

IVF Services for the purposes of Surrogacy and its exclusion from Medicare benefits

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INTRODUCTION

Legal altruistic surrogacy is only relatively new in Australia. All Australian states now have legislation regulating altruistic surrogacy in Australia with the exception of the Northern Territory¹. However it seems that associated legislation is yet to catch up with the introduction of the surrogacy laws. In particular the legislation and regulations that regulate Medicare require updating to ensure that couples entering into a legal surrogacy arrangement are entitled to Medicare rebates.

This paper is to highlight the outdated legislation that excludes women being entitled to Medicare rebates who undergo Assisted Reproductive Treatment (ART) in order to create embryos.

MEDICARE REBATES AND ASSISTED REPRODUCTIVE TREATMENT (ART)

Where ART is required to create embryos, provided a surrogate is not used, Medicare financially assists families by providing rebates. This is regardless as to whether the couples own sperm and eggs are used, they use donor sperm and eggs or a combination of both. Provided a surrogate is not used to carry the embryo Medicare will provide a rebate. These rebates are paid in accordance with the Medicare Benefits Schedule (MBS) and are not means tested.

Below is a table showing the average out of pocket expenses, couples can expect to pay when they do not use a surrogate:²

¹ *Surrogacy Act 2010 (Qld), Surrogacy Act 2010 (NSW), Parentage Act 2004 (ACT), Assisted Reproductive Treatment Act 2008 (Vic), Surrogacy Act 2012 (Tas), Family Relationships Act 1975 (SA) and Surrogacy Act 2008 (WA)*

² IVF Australia, *IVF Treatment Costs*, <http://ivf.com.au/ivf-fees/ivf-costs> (February 2013)

Procedure	Cycle payment	Estimated Out-of-Pocket Costs 1st Cycle in a Calendar Year (Safety Net not reached)	Estimated Out-of-Pocket Costs Subsequent Cycles in a Calendar Year (Safety Net reached)
IVF cycle	\$7,765	\$3,049	\$2,499
ICSI cycle	\$8,495	\$3,323	\$2,773
Intrauterine Insemination (IUI)	\$1,940	\$1,282	\$1,282
Frozen embryo transfer (FET)	\$2,700	\$1,356	\$1,219

Medicare does not provide a rebate for hospital related services, such as egg collection and embryo transfer. However Medicare may provide a rebate for the anaesthetist and those with private health may be eligible for a rebate from their fund. Out of pocket expenses for hospital related services range from \$1,000 to \$2,400 depending on whether the couple has private health cover.³

With the assistance of Medicare, couples can expect to pay a total of \$3500 to \$5000 per full cycle.

There is no limit to how many cycles a couple may undertake during a year. In fact, the more cycles a couple does each year, the more Medicare will pay. When couples reach their annual threshold, the Extended Medicare Safety Net (EMSN) provides an additional rebate. Given it is usually necessary for a woman to have 3-5 IVF cycles before a successful pregnancy occurs⁴, this can result in Medicare contributing \$7,500 to \$13,500.

Where a surrogate is used, Medicare does not provide any rebate for the IVF cycle. This is regardless of whether the couple use their own eggs and sperm to create the embryos or where donor eggs and sperm are used. Couples using a surrogate to carry their embryo can expect to pay between \$16,000 - \$18,000 for a single IVF cycle.⁵ In addition to these expenses couples using surrogates have legal costs, counselling costs and the usual pregnancy costs. Couples can expect to spend up to \$60,000, provided their surrogate gets pregnant within the first or subsequent IVF cycle.

³ IVF Australia, *IVF Treatment Costs*, <http://ivf.com.au/ivf-fees/ivf-costs> (February 2013)

⁴ http://www.bionews.org.uk/page_90335.asp (February 2013)

⁵ Information provided by variety of couples: Couple A – Life Fertility \$16,000, Couple B – Monash IVF \$18,000, Couple C – Life Fertility \$17,000 and Couple D – Queensland Fertility Group \$16,000

RELEVANT LEGISLATION

Medicare is governed by a variety of legislation including the *Health Insurance Act 1973* and the *Health Insurance (General Medical Services Table) Regulations 2012*.

Section 19A of the *Health Insurance Act 1973* states as follows:

- (1) *Subject to subsection (2), the regulations may provide that, unless the Minister otherwise directs, Medicare benefits are not payable in respect of professional services rendered in prescribed circumstances.*
- (2) *Regulations relating to professional services other than pathology services may not be made under subsection (1) except in accordance with a recommendation made to the Minister by the Medicare Benefits Advisory Committee.*

Regulation 2.37.7 of the *Health Insurance (General Medical Services Table) Regulations 2012* state as follows:

Items 13200 to 13221 do not apply to a service provided in relation to a patient's pregnancy, or intended pregnancy, that is, at the time of the service, the subject of an agreement, or arrangement, under which the patient makes provision for transfer to another person of the guardianship of, or custodial rights to, a child born as a result of the pregnancy.

Items 13200 to 13221 are the item numbers relating to Assisted Reproductive Technology ART Services from the Medicare Benefits Schedule (MBS). Below is an extract from the MBS notes relating to these item numbers:

....

There are no restrictions on the number of cycles that patients can have nor are there any age restrictions for these items.

....

Medicare benefits are not payable for assisted reproductive services rendered in conjunction with surrogacy arrangements where surrogacy is defined as 'an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer guardianship and custodial rights at or shortly after birth'.

....

Given legal surrogacy is relatively new in Australia, it is believed that the legislation regarding Medicare rebates and surrogacy is simply outdated and in need of updating. Other more recent legislation has made provisions for surrogacy arrangements – this in itself indicates that it is not the Government's intention to treat couples requiring surrogates unfavourably to those who do not require a surrogate.

An example of such legislation is the Federal Government's paid parental leave and dads and partner paid leave. The Paid Parental Leave Guide specifically states that surrogacy arrangements are included. Following is an extract from the Paid Parental Leave Guide:

2.1.1 Eligibility Differences between Parental Leave Paid and Dads and Partner Paid Leave

Who can claim?

To be eligible to claim Parental Leave Paid a person must be:

- *a birth mother, including in cases of stillbirth, surrogacy and adoption, or*
- *an adoptive parent who is the initial primary carer of the child, or*
- *the commissioning parents in a surrogacy arrangement, or*
- *a person who satisfies the circumstances prescribed by the Parental Leave Paid Rules.*

To be eligible to claim Dads and Partner Pay a person must be:

- *a biological father of the child,*
- *the partner of the child's birth mother,*
- *an adoptive parent of the child,*
- *a person who satisfies the circumstances prescribed by the Parental Leave Paid Rules.*

If the Government is prepared to pay parental leave to those involved in surrogacy arrangements, it is natural to conclude that it would be the Government's intention to apply all assistance equally to couples, regardless of whether a surrogate is used or not.

Furthermore, if the Government is willing to provide Medicare rebates to couples undergoing IVF cycles whilst using donor sperm and donor eggs, why would they not provide assistance to those couples undergoing IVF using in many cases biological eggs and sperm – although in other cases donor eggs and sperm.

The logical explanation is that when the Medicare laws were written (which specifically excludes surrogacy arrangements), surrogacy was not legally recognised in Australia. Given Australian surrogacy laws are relatively recent, Medicare legislation is now outdated and requires updating. This explanation is also consistent with the more recent introduction of the Government's paid parental leave and specifically applying to surrogacy arrangements.

It is also interesting to note, that prior to the introduction of legal surrogacy in Queensland, the Queensland government requested a committee to consider the decriminalisation of

surrogacy and to provide a report providing its recommendations. On 8 October 2008, the Investigation into Altruistic Surrogacy Committee, chaired by MP Linda Lavarch, submitted a report to Parliament outlining their unanimous decision to support decriminalisation of altruistic surrogacy. Furthermore they recommended that the Queensland Government lobby the Federal Government to provide Medicare rebates for surrogacy.⁶

This committee recognised that the introduction of legislation legalising altruistic surrogacy would require the Medicare legislation to be updated.

DISCRIMINATION

On the other hand, should it be the government's intention not to update the Medicare legislation, then this is a clear case of discrimination on the basis of disability.

By law, surrogacy occurs when a woman has lost the capacity to have a child due to a medical condition. Given the purpose of Medicare is to subsidise treatment for people with medical conditions, there is no reason why it should not apply to surrogacy. A heterosexual couple (not using a surrogate) can receive Medicare funding for an IVF cycle where donor sperm or donor eggs are used because the man or woman are medically infertile. However, the same couple are not entitled to Medicare funding if they are then required to use a surrogate if the woman is medically unable to carry a pregnancy.

A woman without a uterus or the ability to carry a pregnancy for a medical reason is treated less favourably than other women who can carry a pregnancy. This is despite the fact that in many cases the surrogate will be carrying an embryo created with the intending parents sperm and eggs.

The Australian Human Rights Commission investigates complaints of discrimination based on individual's disability. On their website, the Australian Human Rights Commission states that it can investigate complaints of alleged discrimination due to the administration of Commonwealth laws and services.

The *Disability Discrimination Act 1992* states that among other things, one of the objects of the act is to "*to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community*".

⁶ Recommendation 24: Advocating for Medicare funding: The committee recommends that the Queensland Government advocates the Australian Government to provide Medicare funding for altruistic surrogacy.

Section 4 of the *Disability Discrimination Act 1992*, describes a disability as

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body.

Clearly the above definition captures women who do not have a uterus due to a medical condition or women who have a medical condition, which prevents them from safely carrying a pregnancy.

The *Disability Discrimination Act 1992* provides for direct and indirect discrimination⁷. In this case the discrimination can be seen as both. Its direct discrimination as the *Health*

⁷ 5 Direct disability discrimination

- (1) *For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.*

6 Indirect disability discrimination

- (1) *For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:*
 - (a) *the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and*
 - (b) *because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and*
 - (c) *the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.*
- (2) *For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:*
 - (a) *the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and*
 - (b) *because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and*
 - (c) *the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.*
- (3) *Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.*
- (4) *For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.*

Insurance (General Medical Services Table) Regulations 2012 specifically excludes Medicare rebates for IVF services for those requiring a surrogate. It can be also seen to be indirect discrimination as the exclusion to Medicare rebates in the *Health Insurance (General Medical Services Table) Regulations 2011* requires couples to have the ability to carry a pregnancy to be entitled to the rebates. Obviously this is not a condition that couples requiring a surrogate can meet and therefore indirect discrimination occurs.

However the *Disability Discrimination Act 1992* poses a problem for couples requiring a surrogate to making a successful discrimination case against the government. Whilst the *Disability Discrimination Act 1992* provides that it is unlawful to discriminate against someone on the basis of disability in the administration of a Commonwealth law or Commonwealth program⁸, it is not in itself unlawful to have a Commonwealth law that discriminates on the basis of disability⁹.

Regardless, it is unlikely that the Government intends to discriminate against couples on the basis of their disability (their inability to carry a child) nor would they wish to be seen as discriminating against such couples. The *Disability Discrimination Act 1992* simply provides food for thought for the legislators to hasten the actions in updating the Medicare legislation.

CONCLUSION

It is clear that the Medicare legislation is outdated and needs to be amended to reflect the current legislation that makes altruistic surrogacy legal. This amendment would be in accordance with the Government's view to accept surrogacy arrangements (due to medical reasons) in modern Australian surrogacy.

⁸ **29 Administration of Commonwealth laws and programs**

It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person on the ground of the other person's disability in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

⁹ **47 Acts done under statutory authority**

- (2) *This Part does not render unlawful anything done by a person in direct compliance with a prescribed law.*
- (4) *In subsection (1):
disability support pension has the same meaning as in the Social Security Act 1991.*
- (5) *In subsection (2):
law means:
 - (a) *a law of the Commonwealth or of a State or Territory; or*
 - (b) *regulations or any other instrument made under such a law.**

Specifically it is requested that the following amendments occur immediately:

1. The following regulation removed from the *Health Insurance (General Medical Services Table) Regulations 2012*:

2.37.7 Items relating to assisted reproductive services not to apply in certain pregnancy-related circumstances

Items 13200 to 13221 do not apply to a service provided in relation to a patient's pregnancy, or intended pregnancy, that is, at the time of the service, the subject of an agreement, or arrangement, under which the patient makes provision for transfer to another person of the guardianship of, or custodial rights to, a child born as a result of the pregnancy.

2. The following paragraph be removed from *Note T1.4 Assisted Reproductive Technology ART Services - (Items 13200 to 13221)* of the Medicare Benefits Schedule:

Medicare benefits are not payable for assisted reproductive services rendered in conjunction with surrogacy arrangements where surrogacy is defined as 'an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer guardianship and custodial rights at or shortly after birth'.

Such a change would provide significant financial assistance to couples involved in surrogacy arrangements. The surrogacy arrangement in itself is a financial burden on couples and any monetary assistance would assist in removing some of this burden. It is important to note, that these couples are simply attempting to fulfil their dreams of completing their families. Their dreams have been shattered due to medical conditions and/or illness. Such couples are entitled to be treated equally to other couples requiring IVF to complete their family dreams.