THE GREAT IVF DEBATE

Ella Latham Theatre
Royal Children's Hospital
5.30 pm, Monday August 14, 2000

On 28 July 2000, Justice Ross Sundberg brought down his decision in the Federal Court in response to the case of McBain v State of Victoria & Ors. The media said that it took four minutes to make the declaration. We have seen in the last two weeks that a significant debate has raged through the media, and also I suspect within each of the workplaces of people who are here tonight.

Broadly, in the view of the Infertility Treatment Authority, the decision made a couple of key points, which the Authority has to take into account in guiding our application of the legislation which is outlined in the *Infertility Treatment Act*. These are:

1. That insofar as the marriage requirement is a feature of the *Infertility Treatment Act* it is considered in contradiction to the requirements of the *Sex Discrimination Act* (Cth) 1984, and to that extent is inoperative by virtue of s.109 of the Australian Constitution. The Authority, in subsequent advice, understands it to mean that it is not possible to exclude a woman from receiving a treatment procedure on the basis of her marital status, i.e. that she is a single woman.
2. That the declaration made by Justice Sundberg was made within the context of the over-riding features of the *Infertility Treatment Act* and, of particular interest to the Authority, made in the context that the requirement for what is now colloquially known as "clinical infertility". This is evidenced in para 10 of the declaration that Justice Sundberg made, which states as follows:

> *What has to be characterised is the provision of medical treatment that is designed to overcome any trait that precludes fertilisation occurring in the conventional manner. Fertility treatments dissect the biological processes and focus on overcoming any one of a series of problems that may arise before, during or after intercourse, and which preclude fertilisation.*

3. That the declaration made by Justice Sundberg made no specific reference to those circumstances where a couple may present for treatment and the effect this decision in relation to the marriage requirement might make on their treatment.

What I want to do tonight is to first of all try and clearly place the Authority in the context of this decision and then, secondly, to talk about what steps the Authority took in trying to understand the implication of Justice Sundberg's declaration and, thirdly, to foreshadow some of the possibilities of what might happen in the future.

Let me run through quickly what the Authority is. The Infertility Treatment Authority is a government statutory authority, which is vested with the responsibility of administering the requirements of the *Infertility Treatment Act* 1995. It is chaired by Professor Louis Waller and comprises six other members who are appointed on the basis of their expertise. It has significant power and responsibility within the context of the Act and some of those powers have become apparent in the last couple of weeks. It has powers in relation to the licensing of places where treatment procedures are provided, of approving practitioners and of stipulating the requirements in terms of eligibility in relation to those treatments. It is important to emphasise that the

Authority draws its power from the provisions of the legislation - the *Infertility Treatment Act*, a successor to legislation which has often been described as pioneering legislation in terms of common law jurisdiction. Victoria was the first place to legislate in the area of infertility in 1984, and this Act grew out of the experience of that legislative experience. The Authority has the responsibility for implementing the legislation and in doing so needs to understand the policy base of the legislation. It attempts to do this through a number of means.

1 By looking at the guiding principles of the legislation which have been clearly articulated, the primary principle being that of the interests of the child born or to be born as a result of the use of treatment procedures, and the fourth principle which states that infertile couples should be assisted in having children.

2 By drawing on the debates in both Houses of Parliament. This legislation had both bipartisan and bicameral support at the time that it was passed in 1995, and this support continued when the Act was amended in 1997 to allow de facto couples access.

3 By drawing on the experience and the documented policy statements of the previous Standing Review and Advisory Committee on Infertility, and before that by the Reports of the Waller Committee.

This is of course in addition to on-going consultation and discussion with people in the field.

The Authority is aware, that in terms of the comprehensively documented policy history of the legislation, that much of that documentation occurred between 1982 and 1991. It is appropriate to acknowledge that many things have changed since 1991, not the least of which have been the government, twice, the nature of the technology and its potential, but also the social structures that exist in society. Notwithstanding, the Authority has a responsibility to act only within its powers and only within its understanding of the requirements of the legislation. I looked back at the previous reports and was reminded that until 1997 statutory eligibility in terms of marital status was defined as "legally married couples". This is not withstanding the recommendation of the Standing Review and Advisory Committee in 1991 that de facto couples should be recognised in this process. It is difficult to find a clearly articulated policy debate around access to people beyond those who are in heterosexual de facto relationships or who are legally married.

I want to now move to the steps that the Authority took following the Federal Court decision. It would be fair to say that it seemed to be a confusing time following the declarations made by Justice Sundberg. The media often plays an important role in disseminating information and developing an understanding about the potential of technology such as that used in assisted reproduction. In the last two weeks the intensive media attention, in my personal view, has ended up being divisive, and for the people who are brave enough to tell their personal stories it must have been a very difficult experience indeed. The Authority had a responsibility to quickly determine what the implications of the Federal Court decision were in relation to its own powers and functions, and then advise the Minister for Health accordingly, and to take

account of that advice in any further action which it undertook. Because the Authority is a government statutory authority and therefore independent and at arm's length from government it sought its own senior counsel advice and this is the advice which has now been widely circulated, provided by Dr Gavan Griffith QC.

The Authority asked two questions. The first question was: "what are the implications of the Federal Court declaration in terms of the requirement for clinical infertility which had already been in existence in the legislation?" and the second was: "what are the implications of the Federal Court decision insofar as the requirements existed for couples as were previously treated under the legislation to continue within the ambit of the legislation?". The result of that advice is now widely understood and, if I can express it in lay terms, has reiterated the existing requirement in the legislation, that the doctor must be satisfied by an examination that he or she has performed or a treatment provided by him or her that the woman is not capable of becoming pregnant other than by means of a treatment procedure. The second part of the advice is that the marriage requirement, as it has become to be known, is inoperative insofar as it might preclude single women from accessing infertility services, but it is still operative in those cases where married couples or heterosexual de facto couples may seek treatment.

The notification that has been made to the infertility clinics reflects this advice and further requires that gamete donors need to be apprised of the changed circumstances in relation to the application of the legislation and that their existing rights may be asserted if they so choose, that is the right to withdraw their consent. The priority for the Authority has been to ensure that clinics are aware of how they can operate legally

and that is the responsible course of action for the Authority and the responsible course of action for the clinics. There is no indication that we have received that they would respond in any manner other than that.

We consider that we must prepare new definitions which spell out how these requirements will be put into effect and then we will continue our normal practice of consultation, of dialogue, of listening to try and ascertain how best to facilitate the process of ensuring that the clinics remain compliant. This is the process which was utilised in the development of the current conditions for licence which guide the clinics in their operation.

This is not to beg the policy question which arises out of the Federal Court decision. The first obligation and priority of the Authority is to ensure that the application of the legislation is administered responsibility and efficaciously, but the Authority also has responsibility to monitor the provision of infertility treatment and to advise the Minister for Health accordingly of any developments or changes which might occur in the area. The issue of eligibility and access to these services has been one which has shown an extremely high level of public interest and its current portrayal has been divisive and hopefully not destructive, but the Authority is mindful that the policy process has to evolve from here. We are participating in the Department of Human Services Gay and Lesbian Health Working Party insofar as it is looking at the issues related to access to reproductive services, and it is anticipated that this policy group will then feed into a more extensive process of deliberation through the Law Reform Commission. The Authority itself will monitor the changed requirements insofar as they affect the operations of the clinics and try as best we can, within our limited

resources, to utilise this opportunity to collect data to further the understanding about the utilisation of these procedures and to ensure that the Minister is made aware of the consequences of both the Federal Court decision and also the emergence of the technology. The opportunity tonight means that while the issues are fresh it is possible to canvass the issues and perhaps to elucidate them in a more reasoned environment. I will certainly undertake to ensure that outcome of the tonight's proceedings is reflected back in terms of the Authority's deliberations.

In the meantime I would like to conclude by making a number of points. The first is to reiterate that the Authority has a responsibility to react quickly to changes in the legislative context and to advise the clinics accordingly, and equally to advise the Minister in relation to the implementation of legislation in this State. Secondly, it is in all of our interests if the communication with the Authority remains open. We have indicated to the clinics that as issues arise where there is uncertainty we want to maintain that communication. Equally for the people who are potential users of the service or have enquiries in relation to aspects of the service delivery I will undertake to ensure that we are able to achieve an efficient turn-around so that people are aware of what their legal standing is. I thank you for the opportunity of outlining the Authority's response in relation to the Federal Court decision and would be happy to respond to any questions as they arise.

Helen Szoke
Chief Executive Officer

10 August 2000