egg sharing’ schemes and the utilization of surplus frozen eggs nearing their storage limits. These strategies must be carefully designed to avoid disguised inducements.

Payments and egg donation have an understandably uneasy relationship in law, ethics and the public imagination. On the one hand, in capitalist societies, financial inducements play a central role in motivating individuals to participate in various activities; wages are an obvious driver of employment and productivity. Against this backdrop, the most obvious solution to the shortage of some goods is to pay for it or to increase the price that it goes for. But in the case of human eggs, familiar market-based approaches lose much of their appeal. Commerce sits uneasily

alongside human reproduction, and there are longstanding legal, social and ethical norms against trade in human bodily tissues and organs. Commercialising the ‘gift of life’ is a hard sell.

We have argued that there *is* some role that money can play in egg donation that does not require the abandonment of the gift model that currently operates, with seemingly widespread endorsement, in Australia. But in order to work out the appropriate forms and methods of payment, it is necessary to be able to distinguish between contexts where payment serves as a form of recompense (‘reimbursement’ and ‘compensation’), and where it actively incentivises donation (‘inducement’). Conceptual clarity is all the more important given how regularly these distinct terms are used interchangeably. In providing this clarity, we hope to contribute to the process of developing a less ambiguous and more ethically robust system for egg donation in Australia.