APPENDIX 3

THE SITUATION IN SOUTH AUSTRALIA AND WESTERN AUSTRALIA

1.1 As noted, access to fertility treatment is regulated by State and Territory law. Three States have until recently restricted access to services on the basis of marital status, providing access only to married couples and those in de facto, heterosexual relationships. Those States are Victoria, South Australia and Western Australia. In the Northern Territory, the *Anti Discrimination Act* exempts ART procedures,[1] allowing discrimination on the basis of marital status.[2]

1.2 In the other States and the Australian Capital Territory there is no direct legal regulation of access to ART services. However, the New South Wales Government has recently released a discussion paper, *Assisted Reproductive Technologies*, as part of a review of the *Human Tissue Act 1983.*[3] In Queensland, the Court of Appeal of the Supreme Court upheld a decision that it was possible, and not unreasonable, to restrict access to ART on the basis of a person not engaging in heterosexual intercourse.[4]

The Situation in South Australia

1.3 Access to ART services in South Australia is regulated by the *Reproductive Technology Act 1988,* which restricts it to married women and those in heterosexual de facto relationships of five years' duration. Women in these categories must be either infertile or at risk of giving birth to a child with genetic defects.[5]

1.4 A South Australian woman, Gail Pearce, was denied access to the IVF program because she was separated from her husband. She challenged the decision[6] and the Full Court of the South Australian Supreme Court unanimously found that the South Australian legislation discriminated on the ground of marital status. It was thus in breach of the *Sex Discrimination Act 1984* and accordingly a determination was made that s 13(3)(b) was invalid to the extent of that inconsistency. The effect of this decision is that single women cannot be excluded from services by virtue of their marital status.

1.5 If the Commonwealth Bill, including the amendments of 27 November 2000 are passed, they will permit South Australia to exclude from ART access women who are:

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1 Including artificial insemination

2 Northern Territory Anti-Discrimination Act, s 4(8)

3 www.health.nsw.gov.au/corporate-services/legal

4 QFG & GK v JM (1997) QSC 206. Other issues were also considered, including infertility and marital status.

5 *South Australian Reproductive Technology Act 1988,* s 13(3)(4) The Act also established the South Australian Council on Reproductive Technology, which was responsible for developing a Code of Ethical Practice, for oversighting the licensing of premises and practitioners and for setting out guidelines for research.

6 Pearce v South Australian Health Commission, (1996) 66 SASR 486

- Not married;
- Married but separated; or
- Not in a de facto heterosexual relationship.

1.6 The amendment of 27 November 2000 will not permit State or Territory laws to discriminate between married and de facto couples. This means that the five year threshold requirement for de facto relationships in South Australia will not be valid, as a similar length of relationship is not required for married couples.[7] South Australia will therefore need either to remove the five year requirement for de facto couples or require married couples also to have been married for five years. The South Australian Government has suggested[8] that the amendments to the Commonwealth Bill, which it generally supports, should be modified to allow States to require a minimum period of cohabitation for de facto couples.

The Situation in Western Australia

1.7 The relevant legislation in Western Australia is the *Human Reproductive Technology Act 1991*. It is similar in scope to the South Australian legislation. There is no legislation on surrogacy.

1.8 The Act is silent on eligibility for artificial insemination by sperm donation but restricts access to IVF and related services to married or heterosexual de facto couples who are infertile. De facto status must have existed for five years, as in South Australia.

1.9 Those aspects of the West Australian Act governing access to services have not been challenged and remain in force. However, should the proposed Commonwealth amendments come into operation the effect in Western Australia will be the same as in South Australia.

7 Advice from Parliamentary Information and Research Service

8 Letter to Committee from Hon K Trevor Griffin, Attorney-General for South Australia, 29 December 2000