Access to assisted reproductive technology: for single, gay, *de facto* or married women?

LOANE SKENE LLM, LLB(Hons)
Series Editor
PAUL NISSELLE MB BS, FRACGP

Assisted reproductive technology includes both in vitro fertilisation and artificial insemination with donated sperm. Professor Skene explains why recently awarded access to this technology for single and 'gay' women in Victoria may be short-lived; Dr Nisselle counsels doctors to inform, but not sway, the debate-in-progress.

A Federal Court case

A Victorian specialist in assisted reproductive technology (ART), Dr John McBain, recently brought a Federal Court action because he wanted to treat a single woman and this was barred by State legislation – the *Infertility Treatment Act 1995* (Vic). Dr McBain argued that the Victorian provision was invalid because the exclusion of single women on the grounds of their marital status was unlawful under Federal legislation – the *Sex Discrimination Act 1984* (Cwlth). The box on page 68 explains the issues by comparing and contrasting the two Acts.

The court accepted Dr McBain's argument, with Justice Sundberg ruling that the Victorian and Federal Acts were inconsistent.[1] The latter prevailed; therefore, the parts of the Victorian Act that were inconsistent were invalid, by virtue of section 109 of the Australian constitution. These parts included:

- the direct bar on single women
- 'other sections [proceeding] on the basis that the woman will have a "husband", and [requiring] conduct by the woman and her husband or conduct by others towards the woman and her husband'; thus, the provisions requiring counselling for, and consent from, the husband were also invalid.

Justice Sundberg held that the bar on single women was direct discrimination so it was not relevant to consider whether it was reasonable in the circumstances. He also said that the Commonwealth Sex Discrimination Act was passed to implement the Convention on the Elimination of All Forms of Discrimination against Women (adopted in 1979 by the UN General Assembly). Further, both the Act and Convention should not be interpreted in light of more general provisions in the Convention on the Rights of the Child, stating that the latter might require consideration of the 'best interests of the child'.

Reactions to the judgment

Politicians in the press and house

The Federal Court's decision in this case caused a furore in the popular press.

At the Federal level, the Prime Minister of Australia, Mr John Howard, was quick to respond to Justice Sundberg's decision. Soon after it was handed down, he announced that the Federal Government would amend the Sex Discrimination Act to reverse the effect of the court finding.[2]

Prime Minister Howard is reported to have said, 'This issue primarily involves the fundamental right of a child within our society to have the reasonable expectation, other things being equal, of the care and affection of both a mother and a father'.[2] Further, he proceeded at once with the proposed amendment, without consulting federal Sex Discrimination Commissioner, Ms Susan Halliday, who is reported to have expressed 'immense surprise' on hearing of the proposed amendment.[2]

The proposed amendment to the Sex Discrimination Act was introduced into the House of Representatives on 18 August 2000 but has not yet been passed. If passed, the amendment would make it lawful 'to refuse a person access to…[ART] services if that refusal…is on the ground of the person's *marital* status and is *imposed…by or under a law of a State…*(emphasis added)'. It would revalidate the bar on single women in the *Infertility Treatment Act 1995* (Vic). It also revalidates a provision barring unmarried women in South Australia which was also found unlawful in earlier litigation because it breached the Sex Discrimination Act.[3]

The Shadow Attorney General was quick to point out via a press release that the wording of this amendment would also enable States to reintroduce bans on

Professor Skene is Professor of Law, Faculty of Law; Faculty of Medicine, Dentistry and Health Sciences, University of Melbourne, Vic. This article is based on a presentation to a joint meeting of the Murdoch Institute and the Australian Institute of Health, Law and Ethics (AIHLE) at the Royal Children's Hospital, Melbourne on 14 August 2000. It is reproduced here with permission from the Murdoch Institute and AIHLE.
Series Editor: Dr Paul Nisselle is Chief Executive, Medical Indemnity Protection Society, Carlton, Vic.

Understanding the issues: looking at the legislation

To understand the issues at stake in the question of access to assisted reproductive technology by single and 'gay' women, we need to compare and contrast the Victorian Infertility Treatment Act with the Federal Sex Discrimination Act.

The Victorian Act: the Infertility Treatment Act 1995 (Vic)

The Victorian Act sets out the requirements for admission to ART programs. To undergo donor insemination or *in vitro* fertilisation, a woman has to be 'married and living with her husband on a genuine domestic basis; or…be living with a man in a *de facto* relationship'.

Also, consent has to be obtained from the woman's husband (which includes a *de facto* husband); and she and her husband have to have counselling. Further, a doctor has to be satisfied that she is 'unlikely to become pregnant from an oocyte produced by her and sperm produced by her husband' without donor insemination or *in vitro* fertilisation, or 'at risk of having a child with a genetic abnormality'.

The Federal Act: the Sex Discrimination Act 1984 (Cwlth)

Under the Sex Discrimination Act, '[I]t is unlawful for a person who…provides…services, or makes facilities available, to discriminate against another person on the ground of the other person's…marital status…by refusing to provide…services or to make those facilities available…' or imposing terms or conditions.

'Marital status' includes being single. Discrimination may be direct; for example, excluding people from services because they are single. Or it may be indirect; for example, imposing conditions that a single person cannot meet. Direct discrimination is unlawful in itself. Indirect discrimination is unlawful unless it is reasonable in the circumstances.

women in *de facto* relationships as well as single women. The same day, again via press release, the Attorney General rejected this claim as 'a blatant scare campaign' by the Opposition. Nevertheless, it was later announced that the amending bill would be altered to ensure that this did not happen. To date, the bill has not been passed; it is still before the Federal Parliament.

At the State level, the Premier of Victoria, Mr Steve Bracks, declared that single women could only be admitted to ART programs in Victoria if they were medically infertile – 'social infertility', that is, the lack of a partner, would not be sufficient.

Bishops in the court

Justice Sundberg's decision in the McBain case has been appealed to the High Court of Australia by the Australian Catholic Bishops Conference and is awaiting hearing in the Full Court.[4]

In their action, the Bishops claim that Justice Sundberg's decision was wrong in law. They wish to question whether the Sex Discrimination Act can be used to regulate the provision of ART services when the Commonwealth does not have power under the Constitution to regulate in that area. The Bishops also argue that Justice Sundberg should have considered the principles of the 'best interests of the child' and of the family, 'the natural and fundamental group unit of society'.

In response, the Women's Electoral Lobby and Feminist Lawyers have called for support in arguing the case for access to ART services by single and gay women.[5]

What next?

For now, medically infertile women in Victoria who are either not married or in a *de facto* heterosexual relationship may be admitted to ART programs – although how doctors can certify these women are medically infertile when their fertility cannot be tested without a partner seems somewhat problematic. If single women are 'infertile' because they have no partner, then they will have to travel to Albury for their ART treatment (as treating single women is lawful in NSW).

Mr Bracks' directive – and the interpretation of the Victorian Act on which it is based – have not been legally challenged. However, it is possible that the 'barred for 'social infertility' might be challenged as being indirect discrimination under the Sex Discrimination Act since it is a characteristic related to the marital status of being single. The question would then arise as to whether this form of discrimination was reasonable in the circumstances.

The issue of access to assisted reproductive technology by single and 'gay' women has not died down and will certainly revive when the Prime Minister's amendment is debated in Federal Parliament and the Bishops' appeal is heard by the High Court of Australia. We await the legal developments…

Series Editor's comment

Both as a citizen and as an observer of the political process, I was fascinated by the interplay of sociology, morality and raw, vote-catching politics precipitated by the McBain legal action and its aftermath. What do *you* think? Was the political aftermath an attempt, at both Commonwealth and State level, to give statutory recognition to the moral beliefs of most of the community? Or, was it simply a cynical exercise to attract the votes of red-necked, 'middle' Australians, whose votes will determine the outcome of State and Federal elections for the foreseeable future?

Now that the issue has been raised, doctors need clear direction from the community as to how it wants us to ration a very scare resource – donated sperm. Since legislation was enacted giving chil-

dren born as a result of artificial insemination of donated sperm (AID) the right to know the identity of their father, the supply of donated sperm has, if you will pardon the phrase, almost dried up. So, is it simply to become a 'first come, first served' situation (neither pun intended) or do some applicants get precedence over others?

There is a paradox in assisted reproduction: *in vitro* fertilisation is expensive, but readily available; *in vivo* fertilisation using donated sperm is relatively inexpensive, but the basic resource – donated sperm – is scarce. Whether we are talking about healthcare dollars, trained people or sperm, assisted reproduction involves competition for resources. The supply of healthcare resources is not infinite but the demand seems endless. Matching 'need' to available resources inevitably involves either implicit or explicit rationing.

In the 'Oregon Experiment', the citizens of that US state were asked to vote on their ranking of healthcare priorities, on the basis that if rationing was inevitable it should be explicit, and community-determined. They voted to exclude from public funding:

- medical treatment for infertility
- medical treatment for a viral sore throat
- routine screening for adults not otherwise at risk (e.g. for colon cancer)
- aggressive treatment for the end-stages of AIDs, cancer, and for newborns weighing less than 500 g and/or birth at 23 weeks' gestation.[6]

Brave stuff, but when one million healthcare dollars are being allocated, someone has to decide whether taking a 23 to 24 week's gestation neonate through to discharge is of equal, greater or lesser priority than, say, 1,000 total hip replacement operations or 10 or so major organ transplants.

If the rationing of healthcare dollars by allotting priorities is a reasonable course of action, is it also reasonable to rationalise the allocation of donated sperm by assigning priorities to classes of applicants? If such rationalisation excluded socially infertile women by statute, would that represent parliament-sanctioned discrimination?

While I applaud Dr McBain for bringing this issue to public attention, it is now time for doctors to take a back seat. It is not a medical issue but one for debate by the broader community. As doctors, we should be seen to inform, not to sway, this debate. MT

A list of references is available on request to the editorial office.

Access to assisted reproductive technology: for single, 'gay', *de facto* or married women?

LOANE SKENE

MEDICINE TODAY December 2000 pp. 67-69

References

1. *McBain v. State of Victoria* [2000] FCA 1009 (28 July 2000).
2. Gordon M, Farrant D. Howard sparks IVF storm. The Age 2000 August 2; 1.
3. *Pearce v. South Australian Health Commission* (1996) 66 SASR 486.
4. *Re the Honourable Justice Sundberg; Ex Parte Australian Catholic Bishops Conference & Anor* (C21/2000). High Court Bulletin no. 7, 25 October 2000, section 3: cases granted special leave.
5. Powell S. How bishops' IVF bid galvanised feminism. Weekend Australian 2000 October 27-29; 1,6.
6. Stipp D. Prevention may be costlier than a cure. Wall Street Journal 1994 July 6; B1.