DISSENTING REPORT

SENATOR HOGG AND SENATOR COLLINS

Introduction

1.1 This dissenting report is prompted by the need to place the debate on the *Sex Discrimination Amendment Bill (No. 1) 2000* (the Bill) in a broader context. Although the amendments set out in the Bill are limited to specific changes to the *Sex Discrimination Act 1984* (the SDA) their implications are wide ranging. They affect issues as diverse as the regulation of medical research, adoption, surrogacy, abortion, the rights of children, the legal and other obligations of State and Commonwealth governments and the nature of the family. These are moral and ethical questions on which strong views are held within our community. They deserve greater attention than they have received in the Committee's report (the report).

1.2 The Committee's report is not supported by the majority of voting Senators.

1.3 The Committee process has highlighted the diversity of views held in relation to these issues but also, more significantly, it has demonstrated the degree to which people are committed to their views and prepared to stand by them. There is division within the Government as to whether or not the Government's Bill should proceed – Government Senators on the Committee, for example, have expressed divergent views. It is not surprising, then, that the Committee itself has been divided on how the matter should proceed. In general, it seems that Committee members have elected to report on this Bill according to their conscience. This issue is discussed further at paragraph 1.92.

1.4 This dissenting report attempts to accord those important issues the primacy they deserve as well as to outline in some detail the main objections which we have to the matters relied upon in the Committee's report (the report). For the reasons set out below, we conclude that, as is made clear by the submissions, hearings and the various committee reports, there are significant legal issues surrounding this matter that deserve to be addressed and, in our view, by the High Court.

Response to the report

1.5 The arguments that were considered persuasive in the report fail to convince us on a number of levels. Five key points form the foundation of our position and these are each discussed in turn below. They are:

- The report relies too heavily on certain arguments:

  (a) the lack of proximity between the Bill and its objective; and

  (b) that the Bill fails to satisfy the reasonableness test when determining whether the differential treatment contemplated by the Bill is discriminatory;

- The Attorney-General's Department has not adequately presented the Government's case;

- Justice Sundberg's decision appears to be inconsistent with the original parliamentary debate surrounding the introduction of the SDA;

- The report does not deal with the current status of the McBain decision in terms of the hierarchical structure of judicial decision-making in Australia; and
- A number of other matters were given insufficient attention in the report.

The reliance of the report on certain arguments

1.6 In our view, the report relies too heavily on arguments that are either unconvincing or unsubstantiated.

Argument (a): The lack of proximity between the Bill and its objective

1.7 The report argues that while the objective of the Bill (to see that children have the reasonable expectation, other things being equal, of the care and affection of both a mother and a father) may be desirable, the Bill will not achieve this objective.

1.8 Paragraph 4.40 of the report explains why this is so:

> …it is difficult to see how the legislation would achieve its stated end…the Commonwealth at best would have an indirect influence on the status of some children and only at a particular point in time…

1.9 The central point of this argument is the alleged lack of proximity between the stated aims of the legislation and the means of achieving those aims. This argument is deceptively simple – the relationship between the means and the end is so distant that it does not justify passage of the Bill. There is no moral or practical reason to persevere with it. In our view, this argument is unconvincing. In fact, it seems to us that, to the extent that a Government is capable of influencing the circumstances (at whatever time) that would provide increased likelihood of a two parent family, there is much to recommend this approach, in much the same way as other areas of social policy, such as marriage and family support programmes. The arguments in the report here are 'reductio ad absurdem'

Argument (b): The Bill fails to satisfy the reasonableness test when determining whether the differential treatment contemplated by the Bill is discriminatory

1.10 The report argued that the Government witnesses had not established that the Bill meets the 'reasonableness test' which is required to justify differential treatment in relation to access to Assisted Reproductive Technology (ART) services (so that the differential treatment is non-discriminatory). In fact, the Committee received conflicting advice during the inquiry on whether or not the Bill is discriminatory. The Attorney-General's Department argued that, where an appropriate object is to be achieved, distinctions of treatment are both acceptable and non discriminatory where they are based on reasonable and objective criteria and have a legitimate purpose. The Department argued that the objectives of this Bill meet the test of reasonableness and objectivity.

1.11 The Sex Discrimination Commissioner, while acknowledging the validity of differential treatment in some cases, did not agree that this Bill was such a case:

> 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.[1]

1.12 It is stated in the Committee's report at paragraph 4.26 that:

> …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.

1.13 The report concluded, therefore, that it had not been demonstrated that the reasonableness test had been met. In our view, however, there was insufficient evidence presented by the Attorney-General's Department to conclude that the test had NOT been met. The issue about the reasonableness or otherwise of the differential treatment contemplated by the Bill is unresolved. The question about the test is still open.

The case for the Bill not adequately presented

1.14 The issues here are closely related to those discussed in the previous section. We are not satisfied that the Government's case was adequately presented in the submission from the Attorney-General's Department. The Committee is yet to receive significant material on such fundamental issues as the 'reasonableness' test at international law, and the legal advice, which, according to the Attorney-General's Department submission, supports Justice Sundberg's legal interpretation of the Act despite the Government's view that this was not the Act's original intention.

1.15 Although many of the submissions received by the Committee and considered persuasive in the report offered views about the meaning of the term 'discrimination', none of the submissions referred to the meaning of the term 'discrimination' at international law.[2] While the opponents of the legislation claim that the effect of the Bill is 'discriminatory', this is a matter which, in our view, is not settled. The Attorney-General's Department argued that the term as used in the CEDAW has a particular meaning in international law and that meaning has not been referred to nor relied on in the submissions made to the Committee:

> What I was seeking to do this morning is draw to your attention the international law meaning of 'discrimination', which is what is encompassed in the international instruments that are being referred to. 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.[3]

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1 Submission 98A, p 4

2 *Transcript of evidence,* 13 February 2001, p. 180: The Attorney-General's representative, Ms Leon, stated, 'I do not think that the international law definition of discrimination has actually been ventilated at all before the committee, so that is why I thought it was useful to put it to you today. I think many of the people appearing before the committee or putting in submissions have just jumped over that question as to whether it is discrimination in any event'. Ms Leon further stated: 'My reading of the submissions is that there has been a range of views about the question of the CEDAW application. But I think it is significant to note that none of the submissions that have been put to the committee have drawn your attention to the international law jurisprudence on the meaning of 'discrimination … .' at p. 181.

3 *Transcript of evidence,* 13 February 2001, p. 181

1.16 The Attorney-General's Department elaborated on its view of the meaning of 'discrimination':

> More pertinent is that 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.[4]

1.17 In our view, the question of whether the Bill would have an effect that is discriminatory cannot be settled without further information about the meaning of the term at international law. At the same time, we are not convinced that the logic of excluding from access to ART services, the group of people least likely to offer a child the support of a committed parental relationship, is faulty, or should be dismissed for the reasons advanced in the report.[5] Nor are we satisfied with the conclusion drawn in the report at paragraph 4.40 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'. We do not comprehend the distinction that the report attempts to draw between discrimination and the concept of taking into account other factors. In our view it is clear that practitioners in the field are also confused. Practitioners do, in reality, apply their own discernment when deciding whether to accede to a request for ART services. Dr David Molloy, an infertility obstetrician and gynaecologist, described some of his experiences in deciding who should have access to IVF and who should not. Referring to one case in particular, Dr Molloy stated that, in deciding to withhold treatment, he might have been 'discriminating':

> Another case was of a woman who had had her tubes ligated, and had had children previously but, during the course of the interview, it transpired that the reason she did not have any children was that the children's services department had taken them into care for abuse and she wanted to replace those children using infertility services. I personally felt it was inappropriate and so I declined to assist, even though I suspect I may have been committing an act of discrimination.[6]

1.18 The fact is, therefore, that access to ART services is restricted, sometimes on the judgement of the practitioner. In these circumstances, we believe it is appropriate that access to ART services be properly and formally regulated and there is no reason why the established boundaries should not be the basis of that regulation.

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4 *Transcript of evidence,* 13 February 2001, p. 180

5 In domestic law, the High Court has defined 'discrimination' in numerous cases: *IW v City of Perth* (1997) 191 CLR 1 (see especially Gummow J at 36-37); *Street v. Queensland Bar Association* (1989) 168 CLR 461 (per Gaudron J. at 570–572); *Castlemaine Tooheys Ltd v. South Australia* (1990) 169 CLR 436 (per Gaudron and McHugh JJ at 478); *Wastes v. Public Transport Corporation* (1991) 173 CLR 349; *Australian Iron & Steel Pty Ltd v. Banovic* (1989) 168 CLR 165.

6 *Transcript of evidence,* 13 February 2001, p. 188

The McBain decision is inconsistent with SDA debate in 1983

1.19 The Bill seeks to amend the SDA so as to overturn the effect of the McBain decision (discussed in greater detail later in this dissenting report). In the McBain case, Sundberg J. found that certain provisions of the *Infertility Treatment Act 1995* in Victoria that restricted access to ART services to single persons were inconsistent with the SDA and therefore invalid. To revive the Victorian provisions, the Bill seeks to permit State and Territory laws to discriminate on the basis of marital status in the provision of ART services. To this end, it confers an exemption from section 22 of the SDA on State and Territory laws that restrict access to ART services on the ground of marital status. It also confers an exemption on those State and Territory anti-discrimination laws that exclude provision of ART services from their operation.

1.20 Although the Sex Discrimination Bill 1983 was introduced into the Senate in June 1983, it was not passed until May 1984 after prolonged debate, redrafting and amendment. The SDA gives effect to Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (and some aspects of the International Labour Organisation Convention). The objects of the SDA as set out in section 3 are :

- to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women;
- to promote equality between men and women;
- to eliminate discrimination based on sex, marital status, pregnancy and, with respect to dismissals, family responsibilities; and
- to eliminate sexual harassment at work, in educational institutions, in the provision of goods and services and accommodation and in the administration of federal programs.[7]

1.21 The objective in relation to the elimination of discrimination in relation to the provision of services is of particular relevance to this inquiry. The Bill seeks to amend section 22 of the SDA which prohibits discrimination in the supply of goods and services and in making facilities available. Much of the legal argument during the inquiry has revolved around the question of whether the supply of ART procedures constitutes provision of a service under section 22.[8] The term 'services' is not exhaustively defined in section 4(1) of the Act, but includes 'services of the kind provided by the members of any profession or trade.'

1.22 While opponents of the Bill have argued that this broad definition is sufficient to encompass ART procedures, (a view endorsed by Justice Sundberg in the Federal Court),[9] the parliamentary debates on the Sex Discrimination Bill in 1983 indicate that such services were

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7 This information is available at the web site of: Human Rights and qual Opportunity Commission, *SexDiscrimination,* http://www.hreoc.gov.au/sex_discrimination

8 Another contentious legal issue, discussed later in this dissenting report, is the question of whether CEDAW (and the ACT, which gives it effect) deal with discrimination against women in relation to other women as well as discrimination against women in relation to men.

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

never discussed in this context. There is nothing to indicate that they were envisaged as constituting a 'service' under section 22.

1.23 One can say with some confidence, however, that ART procedures were envisaged as falling within the scope of section 32 of the SDA, which deals with exemptions to the Act for services 'the nature of which is such that they can only be provided to members of one sex.' Again, Justice Sundberg did not find that this was the case for ART procedures. Although ART procedures were not widely discussed in this context during the debates on the Bill the related procedures of abortion and sterilisation were specifically envisaged as falling beyond the scope of the Bill:

> …the matters that I think are of genuine concern to Senator Harradine, such as abortion and sterilisation, are already excluded from the operation of the Bill by virtue of being services which can be rendered to one sex only.[10]

1.24 If Justice Sundberg's judgement regarding the nature of IVF services is correct, then it would logically apply to sterilisation as well, which is clearly exempted from the provisions of the SDA.

The report does not deal with the current status of the McBain decision in terms of the hierarchical structure of judicial decision-making in Australia

1.25 As noted above, access to ART procedures in Victoria is regulated by the *Infertility Treatment Act 1995* (as amended 1997) which restricts access to women who are married or in a heterosexual de facto relationship. Within these categories, it further restricts access to those who can demonstrate a medical need. This is defined as cases in which the woman or her partner are infertile or at risk of transmitting a genetic abnormality or disease to the child. The Victorian Act was challenged in the Federal Court by Dr John McBain, an IVF specialist. Lisa Meldrum, a single woman in Victoria, had requested Dr McBain to provide her with ART services. Dr McBain's position was that he would be in breach of the Victorian Act if he provided those services to a single woman and he would be in breach of the SDA if he refused. Dr McBain therefore challenged the validity of those provisions in the Victorian Act that denied single women access to fertility treatment on the ground that they were inconsistent and contrary to the provisions of the SDA which forbid discrimination in the provision of services on the basis of marital status.

1.26 A single Judge of the Federal Court, Justice Sundberg, found that the provisions of the Victorian Act were inconsistent with the SDA and therefore invalid under section 109 of the Constitution. Section 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.[11]

1.27 It is important that the decision itself, and particularly its position in the hierarchy of judicial decision making in Australia, be placed in perspective. The decision was made by a single Federal Court judge and not by the Full Court of the Federal Court. Without meaning to denigrate in any way the quality of decisions made by single judges, a decision by the latter would carry more weight in terms of judicial authority. As it stands, however, an

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10 *Senate Hansard*, 16 December 1983, p 3987 (Senator Ryan)

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

application is on foot at the High Court in relation to that Federal Court decision. This means that the matter is still unresolved in so far as judicial processes are concerned.

1.28 The McBain decision effects a major shift in the concept of the family structure. It is a shift that runs counter to the concept of the family as it is legislatively entrenched in Australian law to date. This being the case, the question is raised as to whether it is acceptable that such a shift can be decided by a single judge sitting alone in the Federal Court. Australians are entitled to expect that cases that involve issues that strike at the heart of society or that deal with questions affecting the fundamental basis of our society, should be referred to a higher authority for determination. We make this assertion without, as we have said, wishing to undermine the authority of decisions generally of judges sitting alone. In the vast majority of cases decided by single judges, questions such as this would not arise. Where they do, however, it is arguable whether such questions should be determined by one person.

1.29 As it stands, the matter is yet to be decided by the High Court which, in our view, is a more appropriate forum for questions of this nature.

1.30 Some evidence to the Committee was critical of the McBain decision pointing out that government legislation regulating access to ART procedures, and more particularly the *Victorian Infertility Treatment Act 1995*, was thoroughly researched and well considered. It was claimed, therefore, that it should not have been 'radically overhauled' by 'one man [making] momentous decisions' and should be revived:

> Carefully considered pieces of legislation should [not] be so readily tossed out, as was the case of the Victorian Infertility Treatment Act 1995 after the recent Federal Court decision. Many hundreds of hours of careful deliberation by a range of experts and authorities, coupled with extensive community consultation went into the original Victorian Act and its amendments. Whether one agrees with all the details of the Act or not, the ability of a Federal Court decision to nullify such an Act seems unwarranted.[12]

1.31 The Australian Catholic Bishops' Conference and the Australian Episcopal Conference of the Roman Catholic Church (the Catholic Bishops) supported the provisions of the Victorian legislation in the McBain case before the Federal Court. Although they were not a party to the case, Justice Sundberg granted them amici curiae status so that the court could have a proper contradictor to the arguments of Dr McBain as the State of Victoria, the Victorian Minister for Health and the Victorian Infertility Treatment Authority all declined to present any argument. Sundberg J. also gave notices of the proceedings to all Attorneys-General under section 78B of the *Judiciary Act 1902*. None desired to intervene in the proceedings.

1.32 The Catholic Bishops were dissatisfied with Justice Sundberg's ruling and, as already noted, have made an application to the High Court for prerogative relief to quash the judgment of the Federal Court. The matter was heard before Justice Callinan on 17 October 2000 and will return to the High Court at a date to be fixed. A number of witnesses before the Committee questioned the appropriateness of the Committee continuing with its inquiry while High Court proceedings are pending:

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12 Submission 60, Australian Family Association, p 2

> My simple point is that the consideration of this bill and its amendments is premature. Therefore, my recommendation to the committee – respectfully of course – is that the bill be deferred and that it be considered if necessary after the High Court decision in this matter and in the context of a detailed inquiry into IVF. The bill should await the determination of the application for prerogative relief before the High Court. It may be that Justice Sundberg's ruling is overturned, in which case the necessity of the bill and its amendments evaporates. Of course, the issues surrounding it do not.[13]

1.33 The ramifications of the High Court challenge do not seem to have been fully appreciated by the Government in pressing ahead with this Bill. Its removal from the legislative program pending the outcome of the High Court decision would also allow greater time to focus upon the complex issues raised by the proposed changes. In support of deferring consideration of the Bill, the Committee was told:

> My first argument, already foreshadowed, runs simply as follows. In the case of *Levy v. the State of Victoria and Ors*, Justice Michael Kirby said that it was '… this court's function of finally declaring the law of Australia in a *particular* case for application to *all* such cases'.
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> My first argument in support of my solitary point is that the High Court has yet to declare the law on matters that are the subject of this bill. Put another way, this legislation is predicated upon the fact that Justice Sundberg's untested ruling is correct. I suggest to the parliament, respectfully, that its responsibility is to ensure that laws are enacted upon the most solid foundation possible. This bill at the moment is founded upon significantly unstable footings, I would suggest.[14]

The report failed to give sufficient attention to several other significant matters

1.34 In addition to the specific deficiencies in the report outlined above, we believe that there are several other matters associated with the subject matter of the Bill that should have been, but were not, sufficiently dealt with in the report.

State and Territory regulation of access to ART services

1.35 The following history indicates the extent to which State and Territory Governments have considered the complex issues involved in this debate. The history clearly indicates that it is incumbent on the Commonwealth Government to respect the position that those Governments have taken.

1.36 State and Territory legislation governing access to assisted reproductive technology is non-uniform, probably reflecting the diverse ethical positions that exist in relation to the increasing array of complex issues that arise in relation to ART. The first 'test-tube baby' (an expression later replaced by use of the acronym IVF) was born in 1978 in England after a decade of intensive research into infertility. Shortly following, the first IVF baby was born in Melbourne. The development of these new technologies was accompanied by strident political and social debate about some of the many issues that surrounded ART. There was argument about the legal status that should be accorded to IVF children and who the legal

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13 Transcript of evidence, Australian Catholic bishops, Conference, Proof Hansard, p 143

14 *Transcript of evidence,* 28 November 2000, p. 143 per Dr Neville, Head of Research Department, Catholic Bishops Conference

parents of an IVF child are. There was also grave concern about the fate of disused or surplus embryos.

1.37 The community debate necessitated government intervention, at both State and Commonwealth level, with a view to deciding whether legislation to regulate the new technologies was appropriate. While there was public support for the use of new technologies to enable infertile couples to experience the joy of parenthood, there was simultaneous community concern about the concept of scientific experimentation using human embryos. Victoria was the first jurisdiction in Australia (and possibly in the world) to legislate to restrict access to ART services. The legislation followed a process of public consultation by the IVF Committee which had been established by the Victorian Government in 1982 and Chaired by Professor Louis Waller. At that time, various other jurisdictions both within Australia and overseas, had also established Committees to investigate the ethical aspects of ART (including: the Warnock Committee in the United Kingdom, the Medical Research Ethics Committee established by the Australian National Health and Medical Research Council (NHMRC) to formulate guidelines on ART and related matters, as well as Committees in Queensland, Western Australia and Tasmania).[15]

1.38 The Victorian IVF Committee unanimously recommended, amongst other things, that IVF should be legislatively regulated and that access to IVF services should be restricted to infertile married couples. The Committee arrived at that decision in full appreciation of the claim by opponents of legislation that issues such as access to IVF services should be determined by the individual or by institutional, ethical adjudication.[16] Following the recommendations of the IVF Committee, the Victorian Parliament enacted the *Status of Children (Amendment) Act 1984* and the *Infertility (Medical Procedures) Act 1984* which was passed with bipartisan support.

1.39 Reflecting on the decision of the IVF Committee to recommend legislation, Professor Waller, the Chair of the IVF Committee, has stated that legislation is the most effective way of enunciating those values which society considers of high importance. Professor Waller asserted that:

> Some critics of the IVF legislation have attacked it root and branch, on the ground that Parliament should not interfere in the private lives of adult competent members of our community. It is the argument of autonomy, and it is, in general, an argument which commands respect. But this is not the general case. What may, for example, be said about anti-contraception legislation, where an argument about the law staying outside the matrimonial bedroom had and has a powerful impact, cannot be sensibly propounded in the case of assisted reproductive technologies and particularly where the formation of embryos is concerned. As a community, we all have a powerful interest in what is done in public and private hospitals, however denominated, and even in doctors' surgeries and clinics, where wide variations in genetic parenting may be initiated. As a community, we have an

15 Many other Reviews in and around the mid 1980's examined the question of access to ART services or related issues. For example: Victoria, Standing Review and Advisory Committee on Infertility established in 1985; Senate Select Committee on the Human Embryo Experimentation Bill 1985; Law Reform Commission of Victoria, Informed Consent, Symposium 1986

16 Louis Waller, *Regulating Birth Technologies,* Res Republica, Vol. 7 No. 3, 1998, p. 19

> interest in developments in what Australia's *Family Law Act 1975* entitles 'the natural and fundamental group-unit of society'. That unit is the family.[17]

1.40 The Victorian Act was superseded by the *Infertility Treatment Act 1995* which was amended in 1997 to open access to ART services to de facto couples.[18] In summary, under Victorian legislation, access to ART services is only allowed where three criteria are satisfied:

- marital status, (including de facto);
- the couple must consent to the procedure; and
- there must be infertility or risk of genetic abnormality or disease. In the McBain decision[19]

1.41 Justice Sundberg of the Federal Court found that part of these criteria are invalid on the basis that it conflicts with the *Sex Discrimination Act 1984* because it discriminates against women on the basis of their marital status.

1.42 Other States have legislated to restrict access to ART services. In South Australia, the *Reproductive Technology Act 1988* restricts access to ART services to married women and to those women who have been in a heterosexual relationship for at least five years. Other eligibility criteria in South Australia include:

- there must be infertility or a risk of transmitting a genetic defect to a child,[20] and
- broad based criteria about a couple's ability to raise a child (for example: the spouses must not have been found guilty of having sexually assaulted a child or be subject to imprisonment or outstanding criminal charges).[21]

1.43 The position in Western Australia is much the same. Access to ART services[22] is restricted to married women or to those who have been in a heterosexual de facto relationship for at least five years. In addition, other criteria include that there must be infertility or a risk of transmitting a genetic disease or defect and the welfare and interests of the participants and the potential child are to be taken into account.[23]

1.44 Although other States and Territories do not have legislation governing access to ART services, administrative guidelines have been formulated in different jurisdictions relating to the provision of those kinds of services at particular hospitals and clinics. In effect, these other States and Territories operate under a self-regulatory system of

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17 Louis Waller, *Regulating Birth Technologies,* Res Republica, Vol. 7 No. 3, 1998, p. 20

18 *Infertility Treatment (Amendment) Act 1997 (Vic)*

19 *McBain v State of Victoria* [2000] FCA 1009

20 *Reproductive Technology Act 1988 (SA),* subsection 13(3)

21 These criteria are contained in the Code of Ethical Practice referred to in subsection 13(3) of the *Reproductive Technology Act 1988 (SA).* The criteria are set out in the *Reproductive Technology (Code of Ethical Practice) Regulations 1995 (SA).*

22 Not including artificial insemination

23 *Human Reproductive Technology Act 1991 (WA),* section 23

institutional ethics and research committees which operates under the NHMRC Statement on Human Experimentation and Supplementary Notes.[24]

Effect of McBain decision on States and Territories

1.45 The McBain decision has implications for other States with legislation restricting access to ART services - South Australia and Western Australia. Those parts that discriminate against a woman on the basis of her marital status are invalid. The decision will also affect those jurisdictions where there are guidelines governing access to such services in relevant institutions.

1.46 It should also be noted that State legislation has previously been subjected to challenges. In the South Australian Supreme Court decision *Pearce v. South Australian Health Commission* (1996) 66 SASR 486, the court found that the South Australian legislation is inconsistent with the SDA. In that case, a woman had been denied access to IVF treatment because she was separated from her husband. The court held, as in the case of McBain, that the legislation discriminated against the woman on the basis of her marital status. Also, in 1997 in Victoria, three women in de facto relationships were awarded damages for being denied access to IVF treatment on the basis of their marital status. The Equal Opportunity Commission found that the Victorian legislation was therefore inconsistent with the SDA (although this has been legislatively remedied in Victoria because women in de facto relationships can now access IVF services).[25]

1.47 If passed, the Bill will revive and preserve the provisions in the Victorian and South Australian Acts that have been ruled inconsistent with the SDA. It will also protect the Western Australian legislation from a future challenge on the same grounds. The administrative guidelines in the Northern Territory seek to exempt ART services from the operation of Northern Territory anti-discrimination laws - that is, it is not unlawful to discriminate on the basis of marital status or sexuality when determining access to ART services. This Bill will protect that exemption.

1.48 In those jurisdictions where there is no legislation governing access to ART services or exempting the provision of ART services from the operation of anti-discrimination laws, individual clinics will continue to be prohibited from restricting access to IVF services on the basis of marital status or sexuality. This is because, if the State or Territory does not legislate, then the SDA will continue to apply:

> When the Bill commences, any provisions of the Victorian and South Australian acts that have previously been ruled inconsistent with the Sex Discrimination Act will revive. The amendment will also ensure the validity of the existing Western Australian legislation.

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24 Breen,K., Plueckhahn, V., Cordner, S., *Ethics, Law & Medical Practice,* Allen & Unwin, 1997, p. 274. The NHMRC Statement on Human Experimentation and Supplementary Notes is set out in Appendix II of the book.

25 *MW, DD, TA & AB v Royal Women's Hospital and State of Victoria* (1997) EOC p. 92 – 886 (5 March 1997)

> If a state or territory chooses not to legislate in this area, the Sex Discrimination Act will continue to apply.[26]

1.49 The Bill preserves the right of States and Territories to legislate to regulate access to ART services as they consider fit. While we are not recommending that the Bill proceed prior to the High Court challenge to the McBain decision, in the event that the challenge is unsuccessful, we would support a broad inquiry including a reconsideration of legislative action.

Inquiry incomplete

1.50 In our view, this inquiry is incomplete in that its very narrow focus (that is, the validity of provisions that restrict access to ART services on particular grounds) ignores the ethical and moral ramifications that flow from the very provision of ART services. Insufficient examination was undertaken of the various IVF agencies that exist throughout Australia. There has been little evidence about precisely what services these agencies offer. There has been little mention made about the underlying rationale for the provision of ART services by these agencies; (for example, whether the provision of ART services is on a 'for-profit' basis). There has been inadequate information about the usage of ART services in those various agencies. In addition, the Committee has arrived at its conclusion with insufficient reference to the guidelines that govern IVF agencies that operate in jurisdictions where they are not subject to legislation. It is our position that, before deciding whether this Bill should proceed, a thorough examination should have been made of the procedures and practices of IVF clinics operating throughout Australia.

1.51 The issue of the legislative regulation of the provision of ART services raises the question of the juxtaposition of ethics, morality and science/medicine and this has been overlooked throughout the course of the inquiry. From reading the Committee's report, one might surmise that science operates in an ethical and moral vacuum and that medical and scientific research is a law unto itself. We are only too aware of the grave social, moral and ethical concerns that some sections of the community hold in relation to the direction that genetic and reproductive technology is taking. The following are but some of the technologies either already available or being researched:

- the frozen storage of embryos for implantation;
- embryo transfer from one womb to another;
- gamete intra-fallopian transfer (GIFT);
- embryo gender selection;
- embryo cloning;
- gene therapy;
- male pregnancy;
- ectogensis (the development of the foetus outside the body); and

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26 Attorney-General, the Ho. Daryl Williams, QC, MP, Second Reading Speech, House of Representatives, *Hansard,* 17 August 2000, p. 17538,

- selective reduction.

1.52 Too many of these very important issues are being determined outside the supervision of representative community and without sufficient accountability mechanisms imposed. There is a significant view within the community that questions in relation to these kinds of issues are being determined without any or adequate community consultation. As these are issues which affect the future of the human race, it is our contention that the community has an indisputable 'right to know' and be involved in relation to these issues.

1.53 In this respect, we also note that when ART services were originally contemplated, it was with the **express purpose of assisting infertile married couples**. ART services were confined to this niche area of medical practice and involved few practitioners. The ethical and moral considerations, therefore, were easily identifiable and controlled. Since then, the technologies, practitioners and the users have expanded to a point where we are losing sight of the moral and social implications of medical and scientific advances. These issues seem to be moving beyond the purview of parliamentary scrutiny and legislative control.

1.54 As highlighted by the Fertility Society of Australia, there are also cost considerations involved.[27] ART procedures are very costly. One submission, for example, estimated them to be $66 million annually ($40 million through Medicare and $26 million through the Pharmaceutical Benefits Scheme.)[28] These costs are likely to increase with the extension of access to IVF, which is the most expensive of the ART procedures. Further costs will flow from the Government's decision last year to extend Medicare funding from six to 12 IVF treatment cycles.

1.55 General public health services are under-funded in Australia, resulting in long waiting lists for hospital beds and delayed treatment for non urgent cases. Whilst cautioning against mixing issues of access with issues of cost, one must question the diversion of scarce resources from essential treatment to costly technical procedures benefiting only a few, especially given their very low success rate.[29]

Public Policy Considerations

1.56 The changes proposed in the Bill have significant public policy implications. They go to the nature and role of the family and of parents and to the extent of governments' responsibility for supporting them. These implications were well understood and articulated in evidence to the Committee.

1.57 Many submissions argued that, while some children will unavoidably end up living in single parent families (through the death, divorce, separation or desertion of their parent(s)), and many single parents undoubtedly are very successful in raising their children this model is generally recognised as not being an ideal situation.

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27 *Submission 130,* Fertility Society of Australia, p. 1. See also *Transcript of evidence,* 13 February 2001, p. 171

28 *Submission 79*

29 The 1999 Victorian Infertility Treatment Authority report stated that in the previous year only 11.9% of treatment cycles resulted in a confinement or an ongoing pregnancy.

> Ideally, children should have two parents…History has shown us that having both a male and female parent – while not always possible- is the ideal and most promising arrangement for a child's well-being. Indeed, the revived interest in male-female parenting roles (instigated by writers such as Steve Biddulph and others) has given credence to the unique, gender-specific attributes that father and mother bring to child rearing.[30]

1.58 The Committee received substantial documentation of the importance of both a mother and a father to the optimal development of a child.[31] This view is reflected in the findings of a recent *Bulletin* – Morgan Poll.[32] The poll found that, while 85% of respondents approved of access to IVF for infertile married or de facto couples, only 31% of respondents approved of women in lesbian relationships having access to donor sperm from a sperm bank, even when they paid all associated costs. For single women the figure was 38%.[33] Figures were very similar for both males and females interviewed.

1.59 Many submissions imply that there is a mono feminist and standard homosexual perspective regarding access to ART services. This has not been the case as indeed it is not the case regarding many issues such as euthanasia.

1.60 In relation to these kinds of issues, all of the available evidence indicates that there is no consistent view that emerges from any particular group. Even the President of the FSA reported that 'within the FSA, a range of views exist on this contentious issue' regarding access to ART services.[34] The Committee was told that practitioners do make judgements as to who should access ART services. For example, practitioners would be reluctant about letting people with a psychotic illness become parents through the use of ART.[35]

1.61 To facilitate the conception of children by women with no intention of living with the children's father (or in many cases of even knowing who it was) undermines both the interest of the child and support for the family.

> The Parliament ought to honour the Government's commitment to ensure the rights of children to be born into a family where there is a mother and a father. The effect of the decision in the McBain case gives rise to a new definition of family, that is a family where there is only one parent involved in the decision to conceive and give rise to new life.
>
> Clearly we recognise that there are families which are successful in raising children where there is only one parent. That being the case however does not create an environment where the Parliament should consciously pursue a policy that

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30 *Submission 28*, New South Wales Council of Churches, p 2

31 *Submission 60*, Australian Family Association; *Submission 69*, Women's Action Alliance and *Submission 102*, Festival of Light

32 *Bulletin*-Morgan Poll no 3359. Published in *The Bulletin*, 9 Jan 2001 and based on face to face interviews conducted in October 2000 with 1116 men and women aged 14 and over from all over Australia.

33 See also *The Bulletin,* 9 January 2001,p. 18

34 *Transcript of evidence,* 13 February 2001, p. 163

35 *Transcript of evidence,* 13 February 2001, pp. 168-169

> promotes a form of family that has its origins only with the decision of one parent.[36]

Flow Consequences

1.62 The rationale for the Government amendment challenges the reasoning of Sundberg J. that the denial or restriction of any service to some people is per se discrimination and hence should be outlawed. This principle has enormous implications for a range of public policy issues and Government programs well beyond those addressed in the Bill. In a perverse way, discrimination principles may become the vehicle through which Government might be denied the ability to target policy for particular outcomes. What impact will the McBain decision have on the adoption laws? What impact will the decision have on the laws relating to surrogacy? Will the decision affect the current laws affecting the distribution of welfare payments and benefits? Will there be consequences in relation to the operation of the *Family Law Act 1975?* The McBain decision, if unchanged, will undoubtedly re-open these issues and more and cast doubt on the established principles on which some of the laws governing these areas rest.

1.63 All of those areas share a common denominator – the concept of the traditional family. There is no doubt that the contemporary formulation of policy in those areas remains underscored by a commitment to that concept. One need only refer to the various Parliamentary Debates where issues such as IVF have been discussed. During the debate in the Victorian Parliament to the *Infertility Treatment Bill 1995,* members of the Legislative Assembly constantly referred to the effect that opening the surrogacy laws, for example, would have on the traditional family. It was claimed that surrogacy can destroy families.[37] Even altruistic surrogacy has reportedly had devastating effects on the lives of those adults involved. Of greater concern, however, is the confusion that it creates for children:

> There can be a situation where a child might have three separate mothers: the genetic mother, the biological mother and the caring mother. It is very distressing for a child to sort out those relationships.[38]

1.64 We have no doubt that the same kinds of damage can be caused to families and children through legislative policies that fail to adequately restrict access to ART services to ensure that children are born into situations which have the highest potential for stability. The importance of ensuring that children are born into situations with the best chance for stability and security is evidenced in the debates of the *Infertility (Medical Procedures) Bill (No. 2) 1984 (Vic).* One of the issues then was whether *de facto* couples ought to be able to access ART services. At the time, the Bill was amended to restrict access to married infertile couples.[39] As mentioned above, this was later amended in that Act's successor the *Infertility Treatment Act 1995* to enable *de facto* couples to access these services (that particular amendment was in 1997). But the principle remains the same. The concept of the family cannot be overlooked when regulating the provision of these kinds of services because at the end of the process, there will be a child whose interests should be paramount. Helping

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36 *Submission 41,* National Civic Council, p 3

37 Victoria, Legislative Assembly, *Hansard,* 30 May 1995, p. 1929

38 Victoria, Legislative Assembly, *Hansard,* 30 May 1995, p. 1930

39 See for example, Victoria, Council, *Hansard,* 23 October 1984, p. 805-817

infertile couples and ensuring that children are protected are the main intentions behind the legislation that regulates the provision of ART services:

> The guiding principle of the new Act [the *Infertility Treatment Act 1995*] placed emphasis on the welfare of any person born following these procedures, and stated that human life must be preserved and protected, that the interests of the family should be considered and that infertile couples deserve assistance.[40]

Community debate around associated issues

1.65 It is our contention that there are issues of grave significance that are unresolved by this inquiry - issues that, while not part of the specific, narrow focus of the bill, nevertheless are very much an integral part of the whole ART process. In our opinion it is premature to determine some issues about access to ART services when other issues, perhaps of even greater importance, are left in abeyance. Issues that need to be considered in relation to ART include the importation of embryos, stem cells and issues about the buying and selling of embryos. We note with concern the anecdotal information about the growing trade in embryos – dealing with embryos as a commodity rather than as nascent human life, which they are. In this context, we urge the Parliament to give consideration to referring these wider issues for inquiry and review.

Abortion

1.66 The availability of abortion procedures has been the subject of a continuing struggle between community groups, Churches, the medical profession, politicians and experts of all persuasion. It has been an issue which has divided continents, let alone communities. Yet, notwithstanding the enormous amounts of argument and evidence during the last forty years, the legal status of embryos remains the subject of debate. It is the belief of many that abortion is the taking of life. What, then, are the implications from the abortion debate for the IVF process? What does the destruction or disposal of surplus embryos constitute? Is selective reduction abortion? What is the legal status of embryos in the IVF process? These are all important issues that remain to be addressed.

What are children?

1.67 One of the most concerning aspects of the debate on the Bill is the apparent relegation of babies (on the part of some participants) to the status of commodities, to be purchased to satisfy the needs of women who want babies, without any consideration of the long term interests of the children conceived.

1.68 The most extreme manifestation of this approach can be seen in the United States, where women are able to specify the characteristics of a male donor and 'order' sperm from a catalogue listing the physical and racial attributes of prospective fathers.

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40 Breen,K., Plueckhahn, V., Cordner, S., *Ethics, Law & Medical Practice,* Allen & Unwin, 1997, p. 273

Pick a father: Sperm donor catalogue[41]

Race/Ethnicity	Skin Color	Hair Color	Eye Color	Height	Weight	Blood Type
African/American	dark	black Curly, thick	brown	180cm	102.9kg	O+
Caucasian, Latino/ German, English, Irish, Chilean	fair freckles	light brown straight	blue	182cm	85.2kg	O+
Caucasian/ Czechoslovakian, Austrian, Russian, Irish, English, ½ Jewish	fair, rosy	dark blonde, straight	light brown	182cm	70.7kg	A+
Latino/Mexican	medium	black	brown	167cm	61kg	A+

Source: www.thespermbankofca.org/donor

1.69 There is some evidence that a number of Australian women are also ordering sperm in this way. It was claimed in a recent newspaper article that the Albury Reproductive Medicine Unit had confirmed that five women had ordered sperm online and had it delivered to Albury. The article stated that:

> The Albury program manager, Ruth Keat, said California clinics were popular because they disclosed a great deal of information about the men donating sperm.
>
> 'Most of the single women we deal with are very well educated women who have considered their decision to have children for a long time, and the (Californian) clinics are very open about the criteria,' Ms Keat said.[42]

1.70 While recognising the deeply felt human desire for children on the part of many men and women, we maintain that the interests of the child should always remain the primary consideration. In the case of the women affected by passage of this Bill, medical infertility is not the issue. These women are infertile through lifestyle choices. Those choices are perfectly legitimate. However, they have consequences. One consequence is that the women in question are unable to conceive without medical assistance. Another is that they are unable to provide children with the optimal conditions for their full development. In these circumstances there can be no justification for allowing the interests of a number of individuals to be placed above those of children.

1.71 Much of the evidence to the Committee from opponents of the legislation, while far less explicit, placed a great deal of emphasis on the right of women to bear children and concomitantly less emphasis on the rights of children to be born into stable, two parent families.

1.72 Such views have also been forcefully expressed in the wider community. Ms Lisa Solomon, convener of Women's Electoral Lobby (WEL) Victoria, for example, was recently quoted in *The Australian* as saying:

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41 For January-March 2001 Sperm Donor Catalogue, see www.thespermbankofca.org/catalogue.htm

42 *The Age,* 13 July 2000

> We're quite confident, unfortunately, that the bishops are using this (High Court application) as a way to get the primacy of the rights of the child back on the agenda.[43]

1.73 The consequences for children, however, were highlighted in a number of submissions from supporters of the Bill. For example:

> We should be very clear that nobody has a right to a child. Children are not commodities. A child is not a piece of property to which an adult can claim to have a right. We do not, as parents, "own" our children. We are custodians of our children and have the responsibility to love and care for them as they grow up.[44]

and

> The whole debate about IVF access for singles and gays tends to ignore the most important question of all: how will the child be affected by such choices? In an age of rights, the rights of and claims of children seem strangely silenced. When societies ignore the needs of their own children, preferring instead to indulge the cravings of adults, it is not just the children who will suffer, but societies as well.[45]

International obligations to children

1.74 Quite apart from the moral and ethical issues involved, Australia has legal obligations to its children. These are enshrined in domestic legislation, most notably the *Family Law Act 1975* and in international treaties to which Australia is a signatory, most notably the United Nations Convention on the Rights of the Child (CROC).

1.75 There has been much debate around interpretations of the CROC, in particular about the definition in that document of the terms 'family', 'parent' and 'the right of the child to be cared for by his/her parents'. The debate has confused rather than clarified the issue. The Convention is in fact straightforward. It is stretching a very long bow to suggest that when its drafters used the term 'family' they meant a single individual or two same sex individuals in a de facto relationship, and that when they used the term 'parents' they meant two men or two women. Furthermore, the Convention specifically stipulates the right of a child to ongoing contact with each of its parents. Such a right is deliberately denied at birth to any ART child conceived to single women or lesbian couples. Article 9(3) states:

> States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.[46]

1.76 In our view, it is both incorrect and misleading to suggest that passage of the Bill will in any way contravene Australia's obligations under CROC. Nor will it contravene Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Covenant on Civil and

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43 *The Australian,* 25 October 2000

44 *Submission 79A*, Shop, Distributive & Allied Employees' Association, p 5

45 *Submission 60*, Australian Family Association, p 4

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

Political Rights (ICCPR), the two other treaties referred to at length in evidence to the Committee.

1.77 The CEDAW is directed to the elimination of discrimination against women in relation to men, as Article 1 of the Convention clearly states:

> 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.[47] (emphasis added)

1.78 The Sex Discrimination Act was drafted to give effect to CEDAW. Its aim was also to prevent discrimination against women in relation to men in the many areas where this was a major concern at the time of the Act's implementation, as a number of witnesses pointed out:

> 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.[48]

1.79 The amendments proposed in the Bill relate to discrimination against a small group of women in relation to all other women. It is disingenuous to argue, therefore, that it is contrary to CEDAW, the focus of which is on the elimination of discrimination against women in relation to men.

1.80 Nor do we accept the view that the proposed amendments are contrary to the International Covenant on Civil and Political Rights (ICCPR). Those who support such a view claim that, by allowing States to restrict access to fertility services to some groups of women the amendments contravene Article 26 of the Covenant, which states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[49]

1.81 It is important, however, to consider Article 26 in relation to the other provisions of the ICCPR, which opponents of the Bill have conveniently failed to do. This is particularly so in relation to the Preamble which makes it clear that all the rights afforded in the Covenant 'derive from the inherent dignity of the human person.'

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47 Convention on the Elimination of All Forms of Discrimination Against Women, Australian Treaty Series 1983 No 9, Article 1

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

49 International Covenant on Civil and Political Rights

1.82 The McBain decision increases the possibility of single and lesbian women accessing ART procedures and conceiving children in situations which may fail to respect the inherent dignity of those children. Thus, in our opinion, this may constitute a contravention of Australia's obligations under the ICCPR.

Lost Generation

1.83 We have heard a great deal in Australia in the last decade about the disastrous consequences of removing children from their families and denying them knowledge of their parents and broader family background. In Australia these revelations relate mainly to Aboriginal children, the 'stolen generation.'[50] They are equally applicable to children brought up in similar circumstances elsewhere.[51] The suffering of children denied knowledge of their identities seems to occur regardless of the motives of those who removed them (which at least in some cases may seem to have been well intentioned) or of the circumstances to which they were removed.

1.84 In Australia we have gradually recognised the importance to every individual of knowledge about his/her family and cultural background. In response, State governments have amended their legislation so that adopted children can have access to this information, although conditions surrounding access vary between jurisdictions.[52]

1.85 In view of our increasing understanding of the detrimental consequences of denying children information about their parents, it is difficult to justify the creation of a new 'stolen generation'. Yet, this is what we will be doing if we sanction the use of those ART procedures which rely on the donation of sperm or eggs from unidentified donors.

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50 See Human Rights and Equal Opportunity Commission, *Bringing Them Home – National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families*, April 1997; and Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations, The Report of the Inquiry into the Federal Government's Implementation of Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home*, November 2000

51 See House of Commons, Select Committee on Health, Third Report, *The Welfare of Former British Child Migrants*, 23 July 1998; See also, Alan Gill, *Orphans of the Empire: The Shocking Story of Child Migration to Australia*, 1997

52 See for example, New South Wales Standing Committee on Social Issues, *Releasing the Past. Adoption Practices 1950-1998. Final Report*, November 2000. The Committee addressed donor insemination as an issue for the future, stating: 'The issue of access to "origins" information is also of importance to people who have been conceived by means of donor insemination. There is limited NSW legislation governing donor insemination and the use of donor semination and the use of donor semen for IVF procedures and there are no provisions for the offspring's right to know about their genetic heritage. The NSW Department of Health is currently reviewing the need for comprehensive legislation governing assisted reproductive technology. The review is considering issues such as the establishment of a donor register, the regulation of donor clinics and the importation of semen from overseas for use in this State'. The Committee supported the establishment of a donor register and urged the Government to clarify the situation as soon as possible. See also, Parliament of Tasmania, *Joint Select Committee on Adoption and Related Services 1950-1998*, 1999. The laws relating to adoption and access to information were changed in Tasmania with the *Adoption Amendment Act 1998* which incorporated a clause relating to the 'contact veto'. The Committee stated that 'the laws were changed to reflect the reality that a large proportion of relinquishing parents and adoptees had a deep desire to be reunited in some form, at some time in their lives. The fact that these reunions are seen as disruptive and emotionally upsetting by adopting parents is generally recognised by the Committee, but the Committee believes that following all the evidence received, the recently passed Acts are very necessary'.

1.86 The analogy with the 'stolen generation' was made on a number of occasions during the Committee's public hearings:

> 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 mother and father are. That is a much more basic right than the right of someone to have a child, real as their needs and desires are.[53]

1.87 It was also made very movingly by Ms Joanna Rose, a young woman conceived by ART procedures in the United Kingdom through use of sperm from an unidentified donor. She is still desperately seeking to identify her biological father. Her case was discussed on the ABC *Lateline* program of 10 August 2000, a transcript of which was forwarded to the Committee by the Australian Catholic Bishops' Conference.[54] In the transcript, Ms Rose describes her need to know not only the identity of her father but also about her extended family, her ancestry and her genetic and medical background.

1.88 We believe that governments will be negligent in their duty if they fail to take all necessary steps to minimise the kind of personal tragedy described by Ms Rose. Indeed, some evidence to the Committee suggested that in the future it would be open to children conceived in this way, with State funded assistance, to sue governments for misfeasance of duty since governments are now well aware of the adverse consequences of such conceptions.

> … 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.[55]

1.89 One of the potentially significant consequences of the more widespread use of unidentified eggs and sperm is the danger that the eggs, or (more likely) the sperm of one donor will be used extensively in a community. There is some suggestion that this is already happening as a result of the drop in the number of sperm donors (the drop has apparently been occasioned by the suggestion that the donor's identification should be made known to their offspring). The serious potential health and social consequences of this development deserve greater attention than has been accorded them to date.

1.90 Many of the social and legal consequences of the conception of children through ART procedures have not been adequately addressed. Doubt remains in some cases about the relative financial and other responsibilities for such a child between the biological and social parent(s). What should happen, for example, where a couple with an IVF child separate? There have already been cases where the continuing responsibility of the non biological parent has been challenged. Problems have also arisen in surrogacy arrangements where the

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

54 *Submission 65A*, Australian Catholic Bishops' Conference, pp. 2-7

55 *Submission 69*, Women's Action Alliance, p 2

birth mother has refused to relinquish the child after birth.[56] The inheritance of property is also a contentious and largely unresolved issue.

1.91 In all of these instances, scientific advances and the increased resort to ART procedures have preceded the full appreciation of the social and legal consequences of such advances and the legal measures required to regulate them.

Conscience Vote

1.92 There is division within both major political parties regarding this Bill. This is not surprising. The Bill deals with moral and ethical issues which cannot be resolved on the basis of political ideology. The Bill deals with State responsibilities relating to the regulation of access to ART procedures. It raises profound issues of life and death. As such, it is as deserving of a conscience vote as other moral issues recently before the Parliament, most notably the question of euthanasia. We note that the report did not address the question of a conscience vote.

1.93 The issue of conscience votes will need to be addressed more broadly by the Parliament than has been the case to date. In the past, when Australia was a more homogeneous society and the major political debates were on economic issues, divisions in society were reflected by the divisions between the parties. The position now is less clear cut. Australia is a very diverse society and many issues before the Parliament are of a social or moral nature rather than an economic one. Divisions within society on such issues are reflected within parties rather than between them and this should be acknowledged and addressed through more frequent allowance of conscience votes. In this context, it is interesting to recall that a conscience vote was allowed when the Sex Discrimination Bill was passed in 1983 and also on the Family Law Bill in 1974.

1.94 Today, many are attempting to confine the debate to the narrow scope of the specific amendments before us, thus attempting to justify their refusal to sanction a vote of conscience. While understandable, this position is not acceptable. It does no justice to the people we represent. One role of a parliament in a democratic society is to encourage debate on contentious issues, not to suppress it. This is even more necessary where views are deeply and sincerely held.

1.95 A recent article in *The Australian* made the same case for greater use of a free vote:

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56 See for example, the High Court decision in *JRN v. IEG and Anor* B18/1998 (11 September 1998) which upheld the decision of the Family Court to return a child born in a surrogacy arrangement to her birth mother. See also Anita Stuhmcke, *For Love or Money? The Legal Regulation of Surrogate Motherhood*, May 1996: 'In the last decade, five Australian jurisdictions have introduced legislation to regulate the practice of surrogate motherhood - Victoria, South Australia, Queensland, Tasmania and the Australian Capital Territory. While the legislation is not uniform, each jurisdiction distinguishes between the concepts of paid and unpaid surrogacy. In the majority of jurisdictions, the legislation treats paid surrogacy more punitively, attaching criminal sanctions to its practice while leaving unpaid surrogacy unregulated. In recent years, this distinction has become increasingly marked. For example, in Victoria in 1993 the Victorian Cabinet recommended that unpaid surrogacy be legalised and the Australian Capital Territory legislature allowed parties to an altruistic surrogacy agreement to seek professional assistance in relation to the formation of such an arrangement.

> Free votes are rare, but not as rare as might be thought, and new science and technology is bound to increase the pressure for conscience votes.
>
> Given both the number and range of the precedents, a free vote on the access-to-IVF issue would be far from groundbreaking.
>
> Indeed, it would simply continue a well-established pattern in which MPs and senators were compelled to rely on their personal views rather than the party whip when exercising their votes on important public policy matters.[57]

1.96 The Blair Government has already moved towards allowing conscience votes on issues of this nature. Prime Minister Blair decided to allow a conscience vote on legislation that seeks to allow scientists certain rights to clone human embryos. In addition, it is hardly surprising that members within particular political parties have diverse views in relation to these kinds of issues and one is entitled to expect that it is entirely consistent with open government to allow those different views to be expressed. In relation to the different views on this issue held by members of the ALP, for example, it was recently reported that:

> And it is difficult to demonstrate that the social conservative tradition is any more, or any less, a true labor position than the libertarian ethos.[58]

1.97 In our view, the enormous wastage of life that is associated with the utilisation of these kinds of services, makes it absolutely imperative that parliamentarians should be able to invoke their right to vote according to their conscience.

Conclusion

1.98 In conclusion, we remain committed to the belief that access to ART services should be properly and appropriately regulated so as to ensure that the best interests of the potential children are served. The interests of the child are paramount.

1.99 We are of the view that consideration of the Bill should be deferred until the High Court has considered the matter. In the event, however, that the High Court challenge is unsuccessful, we would call for a more in depth inquiry by the Parliamentary Committee system into the many issues that arise in relation to the provision of ART and other services.

1.100 Further, it is our contention that, if legislation dealing with these issues is before the Parliament in the future, then, irrespective of whatever form the legislation takes, it would not be appropriate for parliamentarians to consider such legislation without access to a conscience vote.

Senator John Hogg, Member **Senator Jacinta Collins, Participating Member**

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57 Ian Henderson, *The Australian,* 15 August 2000

58 Gerard Henderson, *The Sydney Morning Herald,* 22 August 2001 p. 14