Australian Government

Department of Health, Disability and Ageing

Review of Surrogacy Laws

Submission from the Department of Health, Disability and Ageing to the Australian Law Reform Commission

11 July 2025

Australian Government

Department of Health, Disability and Ageing

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Abbreviations

Ahpra	Australian Health Practitioner Regulation Agency
ALRC	Australian Law Reform Commission
ANZSREI	Australian and New Zealand Society of Reproductive Endocrinology and Infertility
ART	Assisted reproductive technology
FSANZ	Fertility Society of Australia and New Zealand
GP	General practice / general practitioner
IVF	In-vitro fertilisation
LARC	Long-acting reversible contraception
LGBTIQA+	People who are lesbian, gay, bisexual/bi+, trans and gender diverse, have innate variations of sex characteristics, queer, asexual/aromantic, or people otherwise diverse in gender, sexual orientation and/ or variations of sex characteristics.
MBS	Medicare Benefits Schedule
NHMRC	National Health and Medical Research Council
NHRA	National Health Reform Agreement
NRAS	National Registration and Accreditation Scheme
PBS	Pharmaceutical Benefits Scheme
PHN	Primary Health Network
RTAC	Reproductive Technology Accreditation Committee

Acknowledgement

The Department of Health, Disability and Ageing (department) welcomes the opportunity to make a submission to the Australian Law Reform Commission's (ALRC) Review of Surrogacy Laws. The department consulted with the National Health and Medical Research Council (NHMRC), acknowledges its contribution to this submission, and notes its intention to provide a separate submission.

Summary

Supporting, protecting, and promoting sexual and reproductive health care of all Australians is critical to the Australian Government. This is recognised in the *National Women's Health Strategy*, the *Woman-centred care: Strategic directions for Australian maternity services* the *National Men's Health Strategy 2020-2030*, and the *National Action Plan for the Health and Wellbeing of LGBTIQA+ People 2025-2035*. The Government also supports funding for maternity-related initiatives which include miscarriage support, preterm birth prevention, activities that prevent stillbirth through the *National Stillbirth Action and Implementation Plan*, and bereavement care.

When people are faced with infertility, their journey to parenthood has additional financial, physical and emotional complexities. Pursuing fertility treatment can have significant impacts on a person's physical and mental health, as well as the financial burden often associated with assisted reproductive technology (ART) treatments. In some cases, the cause of infertility means a surrogate is needed to undertake the ART treatment and gestate and birth the child.

Responsibility for the ART sector in Australia is a complex issue that spans across the Commonwealth, state, and territory governments. The Australian Government primarily has a funding role through the contribution of funding to ART services via the Medicare Benefits Schedule (MBS), the Pharmaceutical Benefits Scheme (PBS), and the National Health Reform Agreement (NHRA) which helps fund state and territory health services.

MBS rebates are available for ART procedures, however legal restrictions prohibit the payment of MBS benefits for ART services when rendered in conjunction with surrogacy arrangements.

While surrogacy is regulated by state and territory governments, the National Health and Medical Research Council (NHMRC), an Australian Government agency, has established ethical standards for the clinical practice of ART. These standards are used by the ART accrediting body as a compulsory criterion for ART practice. The guidelines extend from principles of clinical practice as well as the application of those principles. Surrogacy is addressed as a practice that raises specific ethical issues.

Within a health equity framework, surrogacy may be associated with serious adverse medical or psychological outcomes[1]. This should be considered in discourse around surrogacy, but particularly compensated or commercial surrogacy.

[1] Brandão P, Garrido N. Commercial Surrogacy: An Overview. Revista Brasileira de Ginecologia e Obstetrícia 2023;44(12):1141-58, p1144.

Noting commercial surrogacy is currently prohibited in Australia, there are no plans to alter Commonwealth health-related funding or policy settings to allow for commercial surrogacy.

Australian Government support for sexual and reproductive health

The Government recognises the importance of ensuring access to sexual and reproductive health information, treatment and services that empower individuals to have choice and control in decision-making about their bodies. To support this, the Government, though the 2025-26 Federal Budget is providing[2]:

- $134.3 million to increase the schedule fee for four long-acting reversible contraception (LARC) items on the MBS, and to incentivise bulk billing through the creation of an MBS item claimable when a provider bulk bills a LARC placement or removal service.
- $25.1 million to establish eight LARC Centres of Training Excellence to provide LARC services and training to health professionals.
- $19.6 million to support 33 Endometriosis and Pelvic Pain Clinics to provide specialist care and support for women experiencing endometriosis, pelvic pain, perimenopause and menopause.
- $26.3 million to introduce a health assessment item on the MBS for women of all ages experiencing perimenopause and menopause.
- $49.1 million to introduce new long consultations with gynaecologists to support women with complex gynaecological conditions, including but not limited to endometriosis, polycystic ovarian syndrome and chronic pelvic pain.

The investment builds on previous Government commitments of $56.1 million over four years from 2024–25 to improve access to sexual and reproductive healthcare for women in Australia across the life-course. Funding will support women's health services on miscarriages, preterm or early-term births, stillbirths, early pregnancy and menopause. Funding includes:

- $12.5 million over four years from 2024–25 to provide free menstrual hygiene products to rural and remote First Nations communities to alleviate some financial burden for vulnerable populations.
- $8.0 million over three years from 2024–25 to support the development of datasets on miscarriages and sexual and reproductive health, and evaluation activities for early pregnancy assessment services.
- $7.0 million over four years from 2024–25 to support the development of miscarriage education and awareness materials and provide funding for bereavement care services for women and families experiencing stillbirth or miscarriage.

[2] Australian Government Department of Health and Aged Care, Budget 2025-26, *Strengthening Medicare – Women's Health*

- $6.0 million over two years from 2024–25 to support Primary Health Networks on the Central Coast to provide local outreach trauma-informed healthcare support for women and their children experiencing domestic and family violence or homelessness.
- $5.8 million over two years from 2024–25 to continue strategies to prevent preterm and early-term birth and reduce the number of babies born too early in participating maternity services and First Nations communities.
- $5.2 million over three years from 2024–25 to support placement costs for health practitioners to undertake LARC insertion and removal training.
- $5.0 million over two years from 2024–25 to continue delivery of the 'Every Moment Matters' awareness campaign, to support women who are planning pregnancy to achieve alcohol-free pregnancies and reduce the incidence of babies born with fetal alcohol spectrum disorder.
- $3.5 million over four years from 2024–25 (and $0.4 million per year ongoing) to expand the Midwife Professional Indemnity Scheme to include indemnity insurance cover for privately practicing midwives providing homebirths and intrapartum care outside of a hospital, and for specified entities providing Birthing on Country models of care.
- $1.2 million over two years from 2024–25 to support training for health practitioners to better treat, care and manage women's health during menopause.
- $1.1 million over four years from 2024–25 to support the development and hosting of a platform for a virtual contraception choice decision making tree.
- $0.9 million over two years from 2024–25 to continue to monitor and evaluate activities under the *National Stillbirth Action and Implementation Plan*.[3]

In addition, the MBS funds rebates for consultations, counselling, diagnosis, specialist and surgical items, pregnancy care and mental health support as well as rebates specific to ART services.

Funding for women's health and reproductive care is underpinned by the *Woman-centred care: Strategic directions for Australian maternity services strategy* to provide national strategic directions to support Australia's high-quality maternity care system and enable improvements in line with contemporary practice, evidence, and international developments. Of primary importance is that Australian families have access to safe, high quality, respectful maternity care.

Men's sexual and reproductive health is one of 5 priority health issues outlined in the *National Men's Health Strategy 2020-2030*. The strategy recognises that "*reproductive health conditions are common among Australian men and can represent a high*

[3] Senator the Hon Katy Gallagher, Media release: *A budget that works for women*, 14 May 2024.

economic and social cost for the individuals affected, yet often these conditions are underdiagnosed and/or under-discussed"[4]. The *National Action Plan for the Health and Wellbeing of LGBTIQA+ People 2025-2035* considers that progress in the delivery of inclusive, safe and high-quality health care will be demonstrated when, among other indicators, specialist LGBTIQA+ care (including for mental health and sexual and reproductive health) is more readily available[5].

[4] Australian Government Department of Health, Disability and Ageing, *National Men's Health Strategy 2020-2030*, p21
[5] Australian Government Department of Health, Disability and Ageing, *National Action Plan for the Health and Wellbeing of LGBTIQA+ People 2025-2035*, p44.

Commonwealth health portfolio responsibilities and surrogacy

National Health and Medical Research Council (NHMRC)

NHMRC is Australia's leading expert body in health and medical research and ensures all people in Australia have access to evidence-based, authoritative health advice. It is also responsible for developing and supporting high quality guidelines for clinical practice, public health, environmental health and ethics.

NHMRC, through the work of the Australian Health Ethics Committee (AHEC), issues the *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (ART Guidelines), which provide ethical guidance on a number of issues related to ART.[6]

In Australia, all persons and bodies offering ART services must be accredited by the recognised accreditation body, the Fertility Society of Australia and New Zealand's Reproductive Technology Accreditation Committee (RTAC), or another body prescribed by the *Research Involving Human Embryos Regulations 2017*. The accreditation of ART clinics by RTAC requires clinics to comply with the ART Guidelines.

Section 8 of the ART Guidelines address practices that raise specific ethical issues including surrogacy. For ART activities requested under a surrogacy arrangement, sections 8.8 to 8.12 of the ART Guidelines are relevant.

The term 'altruistic surrogacy' is defined in the ART Guidelines as "an arrangement where the surrogate receives no financial compensation or inducement, beyond the reimbursement of verifiable out-of-pocket expenses directly associated with the surrogacy procedure, pregnancy or birth"[7].

The ART Guidelines support altruistic surrogacy, where clinics are responsible for ensuring the surrogacy arrangement is ethically acceptable. While it is not the role of clinics to provide legal advice, clinics must not facilitate ART treatment under a surrogacy arrangement if there are concerns about whether the arrangement is ethical and/or legal. The ART Guidelines further sets out requirements relating to consent, exchange of information and reasonable out-of-pocket expenses. This guidance was published in the 2017 update to the ART Guidelines after public consultation (refer to appendix 4 of the ART Guidelines).

[6] National Health and Medical Research Council, Ethical guidelines on the use of assisted reproductive technology, 2017 (updated 2023), accessed 19 June 2025
[7] ibid

The ART Guidelines do not support the practice of commercial surrogacy. Clinics and clinicians must not practise, promote or recommend commercial surrogacy, nor enter into contractual arrangements with commercial surrogacy providers[8].

The MBS is not applicable in any cases where its use breaches state, territory or federal laws.

MBS and surrogacy

The 2023 Senate Committee report into Universal Access to Reproductive Health Care (the Senate report) noted that surrogacy was explicitly excluded from Medicare benefit claims. The Senate report recommended "*the Australian Government implement the recommendations of the Medicare Benefits Schedule Review regarding removal of the exclusion of in vitro fertilisation (IVF) services for altruistic surrogacy purposes*"[9].

In its response, the Government agreed 'in-principle' to this recommendation and committed to "*further consider implementation issues relating to this recommendation, including the scope of any legislative or other changes that may be required*"[10].

Recommendations including those noted above in the Senate report and prior recommendations from the MBS Review Taskforce's review of MBS Gynaecology items[11] are specific in recommending Government consider removing MBS restrictions relating to altruistic surrogacy only.

There have been no changes at this stage to the current position reflected in clause 5.2.6 of Schedule 1 to the *Health Insurance (General Medical Services Table) Regulations 2021*, which restricts access to assisted reproductive services where a pregnancy (or intended pregnancy) is the subject of an agreement or arrangement under which the patient makes provision for transfer of guardianship or custodianship to another party.

[8] National Health and Medical Research Council, Ethical guidelines on the use of assisted reproductive technology, 2017 (updated 2023), accessed 19 June 2025
[9] Community Affairs References Committee, Ending the postcode lottery: Addressing barriers to sexual, maternity and reproductive healthcare in Australia 2023, p128
[10] Australian Government, *Australian Government response to the Senate Community Affairs References Committee report: Ending the postcode lottery* – Addressing barriers to sexual, maternity and reproductive healthcare in Australia, 2025, p43
[11] Australian Government, Taskforce Report on Gynaecology MBS Items, 2020.

Health equity and surrogacy

The department acknowledges the struggle of those who want to be parents but for whom pregnancy is not possible, leading them to seek a surrogacy arrangement. However, the physical and mental health of all parties to a surrogacy arrangement are of equal importance.

Laws in most Australian states and territories mandate all parties involved in a surrogacy arrangement, including the surrogate, intended parents and their partners, undergo independent counselling and receive legal advice before proceeding. This requirement aims to ensure all parties fully understand the emotional, psychological and legal implications of the arrangement.

Although many pregnancies are uncomplicated, some health complications may occur.[12] Women who act as pregnancy surrogates, compared with women who conceive with or without assistance, are at higher risk of adverse pregnancy outcomes including complications such as hypertensive disorder and postpartum haemorrhage.[13]

The department acknowledges that financial incentives associated with commercial surrogacy raise ethical and legal concerns relating to the need to safeguard the rights of vulnerable and economically disadvantaged women. Financial incentives paid to commercial surrogates may undermine the concept of free and informed consent by creating pressures and dependencies that compromise a surrogate's ability to make free and informed decisions.

[12] Johns Hopkins Medicine, Health, Pregnancy complications, accessed 20 June 2025

[13] Velez MP, Ivanova M, Shellenberger J, et al. Severe maternal and neonatal morbidity among gestational carriers: a cohort study. Ann Intern Med. 2024;177:1482-1488. [PMID: 39312777] doi: 10.7326/M24-0417, 24 September 2024.

Australian Government support for ART

Medicare Benefits Schedule

The Australian Government supports access to high-quality, affordable health care by providing both free and subsidised health care services. This includes providing Medicare benefits for services listed on the MBS. There are 14 items on the MBS for ART services including for in-vitro fertilisation (IVF). More information on relevant MBS items can be found on MBS Online, at www.mbsonline.gov.au.

In addition, the MBS funds a range of items which enable patients to receive advice and services which support their potential ART journey. This includes, for example, GP attendance items as well as specialist services delivered through gynaecologists and infertility specialists, and obstetric care.

Expanded access to MBS items for ART treatment

In August 2024, the Australian and New Zealand Society for Reproductive Endocrinology and Infertility (ANZSREI) released an updated clinical definition of infertility. The new definition was endorsed by the Fertility Society of Australia and New Zealand (FSANZ), the peak body representing scientists, doctors, researchers, nurses, consumers and counsellors in reproductive medicine in Australia and New Zealand, and by the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG).

The definition broadens the sector's previously accepted definition of infertility to include: "*the inability to achieve a successful pregnancy based on a patient's medical, sexual, and reproductive history, age, physical findings, diagnostic testing, or any combinations of these factors*."

The consensus statement released by the sector notes that the changes have been made to improve inclusiveness and equitable access to reproductive care irrespective of relationship status, sexual orientation or gender identity.

The updated clinical definition of infertility addresses Recommendation 32 from the Senate Committee report (the Senate report) into Universal Access to Reproductive Health Care, released in May 2023. The Senate report recommended "*the Australian Government explores the feasibility of Medicare rebates for in vitro fertilisation (IVF) services for cohorts not currently eligible for subsidised services*".[14] The Australian

[14] Community Affairs References Committee, Ending the postcode lottery: Addressing barriers to sexual, maternity and reproductive healthcare in Australia 2023

Government supported this recommendation in-principle in its response to the Senate report.[15]

The MBS does not include a definition of infertility. In order to receive a benefit from the MBS, a professional service provided must be 'clinically relevant' and all elements of the item descriptor must be met.

Under the MBS (subsection 3(1) of the *Health Insurance Act 1973*), a clinically relevant service is one which is "*generally accepted in the medical profession as being necessary for the appropriate treatment of the patient to whom it is rendered*".

The Government relies on the judgement of health practitioners in determining appropriate care for patients and upholding the principle of clinical relevance when billing under the MBS. Services which a practitioner considers to meet the updated definition of infertility, and which are delivered in accordance with relevant MBS items and requirements, can attract an MBS benefit.

In practice, the expanded definition of infertility, accepted by the Government, means that "single women and women in same-sex relationships can access subsidies under Medicare".[16] Acceptance of the expanded definition does not remove the barrier to claiming MBS rebates for assisted reproductive technology in conjunction with surrogacy due to the current legislative requirement (as discussed above).

Pharmaceutical Benefits Scheme (PBS)

Subsidies for IVF medications are listed on the PBS. The section 100 IVF Program provides access to PBS medicines to eligible patients as an alternative to natural reproduction, allowing Australian women to receive subsidised fertility medicines. It is underpinned by the *National Health (IVF Program) Special Arrangement 2015*.

Mental health support

The process of assisted reproduction can be associated with increased anxiety, depression and stress.[17] Many jurisdictions have a regulatory framework that requires counselling be provided as a part of the ART treatment. Government services are available to support good mental health for those undergoing ART treatment, although not specifically for the counselling requirements of ART treatment. This includes $588.5 million over eight years from 2024-25, and $113.4 million per year ongoing, for a new digital national early intervention service providing low-intensity mental health support

[15] Australian Government, *Australian Government response to the Senate Community Affairs References Committee report: Ending the postcode lottery* – Addressing barriers to sexual, maternity and reproductive healthcare in Australia, 2025, p43
[16] The Hon Ged Kearney MP [@gedkearney], 2 April 2025, This is a really important policy change for so many women.[Highlight] Instagram. Retrieved 19 June 2025.
[17] COPE - Centre of Perinatal Excellence, *When becoming pregnant isn't easy*, accessed 19 June 2025.

and a $1 billion election commitment by Government to support new free mental health services.

While there are no specific MBS items for mental health treatment in relation to ART, a range of existing items may be suitable, available by telehealth and in-person. This includes but is not limited to a range of GP consultations which may be used to discuss reproductive concerns or counselling.

Medicare benefits are available under the Better Access initiative for psychological treatment for patients recognised as having a mental disorder informed by the World Health Organization's *Diagnostic and Management Guidelines for Mental Disorders in Primary Care: ICD-10 Chapter V Primary Care Version* (1996). Some people undergoing ART may be eligible.

Broader funding and accreditation

Some public fertility care, including ART, is undertaken in state and territory-managed public hospitals. These treatments, when used by public patients in public hospitals, are provided free to the patient by the Australian Government, via agreements with states and territories under the National Health Reform Agreement (NHRA). It is intended the funding provided is used in a manner consistent with the regulatory frameworks established through state and territory governments, the National Registration and Accreditation Scheme (NRAS), which supports individual practitioner education, training, and practice, and the Australian Health Practitioner Regulation Agency (Ahpra), which governs registration and regulation around individual practice.

Online information

To further assist people seeking IVF treatment, the Government launched the 'Your IVF Success' website in February 2021 with funding provided via the Medical Research Future Fund. This website provides an individual IVF success estimator tool. This allows intended parents to estimate their chances of IVF success through the input of individual characteristics. The website also provides independent and impartial information about nearly all fertility clinics in Australia, including the clinic's success rates, to help couples in their decision making. The website can be found at: www.yourivfsuccess.com.au.

Health Ministers' Rapid Review of Regulation of the ART Sector

In June 2025, Health Ministers requested that Health Chief Executives undertake a rapid review of the regulatory and accreditation arrangements in place for the ART sector and its IVF clinics.[18]

[18] Health Ministers Meeting (HMM) – Communique 13 June 2025

The Victorian Government is leading the review which will identify opportunities for improvement and action, including:

a. Options for implementation of an independent accreditation body and process;

b. Consideration of how existing state based regulatory regimes could be strengthened; and

c. Consideration of whether a national regulatory approach would deliver benefit.

The department will work closely with Victoria on this review with a report being delivered back to Health Ministers by September 2025.