FEDERAL COURT OF AUSTRALIA
[2000] FCA 1009

JOHN MCBAIN v THE STATE OF VICTORIA & Ors

Sundberg J
28 July 2000

EXPLANATORY STATEMENT:

In matters of public interest before the Court, it is customary to provide an explanatory statement to assist the public in understanding the proceeding in which judgment is delivered and the reasons for that judgment. This summary is not intended to take the place of the complete reasons.

The proceeding relates to the Victorian Infertility Treatment Act and the Commonwealth Sex Discrimination Act. Section 8(1) of the Victorian Act provides that to be eligible to undergo infertility treatment a woman must either be married and living with her husband on a genuine domestic basis or be living with a man in a de facto relationship.

Section 22 of the Commonwealth Act makes it unlawful for a person to refuse to provide services to another person on the ground of the other person's marital status.

Dr McBain wishes to provide infertility treatment to Ms Meldrum, who is a single woman not living in a de facto relationship.

Dr McBain has asked the Court to declare that the requirements of the Victorian Act are inconsistent with those of the Commonwealth Act. Section 109 of the Commonwealth Constitution mandates that where a State Act is inconsistent with a Commonwealth Act, the State Act is invalid to the extent of the inconsistency.

The infertility treatment is a "service" within s 22 of the Commonwealth Act. Dr McBain is precluded by the State Act from providing the service to Ms Meldrum because of her marital status. The State Act is accordingly inconsistent with the Commonwealth Act, and the Court declares that by force of the Constitution, the State Act is invalid to the extent of the inconsistency.

This means that women are not required to be married or in a de facto relationship in order to be eligible for infertility treatment, and Dr McBain is at liberty to provide that treatment to Ms Meldrum.

A full text of the Court's judgment can be found on the Federal Court's homepage at www.fedcourt.gov.au

FEDERAL COURT OF AUSTRALIA

McBain v State of Victoria [2000] FCA 1009

DISCRIMINATION - Marital status - State law precluding provision of IVF treatment to single women not in de facto relationship - Commonwealth law making it unlawful for a person to refuse to provide services to another on ground of that other's marital status - "Services" includes services provided by member of any profession - Whether IVF treatment a service - Nature of service provided by infertility treatments - Inconsistency between laws.

Sex Discrimination Act 1984 (Cth) ss 6(2), 7B, 22, 32
Infertility Treatment Act 1995 (Vic) s 8

I W v City of Perth (1997) 191 CLR 1 applied
Minister for Immigration v Teoh (1995) 183 CLR 273 cited
Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165 applied
Waters v Public Transport Corporation (1991) 173 CLR 349 applied
Australian Medical Council v Wilson (1996) 68 FCR 46 applied
Pearce v South Australian Health Commission (1996) 66 SASR 486 cited

JOHN McBAIN v STATE OF VICTORIA, MINISTER FOR HEALTH OF THE STATE OF VICTORIA, INFERTILITY TREATMENT AUTHORITY and LISA MELDRUM
V 673 OF 1999

SUNDBERG J
28 JULY 2000
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 673 OF 1999**

BETWEEN:	**JOHN McBAIN** **APPLICANT**
AND:	**STATE OF VICTORIA** **FIRST RESPONDENT**
	MINISTER FOR HEALTH OF THE STATE OF VICTORIA **SECOND RESPONDENT**
	INFERTILITY TREATMENT AUTHORITY **THIRD RESPONDENT**
	LISA MELDRUM **FOURTH RESPONDENT**

JUDGE:	**SUNDBERG J**
DATE OF ORDER:	**28 JULY 2000**
WHERE MADE:	**MELBOURNE**

THE COURT DECLARES THAT:

(1) Section 8(1) of the *Fertility Treatment Act* 1995 (Vic) ("the State Act"), to the extent to which it restricts the application of any treatment procedure regulated by it to a woman who -

(a) is married and living with her husband on a genuine domestic basis, or

(b) is living with a man in a de facto relationship as defined in s 3(1) of the State Act

("the marriage requirement"), is inconsistent with s 22 of the *Sex Discrimination Act* 1984 (Cth) and inoperative by reason of s 109 of the Constitution of the Commonwealth of Australia.

(2) The sections of the State Act referred to in the attached Schedule, to the extent that they are dependent upon the marriage requirement, are inconsistent with s 22 of the *Sex Discrimination Act* and inoperative by reason of s 109 of the Constitution.

(3) The applicant may lawfully carry out a treatment procedure in respect of the fourth respondent notwithstanding that she does not satisfy the marriage requirement.

THE COURT ORDERS THAT the first and second respondents pay the applicant's costs of the proceeding.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

S C H E D U L E

Sections 8(2) and (3), 9(1)(b), 10(1)(a) and (b), 10(2), 11(1) and (2), 18(1)(a) and (c), 20(1), (2) and (3), 21, 62(2)(d), 63(2)(c), 66(c), 67(1) and (4)(a), 71(1), (2), (3), (6), (7), (8) and (9), 72(1), (3), (4), (5), (7) and (8).

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 673 OF 1999**

BETWEEN:	**JOHN McBAIN** **APPLICANT**
AND:	**STATE OF VICTORIA** **FIRST RESPONDENT**
	MINISTER FOR HEALTH OF THE STATE OF VICTORIA **SECOND RESPONDENT**
	INFERTILITY TREATMENT AUTHORITY **THIRD RESPONDENT**
	LISA MELDRUM **FOURTH RESPONDENT**

JUDGE:	**SUNDBERG J**
DATE:	**28 JULY 2000**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

THE CLAIM

1 The applicant seeks a declaration that s 8 of the *Infertility Treatment Act* 1995 (Vic) ("the State Act") is inoperative on the ground that it is inconsistent with s 22 of the *Sex Discrimination Act* 1984 (Cth) ("the Commonwealth Act").

THE FACTS

2 The applicant is a medical practitioner registered to practise in Victoria pursuant to the *Medical Practice Act* 1994 (Vic). He is a gynaecologist, specialising in reproductive technology and in vitro fertilisation ("IVF") techniques. He is licensed to perform fertilisation procedures pursuant to the State Act. In August 1999 he was consulted by the fourth respondent ("Ms Meldrum") who wished to obtain IVF treatment. The applicant concluded that a treatment procedure ought to be provided to Ms Meldrum, but told her that, since she was single, the State Act precluded the administration of the treatment. The treatment procedure would have involved the removal from Ms Meldrum of an ovum, the fertilisation of the ovum with donor sperm in vitro, and the transfer of the embryo into Ms Meldrum's womb.

THE PARTIES

3 The first respondent ("the State"), the second respondent, the responsible Minister for the State Act ("the Minister") and Ms Meldrum appeared by counsel. Counsel for Ms Meldrum adopted the submissions made on behalf of the applicant. The third respondent, which administers the State Act, grants licences to

perform treatment procedures, and has power to suspend or cancel such licences, did not appear, but by letter submitted to any order the Court might make. Counsel for the State and the Minister took a "neutral" position on the alleged inconsistency between s 8 and s 22, that is to say they neither asserted there is no inconsistency nor conceded an inconsistency. In view of their "neutrality" I acceded to an application by counsel on behalf of the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church that they be heard as amici curiae. I will call the amici "the Catholic Church". Notices were given to the Attorneys-General under s 78B of the *Judiciary Act* 1902. None of them desired to intervene in the proceeding.

THE STATE ACT

4 Part 2 of the State Act deals with "treatment procedures". A "treatment procedure" is defined in s 3 as:

> *"(a) artificial insemination of a woman with sperm from a man who is not the husband of the woman; or*
>
> *(b) a fertilisation procedure."*

Division 1 of Part 2 consists of ss 6 and 7. Section 6 provides:

> *"A person may only carry out a fertilisation procedure if:*
>
> *(a) he or she is a doctor who is approved under Part 8 to carry out a fertilisation procedure of the kind carried out; and*
>
> *(b) he or she is satisfied that the requirements of Divisions 2, 3 and 4 and section 36 have been met; and*
>
> *(c) the procedure is carried out at a place licensed under Part 8 for the carrying out of that kind of fertilisation procedure.*
>
> *Penalty: 480 penalty units or 4 years imprisonment or both."*

Section 7(2) provides, in substance, that a person may only carry out artificial insemination of a woman using sperm from a man who is not her husband, at a place that is a hospital or centre licensed under Part 8 for the carrying out of donor insemination, if he or she is a doctor who is approved under Part 8 to carry out donor insemination and the doctor is satisfied that the requirements of Divisions 2, 3 and 4 and s 36 have been met. The penalty for contravention is the same as that in s 6.

5 A "fertilisation procedure" is

> *"(a) the medical procedure of transferring to the body of a woman a zygote formed outside the body of any woman; or*

(b) the medical procedure of transferring to the body of a woman an embryo formed outside the body of any woman; or

(c) the medical procedure of transferring -

(i) an oocyte, without also transferring sperm, to the body of a woman; or

(ii) sperm (other than by artificial insemination) to the body of a woman; or

(iii) an oocyte and sperm to the body of a woman."

The word "zygote" is defined as the stages of human development from the commencement of penetration of an oocyte by sperm up to but not including syngamy. The word "oocyte" is defined as an ovum from a woman. The word "syngamy" means that stage of development of a fertilised oocyte when the chromosomes derived from the male and female pronuclei align on the mitotic spindle. "Artificial insemination" is defined as a procedure of transferring sperm without also transferring an oocyte into the vagina, cervical canal or uterus of a woman.

6 Division 2 of Part 2 (which consists of ss 8 to 11) contains general requirements for treatment procedures. Section 8(1) provides:

"A woman who undergoes a treatment procedure must -

(a) be married and living with her husband on a genuine domestic basis; or

(b) be living with a man in a de facto relationship."

Before a woman undergoes a treatment procedure she and her husband must consent to the carrying out of the relevant procedure: sub-s (2). The word "husband", in relation to a woman living with a man in a de facto relationship, means that man: s 3(1). Before a woman undergoes a treatment procedure a doctor must be satisfied that she is unlikely to become pregnant from an oocyte produced by her and sperm produced by her husband other than by a treatment procedure. Before a woman consents to undergo a treatment procedure the doctor in charge of her case must give her and her husband a list of approved counsellors, and enough information about the procedure and the alternatives to the procedure to enable them to make an informed decision about whether to undergo the procedure (s 10), and she and her husband must have received counselling (s 11).

7 Division 3 requires the consent of donors and their spouses to the donation of gametes, zygotes or embryos (ss 12 and 13). Division 4 contains requirements for donor treatment procedures: the circumstances in which donor procedure may be used (s 20), and the information and advice a woman and her husband must receive before the woman undergoes a donor treatment (s 21). The consents are to be given in an approved form

(s 36). Part 8 of the Act deals, amongst other things, with the approval of persons carrying out treatment procedures, and the licensing of places at which those procedures may take place.

THE COMMONWEALTH ACT

8 Section 22 of the Commonwealth Act provides:

> *"(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy:*
>
> *(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;*
>
> *(b) in the terms or conditions on which the firstmentioned person provides the other person with those goods or services or makes those facilities available to the other person; or*
>
> *(c) in the manner in which the firstmentioned person provides the other person with those goods or services or makes those facilities available to the other person.*
>
> *(2) This section binds the Crown in right of a State."*

The expression "marital status" is defined as the status or condition of being single, married, married but living separately and apart from one's spouse, divorced, widowed, or the de facto spouse of another person.

THE CATHOLIC CHURCH'S SUBMISSIONS

9 As I have said, the State and the Minister adopted a neutral position on the question of inconsistency. The Catholic Church, however, contended there was no inconsistency.

Meaning of services

10 Section 22 deals with discrimination in relation to the provision of goods and services. The word "services" is defined in s 4 so as to include "services of the kind provided by the members of any profession or trade". The primary meaning of "service" given by the *Macquarie Dictionary* as "an act of helpful activity". Prima facie the facility provided by the applicant fits that description. However the Catholic Church submitted that the central case of becoming pregnant is intercourse between a man and a woman, and that it is not apt to describe the act of the man as providing a "service" to the woman. But the achievement of fertilisation in the conventional manner is not what is to be characterised. What has to be characterised is the provision of a medical treatment that is designed to overcome any trait that precludes fertilisation occurring in the conventional manner. The end result of the two methods may be the same. But that is not a reason to characterise the treatment in the same way as one would characterise the natural process. It is true that the applicant provides a service aimed at bringing into existence a human being. But it is not a service of the same nature as intercourse,

because fertility treatments dissect the biological processes and focus on overcoming any one of a series of problems that may arise before, during or after intercourse, and which preclude fertilisation. In the ordinary use of language, the medical processes answer the description "services of the kind provided by the members of any profession". In legislation such as the Commonwealth Act the word "services" should be given a liberal meaning. See *I W v City of Perth* (1997) 191 CLR 1 at 12, 22-24, 27, 41-44, 69-75, a case in which the word appeared in the *Equal Opportunity Act* 1984 (WA).

Other treaties

11 There is a presumption, albeit rebuttable, that Parliament intends to legislate in accordance with its international human rights obligations: *Minister for Immigration v Teoh* (1995) 183 CLR 273 at 287. The Catholic Church pointed out that various international instruments recognise the right of a child to be born into a family, to be raised by its mother and father, and to know its parents. For example, Principle 6 of the *Declaration of the Rights of the Child* states that a child "shall, wherever possible, grow up in the care and under the responsibility of his parents". Principle 7 states that the responsibility for a child's education lies in the first place with its parents. Article 10 of the *International Covenant on Economic, Social and Cultural Rights* states that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society". Similarly art 23 of the *International Covenant on Civil and Political Rights* states that the family is the natural and fundamental group unit in society and is entitled to protection by society and the State, and endorses the right of men and women to marry and found a family.

12 The Catholic Church submitted that the word "services" in s 22 can be read consistently with the rights of a child as identified in these treaties, and need not be read so as to breach the fundamental rights they recognise. The difficulty with this argument is that the Commonwealth Act has the purpose of giving effect to a particular treaty - the *Convention on the Elimination of All Forms of Discrimination Against Women*. The Catholic Church's argument would give primacy to implications from other treaties over the words of the very treaty to which the Commonwealth Act gives effect. Further, when the treaties relied on are read as a whole, they tell against the existence of an untrammelled right of the kind for which the Catholic Church contends. Thus art 10 of the *International Covenant on Economic, Social and Cultural Rights* must be read in the light of art 1, which preserves the entitlement of every person to his or her own right of self determination, including the right freely to determine their social and cultural development, and art 2(2), which includes a guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race, colour, sex or other status. Articles 1 and 2(2) of the *International Covenant on Civil and Political Rights* are to the same effect. The preamble to the *Declaration of the Rights of the Child* contains a recital in the same terms as Article 1 of each *Covenant*. As appears from par 11, Principle 6 is qualified by the words "wherever possible".

13 The words of the relevant part of the definition of "services" are clear and unqualified. They are eminently apt to pick up a service rendered by a medical practitioner, and there is no occasion to introduce into them a qualification derived from an assumption made in treaties dealing with other topics, namely that a child will be born into a family as a result of natural processes involving a married couple. The fact that those treaties

proceed on that assumption does not mean they are to be taken to assert or imply a prohibition against the birth of a child as a result of some other, medically assisted, mechanism.

Section 32

14 Section 32 of the Commonwealth Act provides:

> *"Nothing in Division 1 or 2 applies to or in relation to the provision of services the nature of which is such that they can only be provided to members of one sex."*

Section 22 is in Division 2. It was submitted that the description of the relevant "service" in the State Act - that is to say the definition of "treatment procedure" and "fertilisation procedure" set out in pars 4 and 5 - shows it to be one that can be provided only to women.

15 Section 32 looks to the *nature* of the service provided. The nature of the service in question in this proceeding is to be determined by reference to the State Act. All infertility treatments are dealt with in the one legislative scheme. There is no breakdown of the eligibility requirements for each type of treatment. Parliament has, in effect, characterised the treatments as being of the same general nature, namely treatments aimed at overcoming obstacles to pregnancy. Accordingly, the nature of these treatments is such that they are capable of being provided to both sexes. The service is the "treatment procedure" - the artificial insemination of a woman with sperm from a man who is not her husband, or a fertilisation procedure. The reason for undertaking either of these procedures may be because of some physical feature of a man or a woman. The fertilisation procedure may involve taking a sound egg, capable of fulfilling its potentiality in ordinary circumstances, placing it in vitro, and fertilising it in this environment to solve a problem associated with the woman's husband. Whether the primary beneficiary of the treatment is a man or a woman, in the typical case the service is directed to achieving the desire of the couple to have a child. The fact that for biological reasons the embryo is placed into the body of the woman is but the ultimate aspect of the procedure. To concentrate solely on that aspect is not to view the overall "nature" of the service. The vice of the argument is that in order to bring the case within s 32 it is necessary to select from the scope of the service only that part of it that is provided on or with the assistance of a woman. Section 32 is intended to deal with services which are capable of being provided only to a man or only to a woman. The example given in argument is apt - a man who tells his doctor he wants a hysterectomy.

Section 7B

16 Section 7B of the Commonwealth Act provides:

> *"(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.*
>
> *(2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:*

> *(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and*
>
> *(b) the feasibility of overcoming or mitigating the disadvantage; and*
>
> *(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice."*

17 The Catholic Church's argument was that given:

- the obvious public interest in a child knowing its parents and having a parent of either sex
- the public policy manifest in provisions such as s 60B of the *Family Law Act* 1975, which provides that children have the right to know and be cared for by both parents
- the rights conferred by the treaties mentioned in paragraph 11

the Court should conclude that, if there is any discrimination in the State Act in its requirement that treatment procedures be made available only to women who are married or living with a man in a de facto relationship, that requirement is reasonable in the circumstances.

18 Section 7B(1) refers to a disadvantaging effect mentioned in ss 5(2), 6(2) and 7(2). Section 5 deals with discrimination on the ground of sex, s 6 with discrimination on the ground of marital status, and s 7 with discrimination on the ground of pregnancy. Sub-section (1) of each section deals with what has come to be called "direct discrimination". To take s 6(1) as the example, someone who, by reason of another person's marital status, treats that person less favourably than a person of a different marital status, discriminates against that person on the ground of marital status. Sub-section (2) of each section deals with what has come to be called "indirect discrimination". Section 6(2), for example, provides:

> *"For the purposes of this Act, a person (the 'discriminator') discriminates against another person ('the aggrieved person') on the ground of the marital status of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same marital status as the aggrieved person."*

The applicant has approached the Court because he fears that compliance with the State Act requires him to decline to render his services to Ms Meldrum because she is an unmarried woman not living in a de facto relationship. That involves treating Ms Meldrum less favourably than he would treat a married person who requests the provision of his services. That conduct is direct discrimination within s 6(1). Sections 6(1) and 7B are mutually exclusive: *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 170-171, 175, 184; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 392-393, 400-402; *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 54-55, 74. Section 7B is accordingly inapplicable.

CONCLUSION

19 Section 8 of the State Act provides that a woman's marital status, namely her status as a married woman or one living in a de facto relationship, is an essential requirement for the availability of a treatment procedure. Section 22 of the Commonwealth Act makes it unlawful for a person to refuse to provide services to another on the ground of the latter's marital status. That is what s 8 requires a provider of infertility treatment to do. It requires the applicant to treat Ms Meldrum less favourably than a married woman or one in a de facto relationship. It is not possible for the applicant to obey both s 8 and s 22. The sections are directly inconsistent, and the former is inoperative to that extent. The Full Court of the Supreme Court of South Australia came to that conclusion with respect to a provision of the *Reproductive Technology Act* 1988 (SA) that is somewhat similar to s 8: *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

20 Section 8(1) is not the only provision affected by the inconsistency. A number of other sections proceed on the basis that a woman will have a "husband", and require conduct by the woman and her husband or conduct by others towards the woman and her husband. Section 10(1) is an example. See par 6. Provisions such as s 10(1) are inconsistent with s 22 of the Commonwealth Act because they are in part dependent upon the operation of s 8(1). To that extent they too are inoperative. Their operation is otherwise unaffected. See *Interpretation of Legislation Act* 1984 (Vic) s 6(1). The appropriate course is for me to declare

- that s 8(1) of the State Act, to the extent to which it restricts the availability of any treatment procedure regulated by it to a woman who is married and living with her husband on a genuine domestic basis, or with a man in a de facto relationship as defined in s 3(1), is inconsistent with s 22 of the Commonwealth Act and inoperative by reason of s 109 of the Constitution

- that provisions such as s 10(1), which I will list in a schedule, to the extent that they are dependent upon the inoperative operation of s 8(1), are also inconsistent with s 22.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sundberg.

Associate:

Dated: 28 July 2000

Counsel for the applicant:	A C Archibald QC and S Moloney
Solicitors for the applicant:	John W Ball & Sons
Counsel for the first and second respondents:	P Tate

Solicitor for the first and second respondents:	Victorian Government Solicitor
Counsel for the fourth respondent:	D F R Beach
Solicitors for the fourth respondent:	Phillips Fox
Counsel for the amici curiae:	J G Santamaria QC
Solicitors for the amici curiae:	Best Hooper
Date of Hearing:	21 July 2000
Date of Judgment:	28 July 2000

S C H E D U L E

Sections 8(2) and (3), 9(1)(b), 10(1)(a) and (b), 10(2), 11(1) and (2), 18(1)(a) and (c), 20(1), (2) and (3), 21, 62(2)(d), 63(2)(c), 66(c), 67(1) and (4)(a), 71(1), (2), (3), (6), (7), (8) and (9), 72(1), (3), (4), (5), (7) and (8).