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The Honourable Mark Butler MP
Minister for Health & Aged Care
21 Commercial Road
PORT ADELAIDE SA 5015

By Email: mark.butler.mp@aph.gov.au

Copy to: Mr Graham Perrett MP
By Email: graham.perrett.mp@aph.gov.au

Dear Mr Butler

ABOLITION OF THE MEDICARE EXCLUSION FOR SURROGACY

I write to seek the abolition of the current exclusion from Medicare rebate for assisted reproductive services when the service concerns surrogacy.
I have copied in Mr Graham Perrett MP, who has had a longstanding interest in surrogacy matters, and was in 2015-2016 a member of the House of Representatives Social Policy and Legal Affairs Committee, which conducted an informal and then formal inquiry into surrogacy.

FOUR REASONS WHY THE EXCLUSION SHOULD BE ABOLISHED

These are:

1. The exclusion is a historical anomaly;
2. There will be minimal cost to the Commonwealth in removing the exclusion;
3. There is a disproportionate impact on gay couples by having the exclusion in place; and
4. The exclusion is counterproductive in that it encourages intended parents to undertake surrogacy overseas

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THE EXCLUSION

There is currently an exclusion in the Medicare scheme of assisted reproductive services when the service concerns surrogacy.

The exclusion is currently contained in clause 5.2.6 of the *Health Insurance (General Medical Services Table) Regulations 2021*:

> *"5.2.6 Restrictions on items relating to assisted reproductive services – certain pregnancy-related circumstances*
> *Items 13200-13221 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."*

HISTORY OF THE CLAUSE

The Commonwealth started funding assisted reproductive services through Medicare in 1990. The exclusion started at the beginning of that funding.

The forerunner of that current clause first appeared as clause 56 in the schedule to *1990 No. 342 Health Insurance (1990-1991 General Medical Services Table) Regulations*:

> *"56. A service in relation to a patient's pregnancy, or intended pregnancy, that is the subject of an arrangement under which the patient agrees that guardianship or custodial rights in respect of a child born as a result of a pregnancy will be transferred to another person, is not a medical service for the purposes of an item in Division 3A of Part 6."*

It is easy to understand why in 1990 the clause was added as an exclusion to Medicare. In 1988, the first court case in the world concerning surrogacy, the *Baby M* case, was litigated in New Jersey. The intended parents had paid US$10,000 to the surrogate. The surrogate sought to set aside the surrogacy agreement and be recognised as the mother and have the child live with her. The New Jersey court set aside the agreement but found that it was in the best interests of the child that the child live with the intended parents.

Surrogacy, at least through IVF, was then new and controversial.

There was an immediate reaction to the Baby M case in Australia. The various Australian States immediately legislated to ban surrogacy, horrified at the prospect of a repeat of the Baby M case occurring in Australia, for example, in South Australia with the passage of the *Family Relationships Act Amendment Act 1988* (SA). The most extreme example was in Queensland where the passage of the *Surrogate Parenthood Act 1988* (Qld) criminalised all forms of surrogacy, whether commercial or altruistic, traditional or gestational, when undertaken by Queenslanders, whether in Queensland or anywhere else in the world.

Traditional surrogacy is where the surrogate is the genetic mother. Gestational surrogacy is where the surrogate has no genetic link to the child.

The wording of the exemption slightly changed in 1991 in item 25 of the *Health Insurance (1991-1992 General Medical Services Table) Regulations 1991 No. 351*, to a form that in essence has remained the same ever since:

> *"25. Items 13200-13221 (inclusive) do not apply to a service 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 guardianship of, or custodial rights to, a child born as a result of the pregnancy to be transferred to another person."*

Matters subsequently changed following the announcement of the birth of the child of Senator Stephen Conroy and his wife Paula Benson. Although they lived in Victoria, the laws in Victoria were so restrictive about surrogacy, that the couple had to undertake their surrogacy journey in New South Wales.

Then Commonwealth Attorney-General Philip Ruddock called on each of the States to legislate concerning surrogacy. At that time, only the ACT had laws regulating altruistic surrogacy. In quick succession, each of the States have enacted legislation to regulate altruistic surrogacy and ban commercial surrogacy:

WHEN LAW COMMENCED	STATE	LAW
1 March 2009	Western Australia	*Surrogacy Act 2008*
1 January, 2010	Victoria	*Assisted Reproductive Treatment Act 2008*
1 June, 2010	Queensland	*Surrogacy Act 2010*
26 November 2010	South Australia	*Statutes Amendment (Surrogacy) Amendment Act 2010, which amended the Family Relationships Act 1975 (replaced, concerning surrogacy by Surrogacy Act 2019)*
1 March 2011	New South Wales	*Surrogacy Act 2010*
1 May 2013	Tasmania	*Surrogacy Act 2012*

The only State or Territory not to legislate to regulate altruistic surrogacy and to criminalise commercial surrogacy was the Northern Territory. In May this year, the Northern Territory enacted the *Surrogacy Act 2022* (NT) which is to the same effect. I was on that Government's joint surrogacy working group, which led to the enactment of that law. It is expected that the Northern Territory's Act will commence later this year or early next year.

A significant achievement following the election of the Rudd Government was the removal of discrimination against LGBTIQ+ Australians in many spheres of life. One of those concerned parentage. In 2008 s.60H of the *Family Law Act 1975* was amended to allow the recognition of female couples as parents. The change t also allowed recognition of opposite sex couples as parents.

When the amendment bill was considered by the relevant Senate Committee, it was recognised that gay couples were not recognised as parents by this process. They would necessarily be recognised through a surrogacy process. As a result, at the time that section 60H was amended, section 60HB of the *Family Law Act 1975* was inserted. This specifically recognises as parents those who have obtained a surrogacy parentage order in a State or Territory court.

At the same time the *Australian Citizenship Act 2007* was amended, so that in section 8 once a surrogacy parentage order was obtained in Australia, the parents recognised under that order were also recognised as the parents for the purposes of Australian citizenship.

Despite the decriminalisation of sodomy achieved by Attorney-General Lavarch in the Keating Government, Australia continued to be criticised at the Human Rights Committee of the United Nations for our failure to protect the rights of LGBTIQ+ Australians. In response, the Gillard Government caused amendments to the *Sex Discrimination Act 1984* to protect those rights, including, in section 22, as to the provision of services.

Nevertheless, despite all these changes, the surrogacy exclusion to Medicare has remained in each version of the regulations.

The effect to the amendment of section 22 of the *Sex Discrimination Act 1984* in the provision of services meant, inevitably, that restrictions under State law preventing LGBTIQ+ people from accessing assisted reproductive treatment would inevitably fail. Previous restrictions under State law preventing single women from undertaking assisted reproductive treatment were struck down because those restrictions were in conflict with section 22 of the *Sex Discrimination Act*: *Pearce v South Australian Health Commission* (1996) 66 SASR 486; *McBain v Victoria* [2000] FCA 1009.

There remain three restrictions under State or Territory law seeking to prevent LGBTIQ+ residents of those States from accessing assisted reproductive treatment:

- Section 4(8) of the *Anti-Discrimination Act 1991* (NT) allows discrimination in the provision of assisted reproductive treatment. That provision will be repealed upon the commencement of the *Surrogacy Act 2022* (NT).
- Section 45A of the *Anti-Discrimination Act 1991* (Qld) allows for discrimination based on sexuality or relationship status in the provision of assisted reproduction services. In its recent report, the Queensland Human Rights Commission has called for the removal of this exemption in part because it is redundant, in part because it does not reflect current practice (where IVF clinics market themselves to LGBTIQ+ people) and is constitutionally suspect – in other words, it is not fit for purpose.
- In the previous term of Parliament, the McGowan Government sought to amend the *Human Reproductive Technology Act 1991* (WA) and the *Surrogacy Act 2008* (WA) so that those laws no longer discriminated against single men and male couples. The Bill failed in the Upper House. The Government did not have a majority in the Upper House. It now does. There is currently a review of that legislation. I am optimistic that those changes will occur in Western Australia.

ABOLITION OF THE SURROGACY EXCLUSION WILL BE AT MINIMAL COST TO THE COMMONWEALTH

The ABC in 2015 estimated that the cost to the taxpayer of an IVF cycle was about $5,000. When I calculated the numbers by reference to the *Health Insurance (General Medical Services Table) Regulation 2021*, I calculated the cost to the Commonwealth of each IVF cycle TO BE $4,635.05. Canstar research in 2019 estimated the cost of one round of IVF to be over $8,000[1]. The out-of-pocket cost estimated by Canstar was $3,380 on average, leaving the Medicare portion at $4,620, or very close to my calculations.

[1] www.canstar.com.au/health-insurance/ivf/cost.

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It is estimated that the cost of assisted reproductive services funded by Medicare is over $250m a year. In a submission to the *Australian Institute of Health and Welfare Amendment (Assisted Reproductive Treatment Statistics) Bill 2019*, submission 9, it was noted in the financial year 2018-19 Medicare paid a total of $256.6m in benefits for MBS items, 13200-13292 for ART services. This remained relatively stable.

Table 1 – ART Items 13200-13292 (14 items) [2]

YEAR	SERVICES	BENEFITS ($M)
2018/19	285,558	*$256.6*
2017/18	276,952	*$249.0*
2016/17	277,366	*$251.1*
2015/16	279,552	*$256.1*
2014/15	263,663	*$242.2*

The number of IVF cycles undertaken through surrogacy is extraordinarily low by comparison. The Australia and New Zealand Reproductive Database sets out the number of gestational surrogacy cycles that have been undertaken in Australia and New Zealand through IVF clinics. As set out in ANZARD's annual reports, the number of gestational carrier cycles are as follows:

Table 2 – Number of Gestational Carrier Cycles

AUSTRALIA/NEW ZEALAND	2019	2020
Australia and New Zealand	225	*238*
Australia[3]	187	*198*

Because ANZARD does not give a breakdown of the figures in Australia or New Zealand alone, I have used a ready metric to calculate on a per capita basis:

n (being the number of cycles in Australia and New Zealand, as reported to ANZARD) x 25 (being the population of Australia)/(5 population of New Zealand + 25 population of Australia) = Australian proportion

Based on those figures, if the exclusion were abolished, the cost to the Commonwealth each year would be less than $1million.

[2] Department of Human Services, Medicare Australia Statistics, accessed by that submitter on 13 August 2019.
[3] Calculated by me, as per the metric, based on the relative populations of Australia and New Zealand, as set out in the letter.

Table 3 – Potential Cost to the Taxpayer if there had been no exclusion

YEAR	COST PER CYCLE AS AT 2021	GESTATIONAL CARRIER CYCLES IN AUSTRALIA[4]	COSTS
2019	$4,635.05	187	$866,754.35
2020	$4,635.05	198	$917,739.90

DISPROPORTIONATE IMPACT ON GAY MEN

As best I can estimate it, since 1988 I have advised in about 1,800 surrogacy journeys. I do not claim to have kept precise statistics over the years. Approximately 50% of my clientele were heterosexual couples and about 50% were gay couples. There was also a smattering of single men and single women who undertook surrogacy, plus in single digits, those who identified as non-binary or transgender. I have acted in three cases involving lesbian couples who have undertaken surrogacy. Most of the single male clients who were intended parents through surrogacy identified as being gay.

By reason of biology, for men to reproduce when they are single or part of a male couple necessarily involves surrogacy. Gay men therefore are disproportionately affected by this exclusion.

THE EXCLUSION IS COUNTER-PRODUCTIVE IN THAT IT ENCOURAGES INTENDED PARENTS TO UNDERTAKE SURROGACY OVERSEAS

I have managed to collate international and domestic surrogacy births. The source of international surrogacy births has been obtained from freedom of information requests made of the Department of Home Affairs for children who have applied for Australian citizenship by descent who were born overseas through surrogacy. Data from the Department is reported on a financial year basis.

Domestic gestational surrogacy births are reported by Australian and New Zealand IVF clinics to ANZARD. Otherwise, there is no consistent national data as to the number of domestic surrogacy births. Courts in Victoria and Queensland, the Victorian Assisted Reproductive Treatment Authority and the Reproductive Technology Council of Western Australia keep data by which these births can be calculated, but there is no consistent reporting of these births in the ACT, New South Wales, Northern Territory, South Australia or Tasmania.

The only national data that can be obtained is from ANZARD. Again, there is no differentiation between Australia and New Zealand. Again, I have calculated, based on the same metric, as to a breakdown of Australian domestic births.

In short, for every birth via surrogacy in Australia, just under four occur overseas. More Australian children are born via surrogacy in the United States than in Australia. It is expensive to undertake

[4] ANZARD, adjusted as per my metric.

surrogacy. If intended parents are made aware, as they are, that there is no subsidy by the Australian taxpayer to undertake the creation of embryos in Australia, and they are aware that they also have to pay for the costs of transport of those embryos overseas (which cannot, by reason of the *Code of Practice* issued by the Fertility Society of Australia and New Zealand be for commercial surrogacy) then quite simply, intended parents often decide that instead they would rather create embryos overseas than at home. This appears to be another encouragement (of many) for Australian intended parents to go overseas for surrogacy than to undertake surrogacy at home. Quite simply, our policy settings as a country should be, where possible, to encourage Australians to undertake surrogacy at home where we can be confident that:

- There is high quality IVF.
- There are strong human rights protections of the surrogates and the children who are born.

The same cannot be said of every destination to which Australians undertake surrogacy overseas.

I have been opposed to the criminalisation of Australians going overseas for surrogacy. This criminalisation has not been accepted by reviews by the House of Representatives inquiry or in South Australia. The extra-territorial ban doesn't work. As then then heads of the Family Court and Federal Circuit Court said back in 2014 that the extra-territorial ban did not work, made a mockery of the law, and should be repealed. Of the thousands of children born overseas through surrogacy since the changes to the laws about 10 years ago, not one person has been prosecuted for a surrogacy offence. The New Zealand Law Commission's review of surrogacy there recently endorsed the view expressed by New Zealand academics that the overseas criminalisation of commercial surrogacy by some Australian States was a "failed experiment". I would not argue with that view.

Table 4 – Comparison of International and Domestic Births via Surrogacy

YEAR	Australian International Surrogacy Births[6]	Australian International Surrogacy Births in the United States[7]	Australia New Zealand Gestational Surrogacy Births[8]	Australian Gestational Surrogacy Births[9]
2017	164	66	62	51
2018	170	67	86	71
2019	232	95	73	61
2020	275	120	91	76
2021	223	76		

[5] ANZARD is calculated on calendar years. The Department of Home Affairs for international births is calculated on financial years.
[6] Source: Department of Home Affairs.
[7] Source: Department of Home Affairs.
[8] Source: ANZARD.
[9] Source: ANZARD, adjusted by me as per my metric, to break down the Australia and New Zealand figure into an Australian component.

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ABOUT ME

I am a dad through surrogacy. My husband, Mitchell and I are parents of a beautiful 3 year old daughter, Elizabeth, who was born through an altruistic surrogacy process in Queensland.

I was admitted as a solicitor in 1987. My first surrogacy case was in 1988. I have advised in approximately 1,800 journeys since then for clients in every part of Australia and at last count, 36 countries overseas.

Since 1996 I have been a Queensland Law Society Accredited Family Law Specialist.

In 2012-2013 I was the convenor of Queenslanders for Equality, which successfully opposed moves by then Queensland Attorney-general Jarrod Bleijie to strip away the recognition of lesbian couples as parents, and to criminalise gays, lesbians and singles form undertaking surrogacy.

In 2015, I received the Rainbow Keys Award from the LQBTI Legal Service in Queensland. In 2016 my then firm received an Equity and Diversity Award from Queensland Law Society. In 2020 I was the recipient of the inaugural Pride in Law Award from Pride in Law.

Between 2017 and 2022 I lectured in Ethics and the Law in Reproductive Medicine at the University of New South Wales, by which I was awarded a teaching prize in 2019.

I am a Fellow of the International Academy of Family Lawyers, including being a member of its Parentage Committee, its LGBT Committee and its Forced Marriage Committee.

I am a Fellow of the Academy of Adoption and Assisted Reproduction Attorneys, the first Fellow outside the US and Canada. I am a member of its ART Resources Committee.

Since 2012 I have been an international representative on the American Bar Association's Artificial Reproductive Technologies Committee. In that role, I was the principal advocate for and co-author of that Association's policy on a proposed Hague Convention on international surrogacy arrangements. I am a director of Access Australia's Infertility Network Ltd. I am a director of the Fertility Society of Australia and New Zealand Ltd.

I am a member of the LGBTI Committee of Australian Lawyers for Human Rights. I am the founder and director of the LGBT Family Law Institute in Australia.

I have written and presented about surrogacy and assisted reproductive treatment law throughout the world, including being a guest lecturer at Hong Kong University, Monash University and the University of Western Cape. My presentations or writings have included for the International Bar Association, American Society for Reproductive Medicine, American Bar Association, International Academy of Family Lawyers, Academy of Adoption and Assisted Reproduction Attorneys, Fertility Society of Australia and New Zealand, Family Law Section, Law Council of Australia, International Journal of Family Law, the Royal Australian College of Obstetricians and Gynaecologists, the Canadian Fertility and Andrology Society, Queensland Law Society, Hunter Valley Family Law Practitioners Association, Law Society of South

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Australia, and the Family Law Practitioners Association of Western Australia, among others.
I have given expert evidence concerning surrogacy and assisted reproductive treatment regulation in court cases in the Federal Circuit Court of Australia and twice in the High Court of England and Wales, the last time being concerning surrogacy regulation in Cambodia.

I have made submissions or testified at many inquiries in this area, including the two House of Representatives Inquiries concerning surrogacy and most recently, the Queensland inquiry concerning the rights of donor-conceived adults. I was a member of the Northern Territory Government's Joint Surrogacy Working Group, that led to the enactment of the *Surrogacy Act 2022* (NT).

The views expressed in this letter are mine alone.

Yours faithfully

Stephen Page
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