CHAPTER 4

The Legal Basis of the Government's Argument

4.1 The claim that the Government's objectives are met through the Bill is difficult to substantiate. There is a fundamental problem in the nature of the means by which the Government seeks to achieve the objectives, and some real doubt as to whether the objectives can be achieved. The use of arguments concerning States rights has assisted in confusing rather than clarifying the issues,[1] and imprecise references to other conventions have merely added to this confusion, without providing any solid argument in support of the Government's stated objectives.

4.2 The Committee believes that a detailed consideration of the major remaining issues will assist in distinguishing between major and peripheral concerns. These issues are: the relevance and use of international conventions, and the meaning of discrimination.

The Relevance and Use of International Conventions

4.3 The Committee believes that a number of witnesses were confused about the role of international conventions, and the status of one in relation to others. There was also some uncertainty about whether domestic legislation was valid if it covered issues which were thought not to be in the relevant convention.[2]

4.4 Essentially, conventions are read in conjunction with, and not in opposition to, each other. The rights which are considered in one do not under or over value the rights referred to in others.

CEDAW and 'marital status'

4.5 Reference was made briefly to the concern of some organisations that the Commonwealth Act was unconstitutional in that it referred to matters such as marital status, when, it was thought, CEDAW related only to discrimination against women in relation to men:

> We state very clearly that there is no right under International Law for a single woman to access IVF services. Therefore, if Australian Law prohibits single women accessing IVF services, there is no breach of any rights and no breach of any International Convention. [3]

4.6 Other witnesses also perceived that if there was no specific reference to a service, then that service must be excluded:

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1 See above, Chapter 3, Paragraphs 3.2-3.6

2 See above, Chapter 3, Paragraphs 3.39-41

3 *Submission 79A*, Shop, Distributive & Allied Employees' Association, p. 6. See also below, Paragraphs 4.11-4.12

> In our very strong Submission, there is absolutely nothing in the Bill which is inconsistent with the principles contained in ICCPR or in particular in relation to Article 26 of ICCPR.[4]

4.7 This would constitute a limited reading of Article 26 which relates to equality before the law. Numerous cases have raised issues relating to the words 'any ground', 'such as', and 'or other status'.[5] It is more important to look at the objectives of conventions, which are to limit discrimination on any grounds, and increase rights for all, regardless of race, class, language and so forth.

4.8 The Attorney-General's Department, for example, noted that in one sense, the presence or absence of a phrase such as 'marital status' in CEDAW was a side-issue: if marital status was a matter covered in other conventions to which Australia was party, it had already become an international obligation:

> In terms of our international obligations, the government considers that in a sense it really is not significant whether CEDAW extends to marital status discrimination or not because the question of marital status discrimination is also covered under other international obligations that the government has undertaken, particularly under the International Covenant on Civil and Political Rights.[6]

CROC and the pre-eminent rights of children

4.9 There has also been an emphasis on CROC in this inquiry because of the belief that the issue relates primarily to the rights of children, and that a convention on such matters should take precedence over what are suggested as being lesser rights.[7] Thus, while the Attorney-General has argued there is no inconsistency between CROC, other conventions and the Bill,[8] others have been more emphatic that if there were any conflict between CEDAW and CROC, then CROC should take precedence. [9]

4.10 It can be argued that there is an implicit favouring of CROC and/or conventions other than CEDAW in the Government's approach because it is CROC which is the basis of the Government's reasonableness criterion.[10] Through choosing to take action, allegedly with respect to the rights of a child, in a manner which diminishes rights already existing for women in the Commonwealth Act, the Government has effectively agreed that there *is* a conflict and that resolution of the conflict will be in favour of a specific party.

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4 *Submission 79A*, Shop, Distributive & Allied Employees' Association, p. 6

5 See, for example, the Toonen case which referred to Article 26 of the ICCPR, claiming that sexual orientation should come under 'other' status. However, the case was decided primarily on the issue of privacy: Toonen v Australia, Comm. No 488/1992, UN GAOR HRC, 50th Session, UN Doc CCPR/C/50/D/488/1992 (1994). See also *Submission 42*, NSW Gay and Lesbian Rights Lobby, pp. 6-7

6 *Transcript of evidence*, Commonwealth Attorney-General's Department, p. 180

7 See above, Chapter 3, Paragraphs 3. 42–3.44

8 *Submission 128*, Commonwealth Attorney-General's Department, pp. 2-3

9 See above, Chapter 3, Paragraph 3.43

10 See below, Paragraphs 4.18, 4.20

Contravention of international conventions

4.11 A major concern of many witnesses is that the Bill contravenes a number of international treaties to which Australia is a party. The most significant of these is CEDAW, given that the text of CEDAW is annexed as a Schedule to the Commonwealth Act and that this Act was introduced as a means of giving effect to the provisions of CEDAW. These witnesses disagree with the view put forward by the Bill's supporters[11] that CEDAW was intended to deal only with discrimination between men and women and not with discrimination between different groups of women.

4.12 They cite Article 2 of the Convention, which refers in four of its six clauses to 'discrimination against women in all its forms'. They argue that Article 2 is sufficiently broad to encompass discrimination both between men and women and between different groups of women. If this interpretation is accepted, there is no doubt that the proposed amendments contravene the CEDAW Convention:

> It is certainly true that, in relation to Article 1 of the Convention, there is a reference to the equality of men and women. On the other hand, in Article 2, there are a number of references which are specifically in relation to discrimination against women, and it does not in any sense say 'vis-à-vis the position of men.'[12]

> The concept of discrimination against women, which is the subject of CEDAW and defined in Article 1, is a broad concept that encompasses the equal right of women to enjoy human rights and fundamental freedoms in the political, economic, social, cultural, civil and other fields of life. This discrimination does not have to be directly because of a woman's sex or exist directly by comparison to the treatment given to men. It can also be because of something connected with or related to it. Examples, of course, would be pregnancy, breastfeeding or a woman's marital status.[13]

4.13 Article 12 of the Convention is also relevant, as it deals with the elimination of discrimination against women in the provision of reproductive health services:

> 1.States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
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> 2.Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. [14]

4.14 The Law Council of Australia, for example, noted:

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11 See above, Paragraph 4. 5

12 *Transcript of evidence,* Anti-Discrimination Board of New South Wales, Proof Hansard, p. 33

13 *Transcript of evidence,* Human Rights and Equal Opportunity Commission, Proof Hansard, p. 112

14 CEDAW, Australian Treaty Series 1983, No. 9, Article 12

> One of the reasons we are appearing before you is to make the point that there is a particular provision [Article 12 of CEDAW] in relation to health services that does not depend upon a distinction between men and women, but rather would envisage the possibility of discrimination between women of different categories.[15]

4.15 Some witnesses considered the Bill also breaches CROC and ICCPR, to which Australia is a party.

4.16 They point out that Article 7 of CROC, which refers to the right of a child 'as far as possible, to know and be cared for by his or her parents' would not be breached if the original Commonwealth Act stood, because that Article does not define 'parent'. It does not stipulate whether a parent is a biological parent. It also qualifies the right of the child by insertion of the phrase 'as far as possible':

> The [CROC] Convention, and the rights contained in it, has no application prior to birth. Put simply, it is wrong in law to use the CROC to justify restricting access to assisted reproductive technology. Moreover, although CROC recognises the fundamental right of children to know their parents and their heritage, it is silent on who can be classified as a 'parent'. Equally, it does not confine the family unit to traditional families involving heterosexual married couples.[16]

4.17 Furthermore, Article 2 of CROC stipulates that children are not to be discriminated against on the basis of their sex or the sex of their parents:

> …Art 2 of the CROC provides that the rights enumerated in the treaty are to be ensured without discrimination, including discrimination on the basis of the child's or his parent's sex or other status. This would include sexual orientation and marital status.[17]

> …article 2 of that convention [on the Rights of the Child] itself talks about the prohibition of discrimination in relation to the status of parents or legal guardians of the child. It is clearly anticipated or expected that persons other than parents might care for a child. One might also wonder of course how the term 'parents' might properly be interpreted.[18]

4.18 They also disagreed with the interpretation of Article 3.1 of CROC by the Bill's supporters as suggesting that 'the principle that the best interests of the child shall be a primary consideration' meant that the interests of children should automatically override those of women:

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15 *Transcript of evidence,* Law Council of Australia, Proof Hansard, p. 139; see also *Submission 43*, Law Council of Australia, pp. 2-3, 5 where a similar point is made, and reference made to the opinion of the United Nations Committee on CEDAW on this matter

16 *Submission 64*, Anti- Discrimination Commission, Queensland, p. 4

17 Submission 27, Ms Kristen Walker, p. 10, (emphasis in original). In relation to the reference to sexual orientation and marital status this submission cites Toonen v Australia, Comm. No 488/1992, UN GAOR HRC, 50th Session, UN Doc CCPR/C/50/D/488/1992 (1994)

18 *Transcript of evidence*, Law Council of Australia, Proof Hansard, p. 136. See also *Submission 90,* New South Wales Anti-Discrimination Board, p. 4:'The SDA was specifically enacted to give effect to our international obligations under the Convention on the Elimination of All Forms of Discrimination Against Women. The bill stands in complete opposition to the purposes of the SDA to prevent discrimination against women'.

> In the [NSW Anti-Discrimination] Board's view, the human rights of children and women can co-exist. Principle 6 of CROC[19] recognises the importance of a child's parents, it does not define those parents as mother and father. The decision in *McBain*'s case notes that the Principle 6 of CROC is qualified by the words "wherever possible". In the Board's view it is the words which are unqualified which are key to ensuring the rights of children are protected.[20]
>
> We contend that it is an improper use of the concept of human rights and international treaties to pit the rights of one group against the rights of another and to attempt to elevate one- that is, the rights of children- against the rights of women. In our view, human rights are cumulative and this is recognised in both the Convention on the Rights of the Child and CEDAW. CEDAW builds on the Universal Declaration of Human Rights and the Convention on the Rights of the Child build on CEDAW and are contemplated by it.[21]

4.19 The conflict between the proposed amendments and ICCPR was explained by one witness:

> …Article 26 of the International Covenant on Civil and Political Rights, which is also part of Australia's international obligations, requires non-discrimination on any ground. I submit that there is no doubt whatsoever that marital status discrimination is discrimination, about which Australia has an international obligation under one treaty or both. As well, under the general common law principle, based on the Universal Declaration of Human Rights and its acceptance into international law, and on the basis of the ICCPR and CEDAW the Commonwealth Parliament clearly has the power to legislate to outlaw marital status discrimination.[22]

4.20 Justice Sundberg considered the issue of whether the proposed amendments contravene the international treaties to which Australia is a party. In his judgement he rejected the Bishops' argument that the amendments are consistent with Australia's obligations as a party to CROC. He did so on the ground that this argument placed Australia's obligations under CROC above its obligations under CEDAW, to which the Commonwealth Act is intended to give effect:

> The difficulty with this argument is that the Commonwealth Act has the purpose of giving effect to a particular treaty – the *Convention on the Elimination of All Forms of Discrimination Against Women.* The Catholic Church's argument would give primacy to implications from other treaties over the words of the very treaty to which the Commonwealth Act gives effect. Further, when the treaties relied on are read as a whole, they tell against the existence of an untrammelled right of the kind for which the Catholic church contends.[23]

4.21 The Law Council of Australia advised the Committee that there were reasonable grounds for concluding that the Bill will amend the Commonwealth Act in such a way as to

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19 The reference is to Principle 6 of the Declaration of the Rights of the Child rather than the Convention

20 *Submission 90,* New South Wales Anti-Discrimination Board, p. 4

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

22 *Transcript of evidence*, Liberty Victoria, Proof Hansard, pp. 59-60

23 McBain v State of Victoria, FCA 1009, 28 July 2000

conflict with CEDAW and that, if this interpretation is accepted, this will be the first occasion on which a Commonwealth government has legislated to undermine a treaty to which it is a party:

> The Bill amends the SDA, which is intended to implement terms of CEDAW. It is arguable that the Bill is amending the SDA so as to conflict with the very treaty the SDA was intended to implement. There do not yet appear to have been cases in which the Commonwealth has legislated contrary to the terms of a treaty which it purports to implement.[24]

Discrimination

4.22 A more complex debate arose with respect to the meaning of discrimination, and whether the Bill was discriminatory or permitted discrimination. Much of this argument centred on the discussion as to whether there was a crucial difference between the use of the word 'discrimination' in international law and everyday usage:

> The international law meaning of 'discrimination' is well sourced in jurisprudence of the human rights committees that monitor and comment on the meaning and implementation of the conventions, both in their general comments and in their case law and in the comparable jurisprudence in the European Court of Human Rights. To the extent that I am aware, none of the submissions that have been put to you have referred to that. They have simply used the term 'discrimination' in a fairly general sense, whereas in international law 'discrimination' does have a particular meaning that is grounded in case law and that is grounded in [international human rights] committee jurisprudence…[25]

4.23 The Sex Discrimination Commissioner (SDC), however, while agreeing that 'discrimination' has a particular meaning in international law, believed that any distinctions made between groups had to be examined carefully and objectively:

> The SDC recognises that under the international definition of "discrimination" not every form of differential treatment will be prohibited or unlawful. However, in order to establish that a measure is not discriminatory, it is not enough for states parties simply to assert that discrimination is based on reasonable and objective criteria and that it is directed towards a legitimate end.[26]

Is the Bill discriminatory?

4.24 In considering this issue, there are two major points that need to be taken into account. The first of these is whether there is a proper understanding of 'discrimination', and, as part of this, whether the objectives of the Bill are such as to meet that understanding. The second is that there is likely to be a difference of opinion on the validity of the objectives of the Bill, the means by which they are to be achieved, and even if they can be achieved through such means.

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24 *Submission 43,* Law Council of Australia, p. 6

25 *Transcript of evidence*, Commonwealth Attorney-General's Department, Proof Hansard, p. 181

26 *Submission 98A*, Human Rights and Equal Opportunity Commission, p. 4

Discrimination or distinction

4.25 In its consideration of this issue, the Government position is that, where there is an appropriate objective to be achieved, distinctions (which may be loosely called 'discrimination' by others) are both acceptable and non-discriminatory. This, it believes, is a principle established in international law and hence the reason why an understanding of the international law meaning of 'discrimination' is important:[27]

> . . . the international law definition of discrimination means that not every distinction of treatment will constitute prohibited discrimination. Rather, differentiations in treatment in international law constitute discrimination only where they are not based on reasonable and objective criteria that have a legitimate purpose under the instrument in question. The government's view is that the policy basis for the distinction that is being made in this case, namely, the Prime Minister's statement that a child, all other things being equal, should have a reasonable expectation of a mother and a father constitutes reasonable and objective criteria and that has a legitimate purpose under the relevant treaty, and that therefore the distinction being made by the Bill is not 'discrimination' in international law.[28]

4.26 The Department referred in evidence to the use by the European Court of Human Rights of the concept of 'margin of appreciation' in determining whether the criteria on which an act was based were reasonable and objective.[29] The SDC suggests that the concept may not be applicable to the norm of non-discrimination under the ICCPR , CEDAW and CERD.[30] Otherwise, the SDC generally agrees with the Department on the criteria to be applied.[31]

4.27 However, while the SDC agrees that some distinctions between groups are acceptable, she does not believe the objectives of the Bill could be seen in this light in view of the effect the Bill will have on existing rights:

> The primary objective of CEDAW is to bring about equality between men and women, irrespective of marital status.
>
> It is difficult to see how the fulfilment of the reasonable expectation of a child to have both a father and a mother can be a legitimate aim under CEDAW or could be consistent with its objectives and purposes. The Committee on the Elimination of Discrimination Against Women ("the CEDAW Committee") recognises that there is no singular definition of a family to which children should belong….Furthermore, the [CEDAW] Committee is quite explicit that CEDAW requires states parties to refrain from obstructing action by women in pursuit of their health goals and, in particular, that "states parties should not restrict women's access to health services or to the clinics that provide these services on the ground that women do not have the authorisation of husbands, partners, parents or health authorities, because they are unmarried or because they are women."

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27 See above, Paragraph 4. 8

28 *Transcript of evidence*, Commonwealth Attorney-General's Department, p. 180

29 *Transcript of evidenc*e, Commonwealth Attorney-General's Department, p. 183

30 *Submission 98A*, Human Rights and Equal Opportunity Commission, p. 4, footnote 8

31 *Submission 98A*, Human Rights and Equal Opportunity Commission, p. 3

> …Further, even if the aim sought could be considered to be "legitimate" (which the SDC disputes), the differentiation must be actually capable of being considered in pursuit of that aim. That is, differentiation in treatment can only be justified if the means employed are connected or proportionate to the aim it seeks to achieve.[32]

4.28 In short, the stated objectives and the means by which they are to be achieved, have to be seen together. Thus, while the objectives *may* be sound, the process is not, especially as it downplays the value of one convention, CEDAW:

> The changes to the SDA are proposed with the aim of ensuring that a child has a reasonable expectation of a mother and a father. This aim is proposed to be met by denying single and lesbian women access to safe reproductive services. These women may still become pregnant, they may instead be encouraged to use less safe methods. It is not apparent how the stated aim (ensuring a child a father and a mother) can be met by the denial to the child's parents of competent and safe medical services.[33]

4.29 The conclusion of the SDC is that:

> Australia has already made significant progress in implementing its international obligations, including under CEDAW, and marital status discrimination in the provision of goods and services has been unlawful in Australia for many years. In this context, any proposed distinction that winds back established and accepted rights cannot be considered to meet standards of reasonableness and objectivity.
>
> Further, any distinction that is based on the classification of women according to the relationship which they choose to enter into, or which relies on a woman having a male partner in order to access services…can in no respect be considered to be reasonable.
>
> The SDC submits that the proposed changes to the SDA cannot be considered to be reasonable and objective.[34]

4.30 The Committee is not convinced that Government witnesses have demonstrated the proposed legislation meets the 'reasonable and objective' criteria. In the opinion of the Sex Discrimination Commissioner it clearly does not do so. Many assertions were made about the reasonableness and objectivity of the Bill allowing marital status to be used to refuse or restrict a person's access to ART services. However, no real attempt was made – particularly by the Attorney-General's Department –to go beyond assertions and establish that the disadvantages to children from being brought up in single-parent or same-sex households were so great as to provide a reasonable and objective ground for allowing access to ART services to be restricted on the basis of marital status. The Government did not go beyond the statement that, other things being equal, a child had the right to a reasonable expectation of the care and affection of both a mother and a father.

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32 *Submission 98A*, Human Rights and Equal Opportunity Commission, pp. 6-7. Although the SDC's argument refers to CEDAW, it seems from Paragraph 4.8, above, that it is equally applicable to Article 26 of ICCPR

33 *Submission 98A*, Human Rights and Equal Opportunity Commission, pp. 6-7

34 *Submission 98A*, Human Rights and Equal Opportunity Commission, p. 5

4.31 The Committee would also note that the supposed objective is extremely remote from the means adopted. The Attorney-General's Department was unable to assist the Committee by suggesting any close nexus between the stated objective and the Bill, other than reiterating their statements in relation to reasonableness and objectivity.

What Does the Bill Achieve?

4.32 The Committee does not see how the passage of the amendments will affect the standing of the State and Territory legislation at international law. The only difference will be that there is a legislative statement, by the Commonwealth, of the criteria on which the pre-existing State and Territory legislation is based, backed by the Government's rationalisation of those criteria. However, one can ask whether the Commonwealth Government is the appropriate body to provide a rationalisation for the criteria used in pre-existing State and Territory legislation. All that the amendments do is to indicate that the Commonwealth, as being that part of the Australian polity that is ultimately responsible for implementation of international instruments, considers that the State and Territory legislation complies with the international instruments. However, the issue is still to be decided on objective criteria. The 'margin of appreciation', if applicable, is not widened by the amendments. The amendments do not make the criteria on which the State and Territory legislation is based any more or less reasonable and objective.

4.33 However, the amendments also have an impact in domestic law. The SDC has pointed out that the Commonwealth Act (and the amendments) deal with direct and indirect discrimination, although the State and Territory legislation concerned, ie, that in Victoria, South Australia, Western Australia and the Northern Territory, does not concern itself in this case with indirect discrimination. It will be easier if indirect discrimination is considered first.

4.34 S 6 of the Commonwealth Act deals with *Discrimination on the ground of marital status* and is expressed to be subject to ss 7B and 7D. S 6(2) states that a discriminator discriminates against an aggrieved person on the ground of the latter's marital status if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same marital status as the aggrieved person. S 7B(1) provides that a person does not discriminate against another by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in s 6(2) if the condition, requirement or practice is reasonable in the circumstances. S 7B(2) specifies, but does not limit, matters to be taken into account in deciding reasonableness, including whether the disadvantage is proportionate to the result sought by the person imposing the condition, requirement or practice. S 7D deals with the power to take special measures intended to achieve equality and is not relevant for present purposes.

4.35 S 22 makes it unlawful for a person who provides services to discriminate against another person on the ground of that other person's marital status:

(a) by refusing to provide the other person with those services; (which is direct discrimination)

(b) in the terms or conditions on which the first mentioned person provides the other person with those services; (which is indirect discrimination) or

(c) in the manner in which the first mentioned person provides the other person with those services (which, again, is indirect discrimination).[35]

4.36 The amendments would provide that nothing in s 22 makes it unlawful to restrict a person's access to ART services if that restriction:

(i) is on the ground that the person:

(a) is not married (or, though married, is living separately and apart from his or her spouse); and

(b) is not a de facto spouse; and

(ii) is imposed, required or permitted by or under a law of a State or Territory.

4.37 The net effect of the amendments, so far as they relate to indirect discrimination in this area, is that State or Territory legislation based on a person's being married or living apart from his or her spouse or being a de facto spouse would no longer have to be reasonable. The Committee thinks that this is an extraordinary proposal and indicates either the Government's complete lack of faith in the capacity of the courts to determine what is reasonable or that the Commonwealth itself is not interested in being reasonable. The Committee believes that it would also be difficult for any international forum to find that such a change was based on reasonable and objective criteria.

4.38 Direct discrimination is dealt with by s 6 (1). It provides that the discriminator discriminates against an aggrieved person on the ground of the latter's marital status if he or she treats the aggrieved person less favourably than he or she would treat a person of a different marital status in circumstances that are the same or are not materially different, because of:

(a) the marital status of the aggrieved person;

(b) a characteristic that appertains generally or is generally imputed to persons of the marital status of the aggrieved person.

4.39 Although s 6 (1) is expressed to be subject to ss 7B and 7D, those provisions are not relevant because they relate specifically to indirect discrimination (dealt with in s 6(2)) and the power to take special measures to achieve equality. As the SDC points out, there is no provision for a person to be treated less favourably if that is reasonable. The test for direct discrimination under the Sex Discrimination Act is therefore whether an aggrieved person has been treated less favourably on the ground of his or her marital status in circumstances that are the same or are not materially different.

4.40 The replacement test inserted by the amendments would effectively be whether or not the person was married or, if married, living separately and apart from his or her spouse or was a de facto spouse. In other words, if a person did not have the appropriate marital status, no matter what his or her other circumstances, he or she could or must be refused access, depending on the provision made in the State or Territory legislation. This seems to

35 It would appear that charging a person a higher fee for the provision of a service because of his or her marital status would constitute indirect discrimination

the Committee to be too simplistic. Instead of marital status being a circumstance to be taken into account in considering whether a person could or must be refused access, it is spelled out that a person's marital status makes his or her circumstances completely different. Although it has not had the opportunity to discuss the point with witnesses, the Committee does not see that the Commonwealth Act as it currently reads prevents marital status from being a circumstance to be taken into account like other factors such as health, age and support.

Can the Bill Achieve its Objective?

4.41 One of the Government's stated objectives in introducing this Bill is to advance and protect the interests of children by ensuring that they 'have the reasonable expectation, other things being equal, of the care and affection of both a mother and a father'.

4.42 Even if the above factors were to be put to one side, it is difficult to see how the legislation would achieve its stated end. By exempting States and Territories from certain provisions of the Commonwealth Act the Commonwealth at best would have an indirect influence on the status of some children, and only at a particular point in time – in fact, only at conception, or possibly at birth:

> If states take up this option then children will only be born to people who were in a relationship of that nature, when the services were provided, so they are starting out in the best possible position to have the care and affection of a mother and father….the Government does not suggest there is any guarantee.[36]

4.43 Those born as a result of these procedures would not be guaranteed an expectation in any way, even prior to birth, of the care and affection of two parents of different sexes. To a degree, it would appear that the Government is seeking to impose a higher standard on couples provided with ART services than other couples. More importantly, the majority of children are born outside ART procedures. If the care and affection of both parents can be legislated for, it should be directed to all children:

> If the Government's overriding concern is indeed the welfare of children, it would be more constructive to commission and fund an ongoing public awareness campaign to encourage ALL prospective parents – whether two-parent or one-parent, same sex or mixed sex couples, straight or gay – to understand what they can do to help their children develop into happy, emotionally secure, tolerant and loving adults.[37]

36 *Transcript of evidence*, Commonwealth Attorney-General's Department, p. 177

37 *Submission 92*, Australian Reproductive Health Alliance, p. 4