DISSENTING REPORT

SENATOR BRIAN HARRADINE

INTRODUCTION

1.1 I cannot agree with the Report's statement that passage of the Bill would contravene the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and undermine the Sex Discrimination Act 1984. (NB see attachment H1)

1.2 On the contrary, a serious misapplication of the provisions of the Act is likely to result in bringing the Act into disrepute. This would undermine the importance of the Act in the protection of equal rights for women.

1.3 The passage of the Sex Discrimination Amendment Bill (No.1) 2000 will remedy much, though by no means all, of the mischief caused by the misapplication of the Act in the decision of Sundberg J. in McBain v. State of Victoria [2000] FCA 1009.

1.4 The mischief of the decision includes:

- Approval of the concept that children can be deliberately deprived of their rights to be in contact with and cared for by both parents and, in some cases, deprived of knowledge of the identity of their biological fathers;
- Effectively denigrating the status of marriage and its rights, responsibilities and privileges;
- Founding a formal right to a single woman and lesbian couple to demand a child through ART;
- Effectively legislating for a fundamental shift in the foundational structure of human society;
- Implications for State/Territory laws on surrogacy and adoption

Effect of the Sundberg decision on laws of States and Territories

1.5 The effect of the Sundberg decision is that those provisions of the Victorian Act which restrict access to ART services to infertile married or de facto couples are inoperable. This means that, contrary to the intention of the State legislature, single women and lesbian couples will now be able to access those services. The decision, however, also has implications for other states that have legislation in place to regulate access to those services, such as South Australia and Western Australia. In those states, provisions exist which restrict access to ART services to couples that are infertile or at risk of genetically transmitted diseases/defects and who are married or have been in a de facto relationship for a minimum of five years. The South Australian legislation was challenged in 1996 to similar effect as in

McBain. The Western Australian legislation and in those jurisdictions that have guidelines in place are all subject to challenge on the face of the first instance decision of Sundberg J in McBain. There is no doubt, therefore, that the McBain decision has very significant implications for the provision of ART services in Australia.

1.6 The Bill seeks to revive or preserve the provisions of the Victorian legislation that Sundberg J declared inoperable by exempting State and Territory legislation that restricts access to services from the operation of the SDA.

The Sundberg decision in perspective

1.7 The Sundberg decision, if unchallenged, will have a profound effect on very fundamental values in our community. A single Federal Court Judge has founded, a right for any single woman – including those in non-heterosexual relationships - to have a child using ART services. [1] In so doing, Sundberg J has supported the view that it is acceptable to deliberately deprive such children of their right to know their biological father and of the right to be cared for by their father and mother. Sundberg J ignored the concept of the family as entrenched in Australian law in very significant legislative enactments such as the *Family Law Act 1975*. He endorsed a view of society that fails to recognise, or at least give due recognition to, the paramount interests of children. The decision effectively legislates for a fundamental shift in the foundational structure of human society. This is contrary to the role of the courts and has been brought about in a way that is contrary to the principles of a democratic society.

1.8 After long deliberations and careful examination of all the issues in relation to this very sensitive area, the Parliaments of Victoria, South Australia and Western Australia legislated to restrict access in ways that attempted to recognise the rights of children born or to be born as a result of ART procedures. The *Hansard* debates on these pieces of legislation show how thoroughly all the relevant issues were considered. The Victorian *Infertility Treatment Act 1995,* for example, received bipartisan support after extensive debate in the Victorian Parliament. This followed widespread community debate after the establishment of The Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation, in 1982. This was a multidisciplinary committee, chaired by Professor Louis Waller and more commonly known as the 'Waller Committee'.

1.9 The Victorian Infertility Treatment Act 1995 makes it clear that the interests of the child are "paramount" Guiding Principle (1)(a) states: 'the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount.'

---

[1] Kristen L. Walker, *Equal access to assisted reproductive services: The effect of McBain v Victoria,* Alternative Law Journal, V. 25, Dec. 2000, p.288

Justice Sundberg held that the marital status criterion is wholly inoperative, and the medical need criterion is inoperative to the extent that it is 'dependent upon the marriage requirement.'

The Victorian Government subsequently accepted legal advice that 'nothing in Justice Sundberg's ruling… excluded the requirement for IVF treatment recipients to be medically infertile. The legal advice considers that all that needs to be done to avoid breaching the Sex Discrimination Act is to remove the references in the medical need criterion to 'the husband's sperm'. Thus …single or lesbian women will only be able to obtain IVF treatment if they can demonstrate they are infertile or at risk of genetic abnormality or disease. (From *McBain v State of Victoria: Access to IVF for all Women,* Katrine Del Villar. Parliamentary Library Research Note 03 2000/2001

1.10 The passage of the Bill under consideration will revive the Victorian legislation and uphold the democratically expressed intentions of its legislators. The situation will revert to that in place before the Federal Court ruling and reflect the wishes of the Victorian parliament. Similar legislation in South Australia will also revive if the Bill is passed, and the Western Australian legislation will be protected.

Intention of the Sex Discrimination Act

1.11 By restricting ART on marital status grounds, State legislators did so without fear of being overridden by the Sex Discrimination Act. They acted on the reasonable assumption that their actions would not be nullified by the type of misapplication of the SDA we have witnessed in the McBain case. As a member of the Senate at the time, I recall being present during the debate on the Sex Discrimination Bill in 1983 and 1984. The focus of the debate was the elimination of discrimination against women, in relation to men, in matters such as employment, education and accommodation.

1.12 It has been claimed by some that the SDA provisions were never envisaged as extending to ART procedures. This is not entirely correct. Early in December 1983 I discussed with colleagues whether or not to propose amendments specifically exempting IVF. They considered this question was covered by proposed section 32. I accepted this reassurance and was reinforced in this decision by the Minister Assisting the Prime Minister on the Status of Women Senator Susan Ryan, who introduced the Bill into the Senate and delivered the Second Reading Speech. She told the Senate:

> …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 by one sex only.

Other implications of the Sundberg decision

1.13 The Sundberg decision, if unchallenged, will also have implications for other areas of law which deal with children. It is possible, for example, that the decision will be applied where single persons and same sex couples want to obtain children through surrogacy. Restricting access to surrogacy based on marital status might be seen as in breach of section 22 of the SDA. Similarly, it could be argued that the Sundberg ruling could easily be extended to adoption. Currently, many jurisdictions restrict access to adoption on the basis of age, character, infertility and marital status. Although some jurisdictions also allow single persons to adopt children, this is normally restricted to special circumstances such as if the child has a disability or special needs. Applying the Sundberg decision, restricting access to children through adoption on the basis of marital status might constitute a breach of the SDA. A Parliamentary Library Research paper drew attention to the implications of the Sundberg ruling within weeks of the judgment. Adoption was the first item noted.[2]

1.14 The interests of the child are considered less than the interests of the people wanting to obtain children. At worst, the interests of the child are being completely ignored. Subverting the interests of children in this way is contrary to the United Nations Declarations on Human Rights. The rights of a child should not depend on the wants of an adult.

---

2 *McBain v State of Victoria: Implications Beyond IVF*, Katrine Del Villar, Parliamentary Library Research Note 04 2000/2001

Failure Rates and Health Issues

1.15 We need to consider whether it is prudent to extend what is essentially a failed technology to other groups, particularly single women and lesbian couples, most of whom are not medically infertile to begin with. The most authoritative IVF statistics in Australia are gathered by the Infertility Treatment Authority (ITA) of Victoria. The ITA's statistics reveal that IVF procedures have a very low success rate. The latest report of the ITA, the 2000 Annual Report, shows that in 1999, in all of Victorian IVF clinics, only 11.1% of treatment cycles resulted in either a confinement or an ongoing pregnancy. Only 12.4% of couples achieved either a baby or an ongoing pregnancy (some after many cycle treatments).[3] [4] Of the embryos transferred in Victoria in 1999, only 3.2% reached live birth.

1.16 ART procedures, especially IVF, also carry serious risks; there is no doubt that such procedures are stressful and damaging to the health of both women and children. The documented risks of IVF procedures include spontaneous abortion, ectopic pregnancy, multiple births, a high incidence of pre-term births and low birth weight and malformations in the children conceived.

The cost of ART

1.17 The cost of ART procedures is very high, especially in view of its low success rate and the significantly small percentage of the population which use them. Medicare costs have been estimated at more than $40 million annually and Pharmaceutical Benefits Scheme costs at $26 million. The total cost of one IVF birth (taking into account the costs to government, to the patient and to health insurance companies) was estimated at $42,927 in 1994. (Updated by the CPI, this would equate to $47,133 for the March quarter 2000 and $48, 280 updated to December 2000). The costs to Medicare can be expected to increase

---

3 The 1999 Annual Report shows that in 1998, in all of Victorian IVF clinics, only 11.9% of treatment cycles resulted in either a confinement or an ongoing pregnancy. Only 18.4% of couples achieved either a baby or an ongoing pregnancy.

4

		1997	1998	1999
A	Cycles commenced	4544	4992	5252
B	Confinements	479	345	258
C	Babies (incl. Multiple pregnancies)	595	423	327
D	Ongoing pregnancies		252	325
E	Couples	3217	3238	3598

Treatment cycles resulting in confinement or ongoing pregnancies

A ÷ B + D

5252 ÷ 258 + 325 = Avg. 9 cycles per couple

All couples on IVF achieving ongoing pregnancy

E ÷ C + D

3598 ÷ 327 + 325 = 1 baby for every 5.52 couples (ie. 1:5.52)

Infertility Treatment Authority of Victoria, 1998, 1999, 2000 Annual Reports

significantly following the Government's decision early in 2000 to extend payment from six to twelve IVF cycles.

1.18 Given the parlous state of our public health system, especially some of our public hospitals, one must question the advisability of extending access to this very expensive treatment, as facilitated in McBain. The cost of IVF rebates leads to further rationing of scarce health care resources and causes budget shortfalls to deal with public hospital waiting lists or the 50 per cent of people diagnosed with a mental health problems unable to access essential mental health care. In essence, extending access to ART services may result in funding reductions to other vital health services for which there are very high levels of public support. [5]

Creation of a new 'stolen generation'

1.19 Our community is becoming increasingly aware of the adverse impact on children of denying them information about their genetic and cultural background. While the impact has been most widely discussed in relation to Aboriginal children, it is not limited to them. Another Senate committee is currently inquiring into the impact on children, removed from British orphanages to Australia, of the breakdown in their links with their families. Recognition of the profound distress caused to children by the absence of information about their biological parent(s) has also prompted a re-examination of the adoption laws in a number of States. That being the case, it seems particularly appropriate that Parliament passes this legislation and thus limit the increase in the number of children deliberately denied this knowledge as well as the care of and contact with both biological parents.

1.20 The Federal Government should do everything in its power to support the Victorian legislation, given that it is the only legislation in the country which (although limited in its scope) currently guarantees that children born as a result of ART procedures will have access to identifying information about their biological parent(s).

The use of embryos in ART

1.21 A major concern is the fate of embryos used in ART services. Information about what becomes of "excess" embryos is not easily obtainable. According to Victorian ITA Reports, of the embryos created through IVF in Victoria in 1998, only 2.1% reached live birth. In 1999, even fewer reached live birth. Of 23,647 eggs fertilised, only 327 babies resulted. Therefore of the embryos bought into being through IVF in Victoria in 1999, only 1.38 percent reached live birth.[6]

1.22 The National Perinatal Statistics Unit of the Australian Institute of Health and Welfare advised that in 1997 there were 46,327 frozen embryos stored in preparation for IVF treatment in Australia and New Zealand. As of 31 December 1999, there were a total of 55,555 embryos stored in the 38 Units providing assisted reproduction in Australia[7] In

---

5 Rebecca Dresser, *Regulating Assisted Reproduction*, Hastings Center Report, November-December 2000 pp. 26-27

6 *Submission 131*, Flinders Reproductive Medicine, Flinders Medical Centre, p.1

7 *Submission 131*, Flinders Reproductive Medicine, Flinders Medical Centre, p. 1

evidence to the Committee, Dr Molloy gave the latest figures as 50,000.[8] According to the ITA 2000 Report, there were 15,363 embryos in storage in Victoria as at December 31, 1999.[9]

1.23 The Annual Report of the ITA of Victoria uses clinical language which masks the information and makes it almost undiscoverable to the community. While there is also a table of 'terminology used in Reporting data' it does not include expressions such as 'succumb'. The 2000 Annual Report states, in relation to requirements for research on embryos, that: 'No notification or approval is required for research undertaken on embryos after they have been allowed to succumb', What does this mean? If to 'succumb' means the same as 'demise', a term used to refer to the death of an embryo, should we allow research to proceed on embryos that have 'succumbed' without any kind of formal authorization? Should the medical technologist have unlimited powers in this regard?

1.24 The Committee was given only fragmented information about the fate of human embryos involved in the IVF program. Some of the issues which remain unresolved are:

- The genetic screening of embryos: The Committee was told that some IVF units use pre-implantation diagnosis for genetic disease and that there has been an increase in the number of cases where screening has been applied. However, statistical data on the practice is not collected.
- The fate of embryos deemed by an IVF clinic to be abnormal: The Committee was told that IVF clinics 'may allow abnormal embryos to demise, but the act of active destruction does not occur with embryos … in any IVF clinic'. Dr David Molloy, an IVF practitioner, pointed out the lack of National Health and Medical Research Council involvement or regulation in this area:

> … . I am not aware that allowing a genetically abnormal embryo to demise would cut across the NHMRC guidelines. To my knowledge, there is nothing that the NHMRC has said that prohibits the management or the demise of genetically abnormal embryos or, for that matter, genetically abnormal children. After all, there are groups in the community and patients in the community who, for example, would elect to terminate a Down's syndrome child at 16 or 17 weeks of pregnancy with its resultant demise. That act is not prohibited either by the NHMRC, to my knowledge.

- The use of human embryos in experimentation (IVF related and otherwise): There is insufficient public knowledge about the use of human embryos in research, about the

---

8 *Transcript of evidence*, Dr Molloy, p. 189

9 *Submission 131*, Flinders Reproductive Medicine, Flinders Medical Centre includes the following table:

Embryos in storage in south Australia at 31 Dec 1998 – 5,511
Embryos thawed for treatment in the year 2000, 2,577
Embryos frozen during treatment in the year 2000, 2,532
Embryos in storage as of 31 Dec 5,566

numbers of embryos involved in experimentation, and about the actual techniques and experiments in which they are involved;

1.25 The guidelines of the Reproductive Technology Accreditation Committee (RTAC) and the guidelines of the NHMRC that refer to the ethics of research that involves human embryos are inadequate and require community consultation and the sanction of the Parliament. These guidelines raise very serious questions about what is actually taking place in this kind of research. The RTAC guidelines, for example, list certain activities that are unacceptable. At the same time, the NHMRC guidelines leave matters open. Although they state that 'embryo experimentation should normally be limited to therapeutic procedures which leave the embryo or embryos with an expectation of implantation and development', non-therapeutic research on embryos is not prohibited. In fact, the guidelines state that non-therapeutic research involving the destruction of embryos can be conducted if the research will result in a 'significant advance in knowledge', if a restricted number of embryos are involved and if the gamete providers consent;

1.26 What is often not realised is that NHMRC guidelines only apply to Commonwealth funded research. Privately funded or state funded research and clinical practice, including Medicare funded practice are not required to comply with the NHMRC.

1.27 The practice of selective reduction, which involves aborting "excess" fetuses, is used in some Australian IVF clinics but the extent of its use is unknown. There is no requirement to provide figures on this practice to the Australian Perinatal Statistics Unit.[10]

1.28 There should be formal controls on the use of this practice, particularly as it constitutes abortion. It also needs to be established whether the use of the procedure in any way conflicts with the abortion laws of any State or Territory.

---

[10] According to the Australian Institute of Health and Welfare National Perinatal Statistics Unit and The Fertility Society of Australia Assisted Conception Series, *Assisted Conception*, 1997, selective reduction of fetuses may be performed in early pregnancy to abort a severely malformed fetus in a multiple pregnancy or to avoid multiple births. Based on statistics voluntarily provided by some clinics, among pregnancies conceived in 1996, selective reduction was performed in 6 IVF and 2 GIFT pregnancies. Among pregnancies conceived in 1997, there was selective reduction in 9 IVF and 1 GIFT pregnancies. Fetal reduction had previously been performed in 41 pregnancies between 1988 and 1995. Of the 18 pregnancies with selective reduction in 1996-1997, four fetuses were reduced to three in 1 IVF pregnancy and four were reduced to two in 1 IVF and 1 GIFT pregnancies; three fetuses were reduced to two in 8 IVF and 2 GIFT pregnancies and three fetuses were reduced to one in 2 IVF pregnancies; and two fetuses were reduced to one in 3 IVF pregnancies: trisomy 21 and thalassaemia major, both reduced from two fetuses to one. None of the selective reductions in GIFT pregnancies was for fetal malformations. Among the 18 IVF and GIFT pregnancies in which selective reduction was performed in 1996 and 1997, spontaneous abortion of the remaining fetuses was the outcome in 6 pregnancies

According to the 1996 report, there were 4 IVF and 2 GIFT pregnancies notified after selective reduction of pregnancies conceived in 1995. Fetal reduction had previously been performed in 2 pregnancies in 1988, 1 in 1989, 1 in 1990, 9 in 1991, 6 in 1992, 6 in 1993 and 10 in 1994. In 1995, 3 fetuses were reduced to 2 in 3 IVF and 2 GIFT pregnancies, and 4 fetuses were reduced to 2 in 1 IVF pregnancy. The indication for fetal reduction was a congenital malformation in one GIFT pregnancy; cranial encephalocele reduced from 3 fetuses to 2. None of the selective reductions in IVF pregnancies were for fetal malformations. There were no spontaneous abortions of remaining fetuses after selective reduction in these 6 IVF and GIFT pregnancies.

Specific objections to the Report (further detailed observations attached at H1)

Conflicting evidence on application of international law instruments

1.29 The Report's stance on legal issues is problematic given that it received conflicting advice on many of the legal arguments advanced in support of its position. It received conflicting advice, for example, on whether the amendments contravened CEDAW, the Convention on the Rights of the Child (CROC) and the International Convention on Civil and Political Rights (ICCCPR). Given this uncertainty, the Committee has been precipitate in reaching its conclusion that the Bill contravenes Australia's international obligations and that it will undermine Australia's record in protecting human rights.

1.30 The Sex Discrimination Act (SDA), which is being amended by the Bill under discussion, was drafted to give effect to certain provisions of CEDAW. Both the SDA and CEDAW were intended to prevent discrimination against women in relation to men in the many areas where such discrimination was a concern at the time the Act was implemented, such as employment and accommodation. The amendments proposed in the Bill relate to discrimination against a small group of women in relation to all other women. It is incorrect to argue therefore that the Bill is contrary to CEDAW or to the SDA, the focus of each of which is the elimination of discrimination against women in relation to men.

Development of public policy

1.31 A significant argument raised is that the restrictions in the Victorian legislation constitute discrimination between different groups of women and that this kind of discrimination is also covered by the SDA and the CEDAW. As noted above, however, I reject that argument. Public policy cannot be determined by the unilateral actions of a few. The development of public policy must be for the common good rather than an unbridled claim for autonomy by a select few. In formulating policy, it is always acknowledged that there will be those for whom the policy doesn't fit.

Advancement of the interests of children

1.32 The Report has argued that the amendments will not advance the interests of children because they will not facilitate the right of children to the reasonable expectation, other things being equal, of the care and affection of both a mother and a father. I accept, as the Attorney-General's Department has said, that the amendments cannot guarantee such a right. But the essential point here, not mentioned in the evidence of the Attorney-General's Department, is that children are being deliberately deprived from the start of their right to know, have contact with and be cared for by both of their parents. It is important for the Government to make a clear statement of its support for traditional families as providing the best outcomes for children, other things being equal. Passage of this Bill would provide such a statement.

Conflicting advice on rights of children and women

1.33 The Report argues that the rights of children and women can co-exist. In most cases this is true. However the issue at hand concerns very particular circumstances, of cases in which a woman's 'right' to a child overrides a child's right to the love and support of two parents. Of course, many children grow up in one-parent families as the result of the death, divorce, separation or abandonment of their parent(s). While unfortunate, this is quite different from the situation under consideration here, where a woman deliberately makes the decision to conceive without ever intending that the resulting child will have two parents and, in many cases, without even knowing the identity of the father.

1.34 In such cases children are reduced to the status of commodities to meet adult needs. This makes a mockery of any legal obligations, domestic or international, to recognise and respect the rights of children. In these circumstances there can be no justification for government action (or in this case inaction), which will place the interests of a small group of women above those of children.

Conclusion

1.35 The Bill before us, if passed, will address some of the mischief caused by Justice Sundberg's decision in the Federal Court. It will revive the Victorian *Infertility Treatment Act 1995* and the South Australian *Reproductive Technology Act 1988* and protect the Western Australian *Human Reproductive Technology Act 1991*. It will have no effect in the other States and Territories which have no legislation or guidelines restricting access to ART services. The failure of NSW especially to enact ART legislation is a special threat to an orderly approach to public policy in this and associated areas. Although limited in its scope, the Bill is an improvement on the current position and for that reason, should be supported.

1.36 I am disappointed that the Report fails to give proper consideration to the wide-ranging and serious issues associated with ART and raised in evidence, which are not reflected in it.

1.37 I note that the Prime Minister has publicly pledged his support for a Bill of this kind on the basis that the States should have the power to enact restrictive legislation in relation to ART. The Prime Minister has clearly asserted that the issue of amending the Sex Discrimination Act 1984 in this way 'overwhelmingly goes to the rights of children in our society':

> This issue involves overwhelmingly, in the opinion of the Government, the right of children in our society to have the reasonable expectation, other things being equal, of the affection and care of both a mother and a father. And in those circumstances we believe that states have the right to legislate to that effect and as a result we propose an amendment to the Sex Discrimination Act to make it plain that legislation similar to the legislation enacted by the State of Victoria would not be struck down by the Sex Discrimination Act.

1.38 The Report, as its authors acknowledge, is narrowly based. As I mentioned above, however, the Bill is concerned with access to ART services and in making decisions about access to those services, other aspects associated with the provision of those services should not be ignored. Certainly, the evidence to the Committee raised many of these issues and these were not dealt with in the Report.

Recommendation

1.39 Although a limited response to the Sundberg ruling, the Bill is an improvement on the current situation and for this reason deserves support.[11] However it may be prudent to delay its consideration until after the High Court case.

Senator Brian Harradine, Participating Member

[11] States should also be able to determine the duration of a de facto marriage-like relationship.

ATTACHMENT H.1.

Summary of dissent by Senator Brian Harradine to specifics of Report presented by the Chair, Senator Marise Payne (the Report)

General Comments

1. The Report is characterised by two major flaws: (a) it does not fully appreciate that Assisted Reproductive Technology (ART) has, as its object, the technological production of children who would not otherwise be produced. The Report does not give this fact and the associated issue of the best interests of the child the attention required; (b) the Report does not seem to appreciate the inherent conflict between, on the one hand, promoting rights for a particular group of single women based on a selective interpretation of certain international instruments and, on the other, existing statutory regimes which accord formal recognition of and protection to marriage, family and children.

2. More specifically, the Commonwealth has constitutional power [12] to make laws with respect to "marriage" and "divorce and matrimonial causes." Under these powers, the Commonwealth has legislated in the form of the *Marriage Act* 1961 and the *Family Law Act* 1975 to protect and to regulate matters pertaining to marriage, family and children. Moreover, the High Court has interpreted the constitutional power of the Commonwealth quite liberally, especially with respect to the "institution of marriage." Cases and constitutional textbooks detail the broad ambit of Commonwealth responsibilities in this regard. In relation to children, the High Court has held that "marriage ... is primarily an institution of the family.... The procreation of children and the nurture of them is not a mere consequence of marriage." [13] Surprisingly, there is no discussion of the constitutional protection of marriage, family and children in the Report. Nor is there any consideration of whether married persons could, so to speak, counter claim arguing that to allow single women access to ART discriminates against married persons and their right to raise and to nurture children. Rather, all emphasis in the Report is on single women and discrimination against them. There is no consideration of discrimination against married persons if single women are accorded legal status equivalent to those who are married.

3. Part VII of the *Family Law Act* relates to "children", including children born pursuant to ART (s.60H). Section 60B refers to principles to ensure that children receive

---

[12] s.51 (xxi) & (xxii) *Constitution*

[13] *Russell v Russell; Farrelly v Farrelly* (1976) 134 CLR 410, 422, 428; *R v Cook; ex parte C* (1985) 156 CLR 249, 258-59).

adequate and proper parenting, and specifically[14] that "children have the right to know and be cared for by both their parents...." Neither the Attorney General's Department, the Law Council of Australia nor the Sex Discrimination Commissioner raised these specific rights and principles. While addressing alleged rights under international instruments, existing statutory rights of long-standing under Australian domestic law remained unaddressed in the Report.

4. As the above demonstrates, there is a significant collection of domestic law in Australia in the light of which the Bill, and the Report, must be considered. The Report does not do so and therefore is ill conceived. It is remarkable that all legal bodies ignored these laws. At the very least, one would have thought that some consideration would have been given to how these laws would be affected by the Bill. It was disappointing that the Sex Discrimination Commissioner made no reference to Australian domestic law.

5. A third general feature of the Report is its failure to distinguish between just and unjust discrimination. All laws, to some degree, favour one group over against another in the community. As used in the Report, "discrimination" is a pejorative term which, by definition, is biased against the person/group making the judgment.

6. Specific Comments

7. Par.2.10: a "group" also affected by the Bill is those who are married. Those who are single by choice and who seek access to ART should not be treated as equivalent to married persons.

8. Par.2.12: this is inaccurate. It will not revive provisions in the Western Australian (W.A) legislation. To date there has been no challenge to that legislation. The Bill will only directly affect the Victorian and South Australian legislation. It will protect the position in WA.

9. Throughout most of the Report, the headings are seriously misleading. Thus, before 3.5 the heading is "The fundamental issue concerns human rights not access to health services." The heading sets the direction of, rather than illuminates, the debate.

10. Par.3.6: "discriminatory action" is only an allegation. It ignores the consideration of the various State legislatures of law as "protective" of children and couples in ART, as "educative" of the public about priorities of life, children and relationships, and as "regulative" of the same matters. None of these considerations would normally be considered as "discriminatory."
11. Par.3.7: typically, as a sub-text, children have no rights. See further below.

[14] s.60B(2)

12. Par.3.10 & 11: the s.32 defence was raised by the Australian Catholic Bishop's Conference (ACBC) before Sundberg J. However, the intention of parliament was never canvassed in the Federal Court proceedings.

13. Par.3.17 Undue attention is given to anti-discrimination legislation, but no consideration of the constitutional power, and relevant enactments, of the Commonwealth re marriage and family, or of High Court jurisprudence in relation to the same subjects.

14. Par.3.19 and following. This whole section dealing with the rights of children only deals with alleged competing rights under international instruments and does not address domestic law.

15. Par.3.23: this is a popular and self-serving myth. The description relates to the issue of single parenthood by choice, not the suitability of parents or single parent families.

16. Par.3.25 and following. This section is somewhat tendentious. The Report (par.5.18) concludes by saying, effectively, that there are very complex issues, which are too wide for the Committee. However certain other difficult and complex issues were explored, for example particular claims – not always well supported - about the validity of different types of families.

17. Par.3.32: the so-called health issue is also somewhat tendentious. There is no compulsion on any woman to engage in any unhealthy practice.

18. Par.3.36: most of the claims made here are matters of debate and often fall into the realm of "opinion" rather than a considered view of the law, especially in the light of domestic legislation. As noted above, specific sections of the *Family Law Act* identify the kinds of rights about which some, including the Sex Discrimination Commissioner, seemed unaware.

19. Par.3.38: It is unclear why there is a heading "Other arguments challenging the Commonwealth Act" followed by a sentence (par.3.38) which reads: "Some of those who supported the amendments did so on grounds which differed from those advanced by the Government." The expression and juxtaposition are incongruous.

20. Par.3.45: ACBC did not express a view about the legislation. In written and verbal evidence before the committee, it proposed that the Bill be deferred until after the High Court had ruled. It is therefore inaccurate to say that ACBC "supported the amendments." [15]

---

[15] The Women's Electoral Lobby and The Law Council of Australia also shared this view. *Hansard*, Nov 21, p110; *Hansard*, November 28, p 141).

21. Par.3.51: no mention is made that Sundberg J's ruling is only that of a first instance decision. There was a different approach taken by the Queensland Court of Appeal (in relation to access to IVF by a lesbian) in *JM v QFG & GK* (18 August 1998), albeit in relation to Qld legislation and guidelines.

22. Chapter 4: generally, there is no consideration of relevant domestic legislation.

23. Par.4.6 & 4.7: if it were correct to say, as does the Report, that "It is important to look at the objectives of conventions...", one would have thought that specific reference would have been made to the preamble sections of both CEDAW and CROC. The former provides: "Noting...the dignity and worth of the human person and in the equal rights of men and women" and "Bearing in mind...the social significance of maternity...and that the upbringing of children requires a sharing of responsibility between men and women...." The proper interpretation of CEDAW relates to discrimination as between men and women, not as between different classes of women (this interpretation is also confirmed by reference to articles 2,3,4,5,7,8,9,10,11,12, etc, in all of which the point of reference is "on the basis of equality of men and women."). Noting these important statements from CEDAW, it was surprising they were not reflected in evidence from the Sex Discrimination Commissioner. It is also notable that, given the importance accorded conventions by the Report, these particular statements were not given any consideration.

24. Par.4.11: the SDA (s.3) only gives effect to "certain provisions of" CEDAW.

25. Par.4.14: the reference from the Law Council of Australia is incorrect. The text of art.12 (1) says: "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." (Emphasis added.) Art.12 (2) refers more specifically to services to women in connection with "pregnancy, confinement and the post-natal period....” As stated above, the Council also ignores the preamble provisions of CEDAW.

26. Par.4.16: the quote used here is plainly incorrect and its source unclear. The preamble to CROC provides that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*." (Emphasis added.) There is also art. 6.1, which deal with the child's inherent right to life. These are ignored in the Report. Additionally, there is no reference to the "Guiding Principles" of the *Infertility Treatment Act* 1995 (Vic) which provide expressly that the parliamentary intention is to ensure that certain principles be given effect to in interpreting the Act, the first of which refers to (a) "the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount", (b) human life should be preserved and protected", (c) the interests of the family should be considered."

27. Par.4.18: the Anti-Discrimination Board of NSW has over-looked the provisions of the *Family Law Act* and High Court jurisprudence noted above.

28. Par.4.20: This is not correct. It is difficult to see how Justice Sundberg could have "considered the issue of whether the proposed amendments contravene the international treaties to which Australia is a party" when the Bill proposing the amendments was introduced in response to and months after the Sundberg decision.

29. Par.4.21: as the Report notes at the end, views were expressed on the basis of certain interpretations of the law and conventions, and that other legitimate views were held. Given that the Law Council got a number of matters wrong (see above), the view expressed in this paragraph is simply opinion.

30. Par.4.27: the Sex Discrimination Commission ascribes overwhelming precedence to CEDAW and ignores the regime of Australian domestic law. The Report's interpretation of CEDAW also seems to ignore certain parts of the Convention.

31. Par.4.30: the question of "reasonableness" ought properly be considered in the light of domestic law, as well as international obligations.

32. Par.5.4: the Report side steps certain complex issues. Yet the committee did not side-step equally complex issues in relation to its inquiry into euthanasia or native title.

33. Par.5.11: it is very much a question of characterisation of laws. See above the discussion re "discrimination". By referring to the erosion of existing rights, where does that leave children born pursuant to ART and married persons?

34. Par.5.13: This paragraph is illogical. The "evidence" accepted in the Report does give priority to the rights of women over children, and thus opts for a hierarchy of rights, not a cumulative model. One might ask, what is/are the "cumulative" rights of children?

35. Par.5.15: the Report only finds the evidence "persuasive." That evidence will impugn the existing economy or regime of laws relating to marriage and family.

36. Par.5.17: the logical consequence of this paragraph would be to recommend that the Bill be deferred until after the High Court ruling is given.