

5 September 2008

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

***Re: Senate Inquiry into the effectiveness of the Commonwealth Sex  
Discrimination Act 1984 in eliminating discrimination and promoting gender  
equality***

Thank you for the opportunity to make a submission to this Inquiry.

ACL is supportive of the broad aims of the Act, including the promotion of equality between men and women and eliminating sexual harassment in the community. ACL does not support, however, the use of anti-discrimination legislation as a vehicle for social engineering. This is a major pitfall of the *Sex Discrimination Act 1984*.

Whilst the terms of reference to the inquiry are broad, ACL's submission will focus on two issues identified in the inquiry background information:

- e. Significant judicial rulings on the interpretation of the Act and their consequences; [and]
- n. Scope of existing exemptions.

***Significant judicial rulings***

Australian anti-discrimination law has been used as the vehicle for turning the biologically impossible into a legislated right. The year 2000 case of *McBain v State of Victoria* clearly demonstrates this unfortunate development.

A Victorian IVF service provider brought the action on behalf of a single woman who was denied access to artificial insemination services under the Victorian *Infertility Treatment Act 1995*. The claimant successfully argued the provision of the Victorian legislation restricting access to IVF to women who were married or in a heterosexual de facto relationship was inconsistent with section 22 of the *Sex Discrimination Act*

1984. The presiding judge ruled that fertility treatment was in the class of goods and services to be provided without discrimination on the basis of marital status.<sup>1</sup>

ACL believes it unlikely the legislation's original drafters intended it to be the basis for such spurious claims to succeed. The former Coalition government sought to close this unfortunate loophole in the Act, which now allows access to fertility services for single women and lesbians.<sup>2</sup> Without the support of other parties, however, the bill was never introduced into the Senate. That the legislature neglected its duties to the rights of children in this instance is highly disappointing.

ACL argues strongly that the rights of children are paramount in any discussion of reproductive technology. Evidence clearly supports the proposition that children do best when raised by both a mother and a father. Using the *Sex Discrimination Act 1984* to challenge this fundamental principle is a social engineering experiment that deliberately fails to give children the most basic building blocks of development.

As an instrument to promote gender equality and eliminate sexual harassment, ACL is supportive of the aims of the Act, but as a vehicle for placing the wishes of adults before the best interests of children, the Act perpetuates discrimination. To commodify children as goods to be granted to anybody regardless of their circumstances is a dangerous path to tread.

It is hardly discriminatory to deny an individual the consequences of one choice of lifestyle or behaviour when they have consciously chosen another course of action. By granting IVF access to single women and lesbians, the *Sex Discrimination Act 1984* has been used as the route to subvert the natural consequences of lifestyle choices or circumstances. ACL argues this is clearly not the expressed intention of the Act. The problem of discrimination remains if the "right" of adults to have children are placed before the rights of children to have a mother and a father.

There is also some commentary that suggests the McBain ruling may have broader social implications, such as allowing access to adoption "services" to all people regardless of relationship status.<sup>3</sup> Given earlier comments about the rights of children, ACL is obviously deeply concerned by such a proposal. These are clear loopholes in the legislation that an inquiry such as this should recommend a legislative intervention to rectify.

### ***Scope of existing exemptions under the Act***

ACL strongly supports the exemption provisions of sections 37 and 38 remaining in the *Sex Discrimination Act 1984*. These exemptions allow religious bodies, and educational institutions established for religious purposes the ability to appoint staff and conduct activities in accordance with the "doctrines, tenets, beliefs or teachings of a particular religion or creed" without fear of prosecution under the Act.

Such exemptions are necessary if the Commonwealth is to properly separate itself from the religious activities of its citizens. Freedom of religion is an important right

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<sup>1</sup> Katrine Del Villar, *McBain v State of Victoria*: Access to IVF for all Women, 15 August 2000, <http://www.apf.gov.au/library/pubs/RN/2000-01/01RN03.htm>

<sup>2</sup> See Sex Discrimination Amendment Bill (No. 1) 2001 <http://parlinfoweb.apf.gov.au/piweb/browse.aspx?NodeID=1727> and Sex Discrimination Amendment Bill 2002 <http://parlinfoweb.apf.gov.au/piweb/browse.aspx?NodeID=1726>

<sup>3</sup> Katrine Del Villar, *McBain v State of Victoria*: Implications Beyond IVF, 15 August 2000, <http://www.apf.gov.au/library/pubs/RN/2000-01/01RN04.htm>

enshrined in such international treaties as the Universal Declaration of Human Rights 1948<sup>4</sup> and Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>5</sup>

Freedom of religion is also granted to Australian citizens through section 116 of the Commonwealth Constitution<sup>6</sup>. The effect of such a legislative clause is that religions are rightly free to conduct their own business without the illegitimate interference of government.

This is an important facet of Australian law that protects individuals from being forced to participate in religious activities at the insistence of the state. At the same time, the provision protects those exercising their religion from coercion and manipulation by the state. The Commonwealth has imposed upon itself the duty to allow people to freely participate in religion when and how they choose.

Legislators have correctly identified that imposing the full extent of anti-discrimination legislation upon religious organisations is to make an improper judgment about how those organisations should operate. To hold religion to these boundaries is to impinge upon the right of individuals and groups to conduct themselves in accordance with their religious convictions.

The proper forum for theological debate about the role and responsibilities of males and females within a religion is rightly amongst the adherents of that religion. The state has a duty to not participate in such debates, and to impose anti-discrimination legislation upon religions is to illegitimately impinge upon the right of religious expression.

It is our strong contention, therefore, that sections 37 and 38 of the *Sex Discrimination Act 1984* must remain in the legislation. It is a necessary safeguard to protect religious organisations from government interference in the expression of their religion's doctrines, tenets, beliefs and teachings.

The legislative test of the Act that allows religious organisations to discriminate in good faith is "in order to avoid injury to the religious susceptibilities of adherents of that religion or creed". ACL argues that any review or amendment of the section 37 and 38 exemptions should make clear that it is the stated susceptibilities of that religion or creed that provide the standard for the test, not the arbitrarily imposed standard of legislators or the state-appointed judiciary.

### ***Concluding remarks***

ACL is very supportive of the broad aims of the Act, supporting equality of men and women, and strongly opposing forms of unjust discrimination. This is a timely opportunity to review the *Sex Discrimination Act 1984*, as the legislation has been used as the interpretive vehicle to read in rights not supported by the original stated intentions of the legislators. The problem of discrimination is hardly fixed by the Act if

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<sup>4</sup> Universal Declaration of Human Rights 1948: <http://www.un.org/Overview/rights.html>, see Article 18

<sup>5</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: [http://www.unhchr.ch/html/menu3/b/d\\_intole.htm](http://www.unhchr.ch/html/menu3/b/d_intole.htm)

<sup>6</sup> The Constitution: [http://www.comlaw.gov.au/comlaw/comlaw.nsf/0/19541afd497bc2e4ca256f990081e2cf/\\$FILE/Constitution.pdf](http://www.comlaw.gov.au/comlaw/comlaw.nsf/0/19541afd497bc2e4ca256f990081e2cf/$FILE/Constitution.pdf)

it allows the rights of adults to supersede the rights of children. ACL would like the loophole in the legislation allowing single women and lesbian access to IVF, and possibly to adoption services, to be remedied.

It is our very strong contention that exemptions must remain in the Act, especially those in sections 37 and 38, relating to religious bodies and educational institutions established for religious purposes. These are necessary provisions for preserving the right of religious adherents to engage in their own theological debates and religious observances without the illegitimate interference of government.

I hope this information is useful to the Committee.

Yours sincerely

***Jim Wallace AM  
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