CHAPTER 3

The Basis of the Commonwealth Government's Approach

3.1 The Government's reasons for introducing these amendments are succinctly stated in the Explanatory Memorandum to the Bill and in the Second Reading Speech, which is also virtually the same as the Prime Minister's statement on this matter. Three reasons are given for amending the Commonwealth Act. Firstly, that access to these services is a State/Territory matter, secondly, that the Act has unintended consequences, and thirdly, that there is a need to provide to children the protection arising from the care and affection of both parents.

State/Territory responsibility

3.2 The Government considers that legislation in the area of access to medical services is a State/Territory rather than a Commonwealth matter, given the responsibility of the States and Territories for medical care. Thus one purpose of these amendments is to allow the States and Territories to legislate as they see fit, rather than to impose Commonwealth requirements upon them:

> The Commonwealth has limited constitutional power to legislate in this field – it is consistent with the States' responsibilities in relation to the regulation of the provision of medical care and treatment that they be permitted to regulate access to ART services.[1]

3.3 However, the Government's statements on the Commonwealth Act may have suggested to some witnesses that the Act directly made provision for health services, or that States are not bound by the provisions of Commonwealth anti-discrimination legislation.

> Our submission on this legislation reaffirms the sovereignty of state governments to make their own legislation, and they should not be overruled by a decision of a federal judge so we finish up with court made law.[2]

3.4 The Act does not regulate medical services directly, nor does it usurp State powers. However, it may override provisions of State law which are discriminatory, and this was not a matter always understood by witnesses:

> The regulation of the provision of medical care and treatment including ART is clearly a State/Territory responsibility. Some States have already specifically addressed the regulation of ART in legislation.[3]

<u>The fundamental issue concerns human rights not access to health services</u>

3.5 Many witnesses provided evidence which supported an emphasis on human rights rather than on access to health and medical services. It is claimed that, since the Commonwealth has responsibility for legislation preventing discrimination, through its

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1 Explanatory Memorandum, *Sex Discrimination Amendment Bill (No. 1) 2000*, p. 3

2 *Transcript of evidence,* Revd Hon Fred Nile, Proof Hansard, p. 21

3 *Submission 33*, Pro-Life Victoria, p. 1

ratification of a number of international instruments,[4] it will be abrogating this responsibility if it permits the States to introduce discriminatory legislation:[5]

> The States' rights argument may be dealt with briefly, as it carries little legal weight. Such an argument fails to recognise two key legal developments over the past century. First, that the doctrine of reserved powers[6] died in 1929 with the High Court's decision in the *Engineers'* case [Amalgamated Society of Engineers v Adelaide Steamship Co (1920) 28 CLR 129]. And second, that the external affairs power clearly permits the Commonwealth to legislate to implement Australia's international obligations, including the obligations under CEDAW. Fundamental human rights are thus very much a matter within Commonwealth power.[7]

3.6 Further, it is argued, the Bill revives discriminatory action which has already been taken by States such as Victoria and South Australia and enables other States to enact such legislation. Therefore the Commonwealth will be abrogating the responsibilities it has assumed to protect the rights of all women, in terms of its international obligations, if it passes this Bill.[8]

Different standards between States

3.7 A related concern expressed in many submissions opposing the amendments was that, if passed, they will result in different levels of human rights protections for different women, depending on their marital status and their State of residence:

> The need for consistency across Australia in matters of such importance cannot be understated. In undermining these federal human rights guarantees, the Amendment Bill will place Australians in different States and Territories in varying positions with respect to the protection of their rights. This inconsistency is highly undesirable and makes rights - which are fundamental - dependent on where in Australia a person happens to reside.[9]

Unintended consequences

3.8 Secondly, the Government considers that when the Commonwealth Act was passed there was no appreciation of the broader implications of ART developments, then in their infancy, and of their possible extension to a significant number of the population. Consequently, the Government argues, those responsible for the original Act would not have intended that it prevent States and Territories restricting access to ART procedures:

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4 Notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

5 The broader issue of the implications of Australia's agreement to CEDAW and other international treaties is discussed later in this report – see Chapter 4

6 Reserved powers – the implication that the Constitution was to be interpreted narrowly, allowing States to exercise those powers not specifically allocated to the Commonwealth

7 *Submission 27*, Ms Kristen Walker, pp. 2-3

8 It is suggested that this stands in contrast to the position adopted by the Parliament when overriding the legislation of the Northern Territory in relation to euthanasia. *Transcript of evidence*, Anti-Discrimination Board of New South Wales, Proof Hansard, p. 30

9 *Submission 98,* Human Rights and Equal Opportunity Commission, p. 14

> It is the government's view that it was not contemplated that the Sex Discrimination Act would prevent the states legislating to restrict access to ART procedures to women who are married or living in de facto relationships.[10]

3.9 This view received considerable support from many witnesses:

> When Parliament enacted the SDA it was never envisaged that it would be interpreted as in *McBain* to override State infertility treatment laws. At the time of the debate on the SDA, IVF and modern infertility treatment techniques were still largely experimental. It is therefore not surprising that little if any consideration was given to this technology during the debate.[11]

> The federal Sex Discrimination Act was originally intended to stop unjust discrimination against people when, e.g. buying a house or car or applying for a job. Because it was drawn in such wide terms it now has an effect that was never intended.[12]

3.10 On a related matter, some witnesses argue that the intention of the original Act was to exempt from the definition of 'services' in s 22 any services which, by their nature, could be provided only to people of one sex. This exemption is set out in s 32 of the original Act. In this view ART services can be provided only to women and should therefore be exempt from the category of services covered in s 22 and, by extension, in the new Bill:

> …I understand that the Sex Discrimination Act was never meant to cover procedures such as IVF, which can by their nature only be provided to one sex.[13]

3.11 This was one of the issues raised by the Australian Catholic Bishops[14] when they appeared as *amici curiae* before Justice Sundberg. [15]

The law must change and adapt

3.12 Another view was that the perception of law as static and self-contained contained two fundamental errors. The first is the same misunderstanding about the nature of the Commonwealth legislation noted above,[16] and the second is the failure to understand or accept the growth of coverage of legislation which implements international conventions.

3.13 The Government argued that the Commonwealth Act was being used to restrict States' rights to legislate on matters which were not considered when the original Act was passed in 1984 and which therefore properly fall beyond the scope of that Act:

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10 Attorney-General's Second Reading Speech, Hansard, 2 November 2000, p. 19228

11 *Submission 78,* Right to Life Association (NSW), p. 1

12 *Submission 10,* Catholic Women's League of Victoria & Wagga Wagga, p. 1

13 *Submission 7*, Ms Joanne Russell, p. 1

14 The Australian Catholic Bishops' Conference made an application on 17 November 2000 to the High Court against Justice Sundberg's decision. Justice Callinan granted an order directing that the application be heard by the Full Court of the High Court. It is not clear when the hearing will take place

15 See below, Paragraphs 3.45-3.51

16 See above, Paragraph 3.3

> It is the Government's view that it was not contemplated that the Sex Discrimination Act would prevent the States legislating to restrict access to ART procedures …[17]

3.14 However, as some witnesses pointed out, this argument specifically ignores the nature of anti-discrimination legislation linked to international conventions. The key point here is not so much that certain ART services *were* known at the time of the 1983/1984 debates on the original Bill[18] but that the Commonwealth Act was drafted in broad terms that could meet new situations without requiring frequent amendment and modification. The expansion and refinement of ART procedures have been adequately dealt with through the existing provisions of the Commonwealth Act and do not require the special exemptions now contemplated in this Bill:

> It has been argued in support of the amendment that anti- discrimination legislation was never intended to apply to this technology and therefore it is justified to allow discrimination …. There have been many changes since anti-discrimination legislation was enacted. Some of these changes are scientific and medical advances, others are social and economic changes. We do not accept there has been any change in the community's belief in equality of opportunity. Changes will often necessitate the review of laws but not on the basis of legitimising discrimination.[19]

The role of anti-discrimination legislation

3.15 Some witnesses also suggested that the Bill represented an attack on human rights which was of particular concern given the absence of constitutional protection for such rights in Australia:

> The amendment reveals the precarious nature of the rights we presently enjoy. Given that so few of our human rights are constitutionally protected, the willingness of the government to repeal human rights legislation, such as the SDA, when a court delivers a decision with which the government does not agree is particularly worrying.[20]

> It is also very important that we hold the government to account for its compliance with its international obligations because, essentially, it is these international treaties that we have in Australia in the absence of a constitutional or a legislative bill of rights. So it [is] almost more important than in any comparable country that we take account of what these international instruments say, that we take account of the committees that are attached to them and their interpretations of Australia's obligations. It would be viewed very gravely for Australia to be seen as stepping

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17 Press Release, *Sex Discrimination Amendment Bill (No.1) 2000*, Office of Attorney-General, 17 August 2000, p. 1 – see Appendix 6

18 'It is incorrect to argue, as the second reading speech seeks to, that the question of access to ART was not foreseen to be an issue at the time that the Act was originally debated. IVF, the most well-known form of ART saw the birth of the first child, Louise Brown, 21 years ago, some 5 years before the introduction of the Act. Artificial insemination has of course been available for a much longer period of time.' *Submission 50,* Australian Women Lawyers, p. 3

19 *Submission 83,* Women's Legal Resources Centre, p. 4

20 *Submission 27*, Ms Kristen Walker, p. 11

> backwards from the limited rights protections that it has adopted domestically, which is what adopting this amendment would amount to.[21]

3.16 Similarly, concern was also expressed that the Bill would be the beginning of a reduction, rather than an increase, in rights:

> The right to be protected from discrimination on the basis of marital status needs to be preserved and take cognisance of what is actually happening in Australian society today.[22]

Other domestic legal concerns

3.17 A number of other concerns were raised in relation to the effect of passage of the Bill on existing domestic legislation. One was that, because the Bill allows the States and Territories to discriminate on the basis of marital status, it undermines existing Commonwealth anti-discrimination legislation (including the *Racial Discrimination Act 1974* and the *Disability Discrimination Act 1992* as well as the Sex Discrimination Act):

> The proposed amendment will create a legal anomaly in the Commonwealth's anti-discrimination approach. The Commonwealth anti-discrimination legislation prohibits discrimination in the provision of services and access to facilities on a number of enumerated grounds, yet specifically authorises States to discriminate on the ground of marital status. No justifiable position can be advanced that discrimination on the ground of marital status is any more excusable than discrimination on grounds such as race, sex, and disability.[23]

3.18 Another was that the exemption provisions in the Bill, unlike existing exemptions in the Commonwealth Act, were not designed to overcome deeply entrenched disadvantage or protect the interests of particularly vulnerable groups or individuals.[24] Indeed, it might be argued that the reverse was the case:

> Unlike the exemptions contained in the Act, the proposed exemption does not have as its objective some other legitimate social purpose, for example, the enhancement of the Act, the provision of goods and services on the basis of need and so on.[25]

The Rights of Children

3.19 The third, and possibly the most important reason given by the Government for introducing the amendments, was its desire to advance the interests of children by doing

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21 *Transcript of evidence*, Fertility Access Rights Lobby of Victoria, Proof Hansard, pp. 119-110

22 *Transcript of evidence,* Victorian Equal Opportunity Commission, Proof Hansard, p. 72.

'In addition to the specific issue of access to fertility services, I have a broader concern about changes to the Sex Discrimination Act which mean that State governments can pick and choose which bits of the Federal Sex Discrimination Act they are prepared to abide by. … my fear is that this is just the thin end of the wedge when it comes to diminishing Australian women's rights.' *Submission 25*, Ms Jo Tilley, p 2. See also *Submission 42*, Law Council of Australia, pp. 5-6

23 *Submission 42,* NSW Gay and Lesbian Rights Lobby, p. 10

24 See also below, Chapter 4, Paragraphs 4.25-4.31 where the issue of discrimination and differentiation is considered in more detail

25 *Submission 26,* Women Lawyers of Western Australia, p. 2

everything possible to enable them to receive the care and affection of both a mother and a father.[26]

> 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.[27]

3.20 There has been little consideration of the source of this 'right', although a number of witnesses referred to both the International Convention on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CROC). Most of the evidence to the Committee in support of the amendments was based on grounds similar to those expressed by the Prime Minister, with due recognition provided *en passant* of the efforts of single parents:

> There is a substantial body of research on the impact on children of various family forms. The one conclusion which is overwhelming is that by nearly any measure you would care to cite, the **best outcome** for children occurs when they are raised in a **family** where **mum and dad live together and are married.**[28]
>
> Whether we like it or not, the statistics and the research show that, compared to a dual parent environment, children struggle and do not do as well on a range of different measures if they are in a single parent environment. That is not surprising when you think it through. That really is not a surprising result. The Australian Family Alliance has never suggested that this is actually an attempt to either denigrate or bash single parents or the children who live in a single parent family. What we have said is that governments have an obligation to protect and promote the form of family that, all other things being equal, is likely to deliver a better outcome for children. [29]

3.21 The Fertility Society of Australia, within which a range of views exists on the access of single women to ART procedures, recognises the validity of the points of view expressed in the preceding paragraphs. Its Position Statement, presented to the Committee as a submission said in part:

> 7. The FSA recognises the important role of fathers in the nurturing and support of children.
>
> 8. In general, existing social policy support [s] the creation of dual parent families while aiming to avoid the accidental creation of single parent families (e.g. through

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26 The Attorney General was anxious to dispel suggestions that such an attitude failed to acknowledge the efforts of single parents: 'The legislation is not intended to reflect on the efforts of the many single parents in Australia who do an excellent job raising children under difficult circumstances. The issue primarily involves the 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.' Press Release, *Sex Discrimination Amendment Bill (No.1) 2000,* Office of the Attorney-General, 17 August, 2000, p. 1 (Appendix 6)

27 Press Release, *Amendment to Sex Discrimination Act,* Office of the Prime Minister, 1 August 2000, p. 1 (Appendix 5)

28 *Submission 21*, Ms Elizabeth Sorbara, p. 1 (emphasis in original)

29 *Transcript of evidence*, Australian Family Alliance, Proof Hansard, p. 51

> support of family planning services). Thus the deliberate production of single parent families seems at variance with the underlying community aspiration.[30]

3.22 However, the Society's Position Statement went on to say:

> 9. The social reality is that there are many different models of the family unit, including single women (by intent or by accident) and same sex households. The current debate should not be used in any way to pass value judgments on the worth of these alternative family structures.[31]

Children in non traditional families ill served by proposed legislation

3.23 Some witnesses believed that the Bill is detrimental to the interests of the many children growing up in one-parent or homosexual couple families, since it implies their upbringing renders them less acceptable than children growing up in two-parent, heterosexual families.

3.24 As noted,[32] the Attorney-General took some pains to state that the Bill did not intend to make any disparaging assessment of the status of one-parent families.

Need to exclude access by persons in specific groups in order to protect children's rights

3.25 Another view, not expressed by the Government but discussed in some of the evidence, was that people who sought to conceive without ever intending that a resulting child should grow up with its father were selfish because they placed their own needs above those of the child. In this view nobody has a 'right' to a child. Because ART makes it possible for them to conceive, this does not make it appropriate for them to do so. It is suggested that the notion of such a right reduces the status of children (and fathers) to that of commodities:

> … the availability of technology should not dictate its usage. Assisted reproductive technology has allowed us to side-step the natural process of conception. We recognise that this has brought joy to many couples who, for medical reasons, were previously unable to have children. We also believe that just because something is available that does not mean it should be available to everyone. We believe that opening fertility treatments to all women, irrespective of their marital status, not only devalues fathers but may create heartache in the years to come.[33]

3.26 Many of these submissions made extensive reference to research material supporting the view that children raised in two parent (different sex) families achieved better outcomes against a wide range of criteria than did those raised in single parent families.[34] Some claimed that the majority of Australians shared their view that children achieved the best

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30 *Submission 130*, Fertility Society of Australia, p. 1. See also, *Transcript of evidence*, Fertility Society of Australia, Proof Hansard, pp. 163-164

31 *Submission 130*, Fertility Society of Australia, p. 1

32 See above, Footnote 26

33 *Transcript of evidenc*e, New South Wales Council of Churches, Proof Hansard, p. 9

34 *Submissions 60,* Australian Family Association; *69*, Women's Action Alliance and *102*, Festival of Light, are a representative sample of such submissions

outcomes when raised in two parent (different sex) families and therefore opposed the extension of access to ART to single women and lesbian couples.

3.27 Some witnesses and submissions disagree with these arguments. Many do not believe that single women or lesbian couples make less satisfactory parents than married heterosexual couples:

> There is some (not uncontested) evidence that, "other things being equal" children benefit from a stable home life with two loving parents. There is little evidence that the benefit relates to the presence of a father, rather than to other factors such as parental income.
>
> And, of course, "other things" are *never* equal. The complex mix of factors that contribute to happy children who grow into well-balanced adults, involves such variety and combinations that insistence on the presence of a father (who is assumed *a priori* to be caring and affectionate) as the *key* factor is fatuous.[35]
>
> The proposed amendments make subjective judgements about women, and the children born to them, who are living in single parent or same sex families or who have done so in the past. The Government should concern itself with what constitutes quality parenting rather than making moral judgements about sexuality or marital status. YWCA refutes the notion that only a one male and one female parenting couple can provide a loving and nurturing home for children.[36]

3.28 Others believe that any detriment suffered by children growing up in one parent families, compared with those growing up in two parent families, reflects the generally lower socio-economic status of the former group, rather than its single parent status *per se*:

> …I think it is absolutely true that, in general, there is quite a lot of research evidence that if you put together all single mothers and compare them to nuclear families, mother-father families, the children do tend to do less well. But that appears to be because they tend to be poorer, and poverty, we know, is very highly related to child well-being, child adjustment.[37]

3.29 The majority of children in one-parent families, it is stated, have also experienced the divorce or separation of their parents. In this respect, it is argued, their situation is very different from that of children born to women who are single by choice:

> So, when we look at women who are single by choice and the research on them, we find some things that distinguish them quite clearly from other mothers. They tend to be older at the time of the birth of their first child than those with unintended pregnancies or those who later divorce. They tend to be well educated, financially secure, professional, middle-class women.[38]

3.30 Like those who favour the amendments on the grounds that heterosexual couples achieve better outcomes for their children, those with a contrary view were able to supply

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35 *Submission 4,* Ms Linda Gale, pp. 1-2

36 *Submission 44,* YWCA of Australia, p. 2

37 *Transcript of evidence*, Australian Institute of Family Studies, Proof Hansard, p. 99

38 *Transcript of evidence*, Australian Institute of Family Studies, Proof Hansard, p. 99

extensive references to support their claim that it is the quality of nurturing provided rather than the family structure through which it is provided that is the critical factor affecting outcomes for children.[39]

No protection of children's rights

3.31 Many submissions and witnesses at public hearings, whether or not they agreed that the interests of children were best served by growing up in two parent, heterosexual families, nevertheless opposed the Bill because they considered it did nothing to protect or advance the interests of children – purportedly its major objective:

> This bill creates no positive right for children.
>
> …It absolutely does nothing to create a right for children; it allows our state and territory governments to deprive certain people of rights.[40]
>
> The argument that children should have a "reasonable expectation, other things being equal, of the care and affection of both a mother and a father" is not advanced by this proposal. Single women who use reproductive technology, whether provided by medical services or by informal artificial processes, are no different to those women who are without a male partner following conception without artificial assistance. Regrettably there are many men who do not fulfil their responsibilities, despite being the biological father.[41]

3.32 Witnesses and submissions also argued that the Bill was detrimental to the interests of some children in other ways. The first is the generally poorer outcomes for children from different family structures.[42] The second, it is argued, is that by denying single women and lesbian couples access to medically supervised ART services, the Bill ensures that they will be driven to seek informal, non-supervised treatment. This increases the health risks[43] to the women concerned and to any children born as a result:

> The act will not change anybody's behaviour. This conduct will still occur; it will still happen. What it will do is make it less safe. We cannot see any reason for doing that other than an ideological position. The reality is, as you have suggested, that lesbians and gay men have and will continue to access fertility services, whether at home or in a clinical setting…. The law that is proposed here makes that conduct unsafe. It will not stop it; it will just make it unsafe, not only for the woman but, I reiterate, for the child. There may well be cases of children who are born as a result of the passage of this bill …with a number of sexually transmitted

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39 *Submissions 27*, Ms Kristen Walker; *42A,* New South Wales Gay and Lesbian Rights Lobby and *49,* Australian Institute of Family Studies are a representative sample of these

40 *Transcript of evidence*, Women Lawyers' Association of New South Wales, Proof Hansard, p. 4

41 *Submission 73*, South Australian Equal Opportunity Commission, p. 2

42 See above, Paragraphs 3.26-3.30

43 *Transcript of evidence*, Dr John McBain, Proof Hansard, p. 166: 'I do not believe the risk is great, but I believe it is finite. We have a section of women in our society who are being exposed to the risk of infection of… chronic viral illnesses from the use of sperm given by [unsuitable informal donation]'

> diseases, including HIV. And I am not sure that that is something that the parliament intends.[44]
>
> Without access to fertility clinics, women who are not in a relationship with a man will have to run the risk of contracting sexually transmitted diseases, including potentially life threatening ones such as HIV/AIDS, which may have devastating effects on their own health and that of their unborn child.[45]

3.33 Some women denied safe treatment in their own States might be in a position to access such treatment in other States. Others would not have the resources to do so. In this sense therefore, while the Bill discriminates against all single women and lesbian couples living in the States in which the relevant legislation has been introduced, it would have a disproportionate impact upon financially disadvantaged women in these groups.

Knowledge of parents is a right of the child

3.34 Some evidence in support of the amendments pointed to the rights of children to knowledge of their biological parents, arguing that such knowledge is currently denied to many children conceived through ART.[46] Although this lack of information would apply to many IVF children regardless of the marital status of their parents, it was argued that children conceived through ART by single women or lesbian couples were even more likely to be denied such information. This would be to their long term detriment:

> When babies are created through assisted reproduction technology services, the child is often denied the right of knowing both biological parents and has no knowledge of the identity, characteristics or genetic make-up of the father. Since children form their identity by knowing both of their parents, this is already a problem when a heterosexual couple uses donor sperm. In situations involving single women or lesbian couples, the problem will be increased, since there will be no father in the home and the child will lose a role model as well as their genetic heritage.[47]
>
> A child is entitled to know its parents. The stolen generation issue only illustrates the point. A child is entitled to know where their roots are, where they come from and who their mothers and fathers are. That is a much more basic right than the right of someone to have a child, as real as their needs and desires are.[48]

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44 *Transcript of evidence,* AIDS Council of New South Wales, Proof Hansard, pp. 42-43

45 *Submission 25,* Ms Jo Tilly, p. 2

46 The only State which allows children conceived through IVF to have identifying information about their parents is Victoria. The 1995 Victorian Act required the establishment of a central register which records identifying information about the donor, the offspring and the couple. Offspring have an unconditional right to this information when they turn 18. Donors are advised of this requirement before consenting to donate. Under the previous, 1984 Victorian Act, a similar register was established (and is still operating) but identifying information on this register may only be released with the consent of the person to whom the information relates. A Donor Treatment Procedure Information Register is also to be established in Victoria, but lodgement of details on the register will be voluntary. Victoria, Infertility Treatment Authority *Annual Report 2000*, p. 17 and *Transcript of evidence*, Infertility Treatment Authority, Proof Hansard, pp. 158-160

47 *Submission 88,* Salt Shakers – Christian Ethics in Action, p. 3

48 *Transcript of evidence*, Anglican Church Diocese of Sydney, Proof Hansard, p. 14

3.35 Some submissions went further, to suggest that in the future, children conceived though ART and denied knowledge of their biological parents would be in a position to sue governments which supported and funded such practices:

> … one may envisage future litigation by a person who was conceived and born with government funded intervention to a single mother, or to a lesbian couple, against the government for failing to act in its best interests. Such a claim could be supported by evidence that at the time of the intervention there was adequate research data to inform the government that acting in such a manner was not conducive to the best outcomes for the child.[49]

3.36 A major concern of supporters of the amendments was that children should be told the identity of their biological parents. Many witnesses with concerns about the Bill agreed with this, but they did not believe that the proposed amendments would achieve this objective. Rather, they considered that children conceived through ART by single women or lesbian couples were more likely to gain access to information about their biological fathers than were children conceived through ART to married, heterosexual couples:

> The proposed legislation does not give children any enforceable rights or help them in any way. For example, it does not affect how much information a child born as the result of artificial insemination or IVF will be able to access about their parentage and background, including cultural background.[50]

> **One concern with the use of assisted reproductive technologies is that children conceived using such procedures may not know their origins** and may not have any contact with at least one biological parent. However, refusing access to these services for lesbians and single women will not address this problem. On the contrary, **we would argue that children born to lesbian or single mothers are more likely to be told about their biological origins than children of heterosexual relationships.** A child born to a married woman, using donor sperm from a man other than her husband, may never know that her mother's husband is not her biological father.[51]

3.37 One submission pointed out the legal protections conferred on children conceived in accordance with the Victorian *Infertility Treatment Act 1995*, which are denied to those conceived through informal arrangements:

> …if conception occurs under the Infertility Treatment Act, all parties are protected by the statutory scheme. The mother and donor are fully informed and counselled before the procedure and information is recorded that will be available to the child when he or she is 18. Under the Status of Children Act 1974 (Vic) and equivalent legislation in other jurisdictions, the legal relationship between donor and child is severed and a legal relationship between the social parent and the child is substituted. (This may be important if there is a later dispute about responsibilities for child rearing or property). None of this legal protection is conferred on informal conception arrangements.[52]

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49 *Submission 69*, Women's Action Alliance, p. 2

50 *Submission 80,* Professor Sandra Berns, p. 2

51 *Submission 87*, New South Wales Young Lawyers, p. 2 (emphasis in original)

52 *Submission 129,* Professor Loane Skene, p. 18

Other arguments challenging the Commonwealth Act

3.38 Some of those who supported the amendments did so on grounds which differed from those advanced by the Government.

Commonwealth Act is unconstitutional

3.39 One argument advanced was that the relevant provisions in the original Commonwealth Act (s 22) were unconstitutional because they were based on a misinterpretation of Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which the Commonwealth Act was designed to implement.

3.40 Article 1 of the Convention reads:

> For the purposes of the present **Convention the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women,** of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[53]

3.41 According to one organisation, the Convention was intended to deal with discrimination as between men and women and not between different groups of women. The proposed amendments therefore, which discriminate between different groups of women by denying access to a service to some groups of women and not to others are not contrary to the (real) intentions of the Commonwealth Act and of CEDAW:

> A fundamental misconception has arisen in relation to the drafting of the Act. It appears that the drafter has formed the view that the Convention requires to be included within the Sex Discrimination Act a provision that women shall not be discriminated against on the basis of marital status. In our view that interpretation is wrong. The Convention is not about discrimination as between women on the basis of their marital status, but is discrimination between men and women.
>
> To the extent therefore, that Mr Justice Sundberg has used the Sex Discrimination Act to justify his decision that infertility treatments must be made available to all women in our view is not a requirement of the Convention and should not be a requirement of the Sex Discrimination Act. It would be our position that Parliament ought to amend the Sex Discrimination Act to remove any impediment to the States or the Commonwealth's drafting legislation on the basis of marital status.[54]

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53 Convention on the Elimination of All Forms of Discrimination against Women, Australian Treaty Series 1983 No 9, Article 1 (emphasis in original)

54 *Submission 30,* Australian Family Alliance, p. 2. See also *Submission 129*, Professor Loane Skene, pp. 15-16. This submission argues the case both for and against the amendments. Professor Skene goes on to suggest that it is equally possible to argue that the CEDAW text could be read as supporting a general right of women not to be discriminated against in relation to other women **on the basis of marital status**

Other conventions are more important than the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

3.42 Similar concerns were raised in some evidence about whether the Commonwealth Act contravened the United Nations Convention on the Rights of the Child (CROC) and the International Covenant on Civil and Political Rights (ICCPR). Australia is party to both these conventions although they are not implemented in domestic legislation in the same way that CEDAW is through the Commonwealth Act.

3.43 In this view, failure to implement the Bill would leave Australia in breach of its obligations under CROC, which require it to ensure 'the right of a child, as far as possible, to know and be cared for by his or her parents' (Article 7) and to uphold 'the principle that the best interests of the child shall be a primary consideration.' (Article 3.1).[55]

> The Australian Government is a signatory to the United Nations Convention on the Rights of the Child which clearly states that a child has a right to be conceived and born of his own natural parents and to be brought up by them. What has been set in place by the Federal Court decision is that some children will never have access to their father, and this attacks the identity of the child. [56]

3.44 This argument places the provisions of one convention above those of another, which is an inappropriate approach. The Government does not do this in its own arguments in respect of conventions, although the evidence of departmental officers was not entirely clear and consistent on this matter. This issue is discussed in further detail below.[57]

The Bishops' case

3.45 The Australian Catholic Bishops' Conference and the Australian Episcopal Conference of the Roman Catholic Church (the Catholic Bishops) supported the amendments. They were not a party to the decision in McBain versus the State of Victoria but they were allowed by Justice Sundberg to become amici curiae in that case so that the court could have a proper contradictor to the arguments of Dr McBain given that the State of Victoria, although present, declined to present any argument.

3.46 The Bishops opposed the position adopted by Dr McBain on three main grounds. The first was that IVF treatment can be provided only to women and thus (through application of s 32)[58] falls outside the scope of s 22 of the Commonwealth Act. This view has been discussed earlier in this chapter.[59]

3.47 The second argument put forward by the Bishops was that IVF treatment falls outside the definition of 'services' in s 4(1) of the Sex Discrimination Act.

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55 Convention on the Rights of the Child, Australian Treaty Series 1991, No. 4

56 *Submission 41*, National Civic Council, p. 2

57 See below, Chapter 4

58 S 32 provides that the prohibition on discrimination in s 22 does not apply in the case of services which, by their nature, can be provided only to members of one sex

59 See above, Paragraph 3.10

3.48 The Bishops' final argument focussed on the relationship between s 7B of the Commonwealth Act and s 8 of the Victorian Infertility Treatment Act. S 7B of the Commonwealth Act sets up a reasonableness test, which means that it is not discriminatory to impose a condition which indirectly creates a distinction or disadvantage if the conduct is 'reasonable in the circumstances'. The Bishops argued that if there is any discrimination in the requirements of s 8 of the State Act (listing the people who may undergo treatment procedures and the requirements they must fulfil for eligibility) then those requirements are reasonable in the circumstances, having regard to public policy, international treaties and the obvious public interest in a child knowing its parents.

Justice Sundberg's refutations of the Bishops' case

3.49 Justice Sundberg dismissed the arguments put forward by the Catholic Bishops, for the following reasons.[60] Firstly, he found that the nature of the infertility treatments to which the Victorian Act applies (that is, treatments aimed at overcoming obstacles to pregnancy) is such that, though provided primarily to women, they are capable of being provided to both sexes. Thus s 32 is not applicable:

> …Whether the primary beneficiary of the treatment is a man or a woman, in the typical case the service is directed to achieving the desire of the couple to have a child. The fact that for biological reasons the embryo is placed into the body of the woman is but the ultimate aspect of the procedure. To concentrate solely on that aspect is not to view the "overall" nature of the procedure. The vice of the argument is that in order to bring the case within s 32 it is necessary to select from the scope of the service only that part of it that is provided on or with the assistance of a woman. Section 32 is intended to deal with services which are capable of being provided only to a man or only to a woman.[61]

3.50 Secondly, he considered that the definition of 'services' in s 4 of the Commonwealth Act should be given a liberal interpretation so that the medical procedures in question would fall within the description 'services of the kind provided by members of any profession' (s 4).

3.51 Finally, he dismissed the Bishops' argument about the reasonableness test on the basis that the conduct in question in this case related to 'direct discrimination' within s 6(1) of the Act and that s 7B was thus inapplicable as it pertains only to indirect discrimination dealt with in s 6(2). Ss 6(1) and 7B are mutually exclusive.[62]

Cost of services

3.52 A small but significant number of submissions supported the amendments (in part if not entirely) because they were concerned about the extension of expensive, publicly funded fertility procedures to single women and lesbian couples who were not medically infertile. For this group the cost to the public purse was a major consideration. The costs of ART

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60 See McBain v State of Victoria, FCA 1009, 28 July 2000 for more detailed consideration of his counter arguments

61 McBain v State of Victoria, FCA 1009, 28 July 2000, Paragraph 15

62 The Bishops' case and its refutation by Justice Sundberg is described in more detail in Margaret Otlowski, *Federal Court rules Victoria's Infertility Treatment Act 1995 discriminatory,* Australian Health Law Bulletin, Vol 9:2(October 2000), pp. 13-18

procedures are discussed briefly in Appendix 4. However, it is noted that information provided was not always comparable, and is therefore far from definitive.

3.53 The Committee notes that consideration of the cost of services is well outside its concerns, and that a range of factors would need to be taken into account in determining the basis of exclusion of some persons on the ground of cost of any medical procedure.