

CHAPTER 2

Purpose of the Bill

2.1 The Bill proposes to amend the *Sex Discrimination Act 1984* ('the Commonwealth Act'), enabling the States and Territories to restrict access on the basis of marital status to the range of infertility treatments defined in the Bill and together termed assisted reproductive technology (ART) services.

Current State and Territory Legislation

2.2 Access to ART services is regulated by State and Territory law and varies between jurisdictions. Three States, Victoria, Western Australia and South Australia, currently restrict access to services on the basis of marital status, providing access only to married women and women in de facto relationships.¹ The Northern Territory *Anti-Discrimination Act* provides that its controls on the provision of services do not apply to ART services. The South Australian *Equal Opportunity Act 1984* contains a similar provision, in addition to the actual restriction which is contained in the South Australian *Reproductive Technology Act 1988*.²

2.3 In Victoria, access to ART services under the *Infertility Treatment Act 1995*³ was originally limited to legally married persons. In 1997 this Act was amended to include de facto couples.⁴ Within those categories it further restricted access to those who could demonstrate what may be described as a 'medical' need (that is, the woman or her partner requires some assistance to assist fertility, is infertile or is at risk of transmitting a genetic abnormality or a disease to the child). These provisions are at s 8.

2.4 In July 2000 action in the Federal Court resulted in certain provisions of the Victorian legislation being deemed inoperative to the extent of their inconsistency with the provisions of the Commonwealth Act.⁵

1 The situation in Western Australia and South Australia is described in Appendix 3

2 See also Appendix 3

3 The Act regulates access to a range of ART services

4 By necessary implication, a person who is part of a same sex couple is considered single as same sex relationships are not included in the definition of de facto couple. In the Victorian legislation there is no time qualification for de facto recognition. This differs from the position in South Australia and Western Australia where eligibility to certain of these services for de facto couples is restricted to those whose relationship has existed for five years

5 The Victorian Act was challenged in the Federal Court by Dr John McBain, an IVF specialist acting on behalf of Lisa Meldrum, a single woman seeking access to ART services in Victoria. Dr McBain argued that the Victorian Act was unlawful because it denied single women access to ART services and thus directly contradicted those provisions of the Commonwealth Act which forbid discrimination in the provision of services on the basis of marital status. The Federal Court, citing s 109 of the Constitution, found the relevant provisions of the Victorian Act invalid. S 109 states that where a State law is inconsistent with a Commonwealth law then the Commonwealth law shall prevail and the State law, to the extent of the inconsistency, shall be invalid. In its ruling the Federal Court considered only the marital status criterion in the Victorian legislation

The Commonwealth Sex Discrimination Act 1984

2.5 S 22 of the *Sex Discrimination Act 1984* currently makes it unlawful, when providing services, to discriminate against a person on the basis of that person's marital status. Marital status is defined in the Act (in s 4(1)) as describing people who are single, married, married but living separately and apart from their spouse, divorced, widowed or a de facto spouse. A de facto spouse is defined as someone living with a person of the opposite sex as husband and wife on a bona fide domestic basis, although not legally married to that person.

2.6 The stated intent of this Bill is to remove any ambiguity or contradiction in the combined operation of the Commonwealth Act and State or Territory legislation governing access to specified ART services. This is seen as the means by which the Commonwealth objective - of ensuring, all other things being equal, that children have a reasonable expectation of the care and affection of both a mother and a father,⁶ will be achieved.

2.7 In the original Commonwealth Act, subsection 22(1) makes it unlawful, when providing services, to discriminate on the basis of sex, marital status or pregnancy.

Effect of the Proposed Amendments

2.8 The amending legislation adds subsections 22(1A)-(1C)) which would allow the States and Territories to legislate to impose, require or permit refusal or restrictions to access to specified ART services on the basis of marital status.

2.9 Amendments originally proposed in the Bill were intended to ensure that, where State and Territory governments chose to restrict access to treatment on the basis of marriage, they would not be prevented by the Commonwealth Act from doing so. In response to concern that the original amendments proposed in the Bill might be interpreted as allowing the States and Territories to deny de facto couples access to ART services, these amendments were modified. The modifications were introduced into the House of Representatives on 27 November 2000 and specifically exclude married and de facto couples from groups to whom State and Territory governments might refuse or restrict ART services.

2.10 Effectively therefore, the groups now affected by the proposed amendments in the States and Territories which choose to restrict access are single women, regardless of whether they are heterosexual or part of a lesbian couple⁷ and single men.

2.11 Subsection 22(1)(1D) defines the ART services to which the above provisions apply:

- In-vitro fertilisation
- Artificial insemination
- Gamete, zygote or embryo transfer
- Any other services to assist in non coital fertilisation.

6 Press Release, *Amendment to Sex Discrimination Act*, Office of the Prime Minister, 1 August 2000.(Appendix 5). See also Transcript of Media Interview, Office of the Prime Minister, 1 August 2000

7 However, because CEDAW particularly concerns women the Committee has decided not to explore the effect of the Bill on single men, and no evidence was given on this issue

Effects on State and Territory Legislation

2.12 If this Bill is enacted those provisions of the *Victorian Infertility Treatment Act 1995* found inconsistent with the Commonwealth Act by the Federal Court and declared invalid will again become operable. A similar position will apply in South Australia and Western Australia. The impact of the amendments in the latter States is discussed in Appendix 3. In the Northern Territory, the exclusion of ART services from the operation of the Anti-Discrimination Act will effectively be authorised.

2.13 In other States and Territories there is no legislation directly restricting access to infertility services. Therefore, unless these States and Territories choose to introduce such legislation, they will not be affected by the proposed amendments to the Commonwealth Act.

