

CHAPTER 5

5.1 The reference before this Committee is a very specific one.

5.2 The Committee is charged with inquiring into the proposed amendments to s 22 of the Commonwealth Act contained in the Bill.

5.3 The Committee has sought to limit its consideration to the issues most directly relevant to these amendments.

5.4 It acknowledges that the amendments may have an indirect impact on a wide range of issues such as adoption, surrogacy and the right of children to knowledge about their biological parents, all of which were raised during the course of this inquiry. It recognises also the wide diversity of views in the community on these and other issues discussed in evidence to the inquiry. However, the Committee believes that such complex matters require detailed, expert consideration and fall well beyond the scope of the present inquiry. It has therefore focussed its attention on the legal implications of the amendments.

5.5 As noted, the issue raised by the amendments is said by the Attorney-General to primarily involve ‘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.’

5.6 Irrespective of whether it agreed that the best interests of a child were served by having the reasonable expectation of the care and affection of a mother and a father, the Committee concluded that the proposed amendments did nothing of themselves to ensure such an outcome because they were so remote from it. Many submissions and witnesses at public hearings reached a similar conclusion.

5.7 The Committee heard conflicting evidence on whether the proposed amendments contravened CEDAW, on which the Commonwealth Act is based, and are therefore discriminatory. From its own consideration of the wording of the texts and of the evidence presented during the inquiry the Committee considered that the CEDAW text could be read as directed to eliminating discrimination against women in relation to men and as supporting the human rights of women, including a general right not to be discriminated against in relation to other women. As stated by the Human Rights and Equal Employment Opportunity Commission in its evidence noted in the previous chapter¹, the concept of discrimination against women is a broad concept. It need not exist because of a woman’s sex or directly by comparison with the treatment of men. It can also be because of something connected with it, such as pregnancy or marital status.²

5.8 If the latter interpretation is accepted then the proposed amendments are clearly contrary to the aims of CEDAW because they discriminate against some women on the basis of their marital status. The Committee believes it is not unreasonable to suggest that CEDAW is directed to eliminating both forms of discrimination. It concluded that the view that the rights of some women will be diminished if the amendments are introduced is in all

1 See above, Chapter 4, Paragraph 4.12

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

likelihood correct and that the Bill will amend the Commonwealth Act so as to conflict with the very treaty (CEDAW) that it was intended to implement.

5.9 In reaching its conclusions the Committee focussed its attention upon the legal implications of the proposed changes. It was influenced by the fact that, with one exception, **all** of its evidence from individual lawyers and from Australia's leading lawyers' groups³ was of the view that the proposed amendments are discriminatory. Although the Sex Discrimination Commissioner generally agreed with the Attorney-General Department's understanding of the concept of 'discrimination', she disagreed with its assertion that there was no discrimination in this case.⁴

5.10 The Committee was persuaded by the evidence presented during the course of its inquiry that the proposed amendments are contrary both to the spirit and to the letter of the Commonwealth Act.

5.11 By permitting States and Territories to pass legislation discriminating against women on the ground of marital status in the provision of fertility services the Commonwealth is limiting – or permitting the States and Territories to limit - the rights of women set out in the Commonwealth Act. The Committee believes that this is the first such limitation contemplated since the inception of the Act in 1984. The Committee is persuaded that its passage into law would erode existing rights. It would also establish a precedent for future attacks on the rights enshrined in the Act. By creating exceptions to basic guarantees this Bill would introduce uncertainty into our human rights guarantees and undermine public confidence in the system of human rights protections provided by the Commonwealth.

5.12 Some evidence to the Committee suggested that the amendments proposed in the Bill contravened Australia's obligations under other international treaties, notably the United Nations Convention on the Rights of the Child (CROC) and the International Covenant on Civil and Political Rights. Other evidence disputed this and offered different interpretations of these treaties, especially of CROC.

5.13 The Committee concluded that while it was possible to read CROC as supporting or undermining the case for the Bill it was improper to pit the rights of one group - children, whose rights are protected in CROC, against those of another group, women, whose rights are protected in CEDAW. The Committee sees rights as cumulative rather than hierarchical and believes the rights of children and women can coexist without detriment to either.

5.14 In the particular case under consideration here, the proposed amendments are to the Commonwealth Act. This gives effect to a particular treaty – CEDAW. Thus any suggestion of elevating the terms of CROC above those of CEDAW would be particularly inappropriate in this case. It would also be unnecessary, given that Australia's obligations under CEDAW are compatible with its obligations under CROC. No compelling case has been made during the course of the inquiry that the rights of children will be advanced by the passing of the

3 The Committee received 23 submissions from individuals who identified themselves as lawyers, or from law associations. Twenty of these considered the proposed amendments discriminatory; one did not address this issue and one provided arguments for and against the discriminatory nature of the amendments. Only the Commonwealth Attorney-General's Department argued that the proposed amendments were not discriminatory

4 *Submission 98A*, Human Rights and Equal Opportunity Commission, pp. 5-7

amendments. On the other hand, the rights of some women will be diminished. Introducing discussion of children's rights into what is essentially a debate about discrimination in women's access to fertility services confuses rather than clarifies the objectives and effects of the proposed amendments.

Conclusion

5.15 The Committee finds the arguments advanced during the course of its inquiry, especially the legal arguments, that passage of the Bill would contravene an international treaty to which Australia is a party (CEDAW) and undermine Australia's strong record in advancement and protection of human rights, as embodied in the *Sex Discrimination Act 1984*, *persuasive*.

5.16 The Committee suggests that if the Senate, after reviewing the arguments and the evidence, is similarly persuaded, it should consider whether it wishes the Bill to proceed.

5.17 The Committee believes however that it is important to note the strong case made by those whose consideration of the evidence has led them to a different conclusion. In particular, it notes the strongly held views of those who believe that passage of the legislation will enhance the position of children by ensuring that a greater number of them, all things being equal, will enjoy the care and protection of both a mother and a father. The Committee acknowledges that many of the legal arguments in particular are based upon interpretations of legislation and international treaties and that different interpretations are both possible and legitimate.

5.18 In reaching its conclusion the Committee is also mindful of the complex issues raised during its inquiry, and of the wide diversity of views brought to its attention on these questions. It has reached its conclusion on the basis of the legal arguments advanced. This is not because it underestimates the importance of the ethical and moral questions raised during the inquiry but because it considers a short, narrowly focussed and legally based inquiry of this type is unable to provide the detailed, expert consideration which such complex issues require. While a number of witnesses welcomed the opportunity provided by the inquiry for fuller public discussion of these issues the Committee believes that amendments to the Commonwealth Act are not an appropriate vehicle for their adequate consideration.

