

ACCESS TO ASSISTED REPRODUCTION TECHNOLOGY (ART) BY SINGLE AND GAY WOMEN IN VICTORIA

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In July 2000, Justice Sundberg ruled in the Federal Court that Victorian treatment agencies must not refuse single women access to ART¹ services on the ground of their marital status (*McBain v State of Victoria*²). ART specialist, Dr John McBain, commenced the court action because he wanted to treat single women and was barred from doing so by the Victorian Infertility Treatment Act 1995. The Victorian Act limited ART to married and heterosexual de facto couples. Dr McBain argued that the exclusion of single women on the ground of their marital status was inconsistent with the Commonwealth Sex Discrimination Act 1984 and therefore invalid under s 109 of the Australian Constitution. Justice Sundberg agreed. He said that it is unlawful for treatment agencies to discriminate in that way and that the Victorian Act is inoperative to the extent that it requires them to do so.

This paper sets out the relevant provisions in the Victorian and Commonwealth legislation and explains the arguments and rulings in relation to those provisions and the subsequent legal developments.

Victorian Infertility Treatment Act

Under the Infertility Treatment Act 1995 (Vic), a woman could not be admitted to a program for a "treatment procedure" unless certain conditions were met (s 8). A "treatment procedure" means DI ("artificial insemination of a woman with sperm from a man who is not the husband of the woman"); and IVF (a "fertilisation procedure", which is a procedure of "transferring to the body of a woman a zygote [embryo, sperm or oocyte] formed outside the [woman's] body" (s 3(1)). To undergo DI or IVF, the woman had to be "married and living with her husband on a genuine domestic basis; or ... be living with a man in a de facto relationship" (s 8(1)(a),(b)). Also, consent had to be obtained from the woman's husband (which includes a de facto husband: s 3(1), definition of "husband": s 8(2)). A doctor had to be satisfied that she was "unlikely to become pregnant from an oocyte produced by her and sperm produced by her husband" without DI or IVF, or [was] at risk of having a child with a genetic abnormality" (s 8(3)).

Federal Sex Discrimination Act

¹ The term "Assisted Reproductive Technology" includes Donor Insemination (DI) and In Vitro Fertilisation (IVF).

² [2000] FCA 1009 (28 July 2000); Federal and State cases and legislation are available at: <http://www.austlii.edu.au>

Under the Sex Discrimination Act 1984 (Cth), “[I]t is unlawful for a person who ... provides ... services, or makes facilities available, to discriminate against another person on the ground of the other person's ... marital status ... by refusing to provide ... services or to make those facilities available ...” or imposing terms or conditions (s 22(1)(a),(b)). "Marital status" means being single; married; married but living separately and apart from one's spouse; divorced; widowed; or the de facto spouse of another person (s 4). Discrimination on the ground of marital status means treating a person less favourably because of their marital status, a characteristic that appertains generally to persons of that marital status, or a characteristic that is generally imputed to persons of that marital status (s 6(1)); or imposing a disadvantageous “condition, requirement or practice” (s 6(2)) that is not reasonable in the circumstances (s 7 B). In determining whether the condition, requirement or practice is reasonable, one may take into account “the nature and extent of the disadvantage resulting [from imposing it] ...; and the feasibility of overcoming or mitigating the disadvantage; and whether the disadvantage is proportionate to the result sought by the [discriminator]” (s 7B(2)).

Dr McBain's argument and the response of the other parties

Dr McBain applied for a declaration (a court order) "that s 8 of the ...[Victorian] Act is inoperative on the ground that it is inconsistent with s 22 of the ... Commonwealth Act" (judgment para 3).

The first two respondents, the State of Victoria and the Minister for Health, maintained a "neutral" position - "that is to say they neither asserted there is no inconsistency nor conceded an inconsistency" (judgment para 3). The Infertility Treatment Authority, the third respondent, did not appear at the hearing. The fourth respondent, Ms Lisa Meldrum was a patient of Dr McBain's. Her Counsel "adopted the submissions made on behalf of the applicant [Dr McBain]" (judgment para 3)

Intervention by the Roman Catholic Church

The Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church applied to be heard as *amici curiae* ("friends of the court") and "[i]n view of [the 'neutrality' of the Victorian government parties, Justice Sundberg] acceded to [this] application" (judgment para 3). The Church was then able to submit arguments in response to Dr McBain's application. In delivering judgment, Justice Sundberg devoted the bulk of his comments to the arguments of the Church (judgment paras 9-18)

The Church argued that:

- there was no inconsistency between the two Acts (judgment para 10)
- ART is not a "service" because "the central case of becoming pregnant is intercourse between a man and a woman" (judgment para 10)

- "various international instruments recognise the right of a child to be born into a family, to be raised by its mother and father, and to know its parents" (judgment para 11).³
- if the State Act does discriminate against single women, that is reasonable in the circumstances (judgment para 17).

The Federal Court judgment

In the Federal Court judgment, Justice Sundberg ruled that:

- The provision of Donor Insemination is a "service" under the Sex Discrimination Act (judgment para 10).
- The Sex Discrimination Act was passed to give effect to a specific treaty - the *Convention on the Elimination of All Forms of Discrimination Against Women*. It is not to be qualified by treaties dealing with other topics, such as the *International Declaration of the Rights of the Child*. Principle 6 of that Declaration states that a child "shall, wherever possible, grow up in the care and under the responsibility of his parents". However, that Principle did not apply; first, because the Act implemented a specific treaty; and secondly, because Principle 6 itself states that it applies "wherever possible" (judgment paras 12-13).
- Although section 7B of the Sex Discrimination Act allows discrimination where that is "reasonable in the circumstances", that section applies only to indirect discrimination, not to direct discrimination as in this case (judgment para 18).⁴
- The Victorian and federal Acts were inconsistent (para 19).⁵ The latter therefore prevailed. Sections in the Victorian Act that were inconsistent were inoperative (judgment paras 19-20, Schedule). As well as s 8, this included "other sections [proceeding] on the basis that the woman will have a "husband", and [requiring] conduct by the woman and her husband or conduct by others towards the woman and her husband"(ibid).

Subsequent legal developments

Immediately after the judgment, there was widespread media discussion of its impact and implications. There were also political interventions.

Prime Minister's proposal to amend Sex Discrimination Act The Prime Minister, John Howard, responded soon after the judgment. He said: "This issue primarily involves the fundamental right of a child within our society to have the reasonable expectation, other things being equal, of the care and affection of both a mother and a father".⁶ He said that the Sex Discrimination Act would be amended at once to restrict IVF treatment to married and

³ eg Principles 6 and 7 Declaration of the Rights of the Child; Article 10 International Covenant on Economic, Social and Cultural; Article 23 International Covenant on Civil and Political Rights.

⁴ Because s 7B refers to s 6(2) (indirect discrimination), not s 6(1) (direct discrimination).

⁵ The SA Supreme Court reached the same decision in *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

⁶ Michael Gordon and Darrin Farrant, "Howard sparks IVF storm", *The Age*, 2 August 2000, p 1.

de facto couples.⁷ According to press reports, he did not consult federal Sex Discrimination Commissioner, Susan Halliday, who expressed “immense surprise” at the proposed amendment,⁸ but proceeded at once with the proposed amendment.

On 17 August the Sex Discrimination Amendment Bill (No1) 2000 (Cth) received second reading in the House of Representatives.⁹ The Attorney-General, Daryl Williams, introducing the Bill, said that “When the bill commences, any provisions of the Victorian and South Australian acts that have previously been ruled inconsistent with the Sex Discrimination Act will revive”. If passed, the Amendment Bill would insert into s 22 of the Sex Discrimination Act the following sub-section:

(1A) Nothing in this section makes it unlawful to refuse a person access to, or to restrict a person’s access to, assisted reproductive technology services if that refusal or restriction is on the ground of the person’s marital status and is imposed, required or permitted by or under a law of a State or Territory (whether made before or after the commencement of this subsection).

On 18 August, the Shadow Attorney-General said in a press release¹⁰ that this Bill would make it lawful for states and territories to discriminate against de facto couples seeking access to assisted reproductive technology. This suggestion was rejected by the Attorney-General in a press release the same day as “a blatant scare campaign” by the Opposition.¹¹ To date, the Bill has not been passed and is still before the federal Parliament.¹² The federal government later advertised for submissions from the public in relation to the proposed amendment.¹³

Victorian Premier's direction: ART limited to "medically infertile" women

The Victorian Premier, Steve Bracks, announced soon after the judgment that IVF would be available to single women who are *medically infertile* and “not for those who choose it for social reasons or for their own lifestyle choices”.¹⁴ Thus, women will not be excluded from DI and IVF because they are unmarried and not living in a de facto relationship; but

⁷ Ibid.

⁸ Ibid.

⁹ <http://search.aph.gov.au/search/ParlInfo.asp> (search 6/10/2000)

¹⁰ Ibid.

¹¹ Ibid. Similarly, Victorian ethicist Nicholas Tonti-Filipinni, suggested that Justice Sundberg’s “blue pencilling” of various provisions in the Infertility Treatment Act that discriminated against single women would limit IVF for *married* women as well. If all references to a “husband” were omitted in the Act, he said, a married woman could not gain access on the ground of *her husband’s* infertility, but only her own infertility (“Why IVF will be much harder now”, *The Age* 2 August 2000, p 13). This argument was soundly refuted by Melbourne University Law academic, Dr Kris Walker in a letter to *The Age* on 4 August 2000.

¹² House Bills List, 6/10/2000; *ibid.*

¹³ Advertisement by the Senate Legal and Constitutional Legislation Committee, 2 Nov 2000: “Inquiry into the Sex Discrimination Amendment Bill (No 1) 2000. Submissions were advertised to close on 13 Nov 2000 with the reporting date on 4 Dec 2000. However, the Committee is apparently seeking an extension to 27 Feb 2001: Tanya Taylor, “IVF break for lesbians” *Herald Sun* 2 Dec 2000, 10.

¹⁴ Gordon and Farrant, n 6 above, emphasis added.

they will be excluded if they are not medically infertile.¹⁵ This direction is based on s 8(3)(a) of the Infertility Treatment Act. It states that women may not undergo a treatment procedure unless “a doctor [is] satisfied, on reasonable grounds, from an examination or ... treatment ... that the woman is unlikely to become pregnant ... other than by a treatment procedure”.

Appeal by the Roman Catholic Church

In a third legal development, the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church applied to the High Court for an order to review the decision of Justice Sundberg.¹⁶ This appeal has been referred to the Full Court for argument.

Conclusion

For the moment, the public debate on access to ART has abated. It will no doubt revive, however, when the Government's proposed amendment to the Sex Discrimination Act is debated in federal Parliament; or when the Bishops' appeal is argued in the High Court.

¹⁵ Or, presumably, not at risk of having a child with a genetic abnormality, since section 8(3)(b) allows women to be treated if they are fertile but at risk of having a child with a genetic abnormality. This issue has not arisen.

¹⁶ Australian Catholic Bishops Conference & Anor, ex parte The Hon Justice Sundberg C 21/2000 (17 Oct 2000): <http://www.austlii.edu.au/au/other/hca/transcripts/2000/C21/1.html>.