
Kristen Walker*

We are on the verge of creating a whole new generation of 'stolen children'. Is the family any longer recognized and protected in law as the 'fundamental unit of society'? This decision is one more example of the growing trend in our society to treating children as commodities: like the right of any person, single or married, to buy a car, there is now a legal right to buy an IVF child or, more strictly, to buy 'assisted reproduction services'.

Dr George Pell, Archbishop Of Melbourne

I will hope that we will be able to start treating single women and women in gay relationships ... as we would heterosexual women, married or in a de facto relationship, as soon as we are able to satisfy that these people who come along seeking our help understand the importance of the medical procedure and have received information about issues which surround donor sperm parenting.

Dr John McBain

Do you know, I think that what people misinterpret is that IVF babies are probably more wanted than any other baby. I mean, it's not an easy procedure at all and also it's very expensive, so the baby is definitely wanted, definitely, and I think a single mother ... can give all the love that a married couple can give.

Leesa Meldrum

The Government is concerned to do its part to protect the rights of children to have the reasonable expectation of the care and affection of both a mother and a father. The Government will now give further consideration to amending legislation and remains

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3 Ibid.
committed to ensuring that the States and Territories are able to legislate to regulate access to ART services.

Attorney-General for the Commonwealth, The Hon Daryl Williams AM QC MP

I

INTRODUCTION

In July 2000, Justice Sundberg of the Federal Court handed down one of the most controversial decisions of recent times in *McBain v Victoria* Sundberg J decided that certain provisions of the *Infertility Treatment Act 1995* (Vic) (the IT Act) that restricted access to assisted reproductive services to married women or women in heterosexual relationships were inconsistent with the *Sex Discrimination Act 1984* (Cth) (the SDA) and thus inoperative. None of the parties involved in the case wished to appeal the decision. Indeed, Victoria had not presented any argument to the Court on the question of validity. In the absence of an active respondent, Sundberg J had granted the application of the Australian Catholic Bishops Conference (the Bishops) and the Australian Episcopal Conference of the Catholic Church (the Episcopal Conference) to appear as amicus curiae but this of course did not permit the Bishops or the Episcopal Conference to appeal the decision. In the absence of any appeal, the Bishops sought to challenge the decision in a different way — by seeking certiorari in the original jurisdiction of the High Court. The High Court unanimously dismissed the Bishops application. The judicial chapter of the *McBain* case is now over, though the legislative chapter may continue, as the Howard government has indicated it will re-introduce legislation to amend the SDA and override the Federal Court's decision.

The High Court proceedings in *McBain* raised both procedural and substantive issues of considerable importance. The substantive issues concerned equality of access to assisted reproductive services and the broader issue of the scope and operation of the SDA, which gives effect to Australia's international legal obligations concerning discrimination against women. The procedural issues raised important questions of principle concerning when litigation may be reopened and the role of a non-party (in...
this case, the Catholic Church) in enforcing legislation. Although both the substantive and procedural issues were argued before the Court, ultimately the Court dealt only with the procedural issues. One feature of the judgments in the High Court is that they are very technical and almost entirely divorced from the controversial issue of access to assisted reproductive services, although they had a significant impact on women's access to such services.

In this article I will first outline the background to the litigation. I will then examine the substantive issues raised by the Bishops and the Episcopal Conference, but not addressed by the High Court, concerning the scope and operation of the marital status discrimination provisions of the SDA. I argue that these issues will eventually come before the courts and ought to be resolved in such a way as to maximise the protection against discrimination offered by the SDA. I will also analyse the High Court judgments in relation to the procedural questions concerning the Court's jurisdiction and its discretion as to whether to grant the remedy sought by the Bishops. Here I argue that the two different approaches adopted by the majority and the minority reflect an emphasis on different aspects of the rule of law, and that the minority approach is to be preferred. Finally, I will consider where the High Court's decision in Re McBain leaves us in terms of access to such services.

II BACKGROUND

For many years, lesbian couples and single women in Victoria have been travelling interstate to seek access to a variety of assisted reproductive services, including in vitro fertilisation (IVF) and, more often, assisted insemination. The reason for this interstate travel was the effect of certain sections of the IT Act, which prevented doctors from providing such services to women who were not married or in a de facto relationship with a man. Women in South Australia had also been faced with similar provisions, but these had been declared inoperative by the South Australian Supreme Court in 1996 on the basis that they were inconsistent with s 22 of the SDA, which relevantly provided:

(1) It is unlawful for a person who, whether for payment or not, provides goods or services ... to discriminate against another person on the ground of the other person's sex, marital status or pregnancy —
   (a) by refusing to provide the other person with those goods or services ...;
   (b) in the terms or conditions on which the first-mentioned 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 first-mentioned 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.

In 2000 Dr John McBain, a prominent IVF specialist in Melbourne, decided to challenge the constitutional validity of the Victorian restrictions. He wished to treat a Melbourne

10 And its predecessor, the Infertility (Medical Treatment) Act 1984 (Vic).
woman, Leesa Meldrum, who was single and infertile, but felt unable to do so as a result of s 8(1) of the IT Act. That section provided:

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.

Sections 6 and 7 provided that a doctor who disregarded the requirements of s 8 could be subject to 4 years imprisonment. It was also likely that a doctor who breached the IT Act would lose his or her license to provide assisted reproductive services under the Act.

The Royal Women's Hospital, where Dr McBain was based, had already been the subject of a complaint by a single woman to the Human Rights and Equal Opportunity Commission under the marital status ground of s 22 and had, after a hearing, been found in violation of the SDA and ordered to pay damages in the sum of $8,551. The Commissioner in that case took the view that the existence of the IT Act was no defence to a discrimination claim under the SDA and that, although the two Acts appeared to be inconsistent and thus the Victorian Act invalid, it was beyond the power of HREOC to determine that question. That decision was accepted by the Hospital and review in the Federal Court was not pursued. It clearly indicated that doctors in Victoria were at risk of further discrimination claims if they continued to refuse to treat lesbian couples or single women.

Of course, doctors could have chosen to abide by the SDA and treat such women, but this would leave them open to prosecution under the IT Act and to loss of their licence to provide assisted reproductive services. Dr McBain thus commenced proceedings in the Federal Court, seeking a declaration that s 8(1) of the IT Act was inoperative as a result of its inconsistency with the SDA. The respondents to the proceedings were the State of Victoria, the Victorian Minister for Health, the Infertility Treatment Authority (which administered the IT Act and the licensing scheme) and Ms Meldrum who, as matters stood, could have successfully sued Dr McBain for discrimination on the basis of marital status because he refused to treat her in Victoria because she was unmarried.

This was a classic s 109 case, in that Dr McBain was confronted with two laws, one that commanded him not to discriminate and one that commanded him to discriminate. It was perhaps for this reason that, before the Federal Court, Victoria chose not to make submissions in defence of its law—the case appeared to be clear.

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12 No doubt he also wished to treat other Victorian women in Victoria, but the proceedings were founded on his wish to treat Ms Meldrum.
13 Notably, the section had originally permitted only married women to access services. However, after a successful discrimination case in 1997 (MW v Royal Women's Hospital [1997] HREOCA 6 (5 March 1997)), the section was amended to permit doctors to provide services to women in de facto relationships: see Infertility Treatment (Amendment) Act 1997 (Vic) ss 6 and 7.
14 See IT Act pt 8, especially s 115.
16 This was the same approach that had been adopted in MW v Royal Women's Hospital, above n 13.
Ms Meldrum, not surprisingly, supported the submissions made by Dr McBain. Notices under s 78B Judiciary Act 1903 (Cth) were issued to all Attorneys-General, but none chose to appear. In the absence of an active contradictor amongst the respondents, it was not surprising that Sundberg J granted the Bishops and the Episcopal Conference leave to appear as amici curiae in the case, to put several arguments in support of the IT Act’s validity. An application for leave to intervene in the case as a party was abandoned by the Bishops and the Episcopal Conference, a fact that became crucial to the ultimate resolution of the litigation.

The Bishops’ and the Episcopal Conference’s submissions were based on two arguments: the interpretation of the term ‘services’ in the SDA, which they contended should be interpreted to exclude assisted reproductive services, and the effect of s 32 of the SDA, which provided that s 22’s prohibition of discrimination on the basis of marital status did not apply ‘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’. Sundberg J rejected the Bishops’ and the Episcopal Conference’s arguments and held that the SDA did cover assisted reproductive services and that the IT Act was inconsistent with the SDA and inoperative to the extent of the inconsistency. There was much rejoicing and gnashing of teeth.

III THE HIGH COURT PROCEEDINGS

Once it became clear that none of the parties to the McBain Case would appeal, it was thought that the judicial consideration of these issues was concluded. However, not content with the decision, the Bishops and the Episcopal Conference commenced proceedings in the original jurisdiction of the High Court, seeking certiorari to quash Sundberg J’s decision, mandamus to compel him to exercise his jurisdiction according to law and prohibition against Sundberg J and against Dr McBain to prevent him from acting on the decision. Ultimately, however, the case was argued principally on the

17 Although in oral argument in Re McBain McHugh J doubted whether such a course had been taken by a State previously (see Transcript of Proceedings, Re McBain, (High Court of Australia, 4 September 2001), a similar course was adopted in Pearce v South Australian Health Commission (1996) 66 SASR 486, where the South Australian government consented to orders declaring the South Australian legislation inoperative.


20 The application for prohibition against Dr McBain was abandoned by the Bishops and the Episcopal Conference during oral argument; see Transcript of Proceedings, Ausn Catholic Bishops Conference & Anor, Ex parte—Re Justice Sundberg & Anor C22/2000 (High Court of Australia, 4 September 2001).
basis of certiorari, relying on s 76(i) of the Constitution and ss 30(a) and 32 of the Judiciary Act 1903 (Cth).

Because of a potential problem regarding the standing of the Bishops and the Episcopal Conference to institute proceedings in this way, the Episcopal Conference sought and obtained a fiat from the Commonwealth Attorney-General. The fiat, however, was only partial—it was limited to 'an application for relief on the basis that the [SDA] does not, as a matter of construction, apply to infertility treatment the subject of the [IT Act] and is not inconsistent with the [IT Act] for the purpose of section 109 of the Constitution.' It did not cover the arguments that the Bishops and the Episcopal Conference foreshadowed in their written submissions to the effect that the prohibition on marital status discrimination in the SDA was unconstitutional. As a result of the fiat, there were two proceedings on foot—one brought by the Bishops and the Episcopal Conference, and one brought by the Attorney at the relation to the Episcopal Conference.

Initially Dr McBain was not joined as a party to the High Court proceedings—the only respondent was Sundberg J. As is customary, Sundberg J did not appear to defend his judgment. As a result, it appeared that there would be no contradictor. However, at a directions hearing the Women's Electoral Lobby (WEL) sought, and was granted, leave to intervene to support Sundberg J's decision. The Human Rights and Equal Opportunity Commission (HREOC) was also granted leave to intervene in support of the decision, and the Australian Family Association was granted leave to intervene in support of the Bishops and the Episcopal Conference. An individual woman who also sought to intervene was denied leave. The Attorney-General for the Commonwealth also intervened using his statutory right of intervention under s 78A of the Judiciary Act 1903 (Cth). The Attorney made arguments partly in support of the Bishops and the Episcopal Conference and partly against them, raising the unusual situation of the Attorney arguing against the relator.

21 This appears from the judgments of Gaudron and Gummow JJ (Re McBain, [54–5]) and McHugh J ibid [84]. However, it is unclear from the transcript that the application for prohibition and mandamus was ever in fact abandoned.

22 Giving the legislature the power to confer on the High Court original jurisdiction in 'any matter ... arising under this Constitution, or involving its interpretation'.

23 Section 30(a) of the Judiciary Act 1903 (Cth) confers original jurisdiction on the High Court 'in all matters arising under the Constitution or involving its interpretation' and section 32 empowers the Court in the exercise of such jurisdiction 'to grant ... all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided'.


25 Re McBain [48]. This was not the first time a partial or limited fiat had been granted by an Attorney-General: see Corporation of the City of Unley v State of South Australia (1996) 67 SASR 8; 10.

26 She wished to make arguments concerning s 117 of the Constitution, which had little prospect of success on the Court's current approach to that section.
At the hearing of the case before the High Court, full argument was put on both procedural and substantive issues. The Court, in a 7-0 result comprising six separate judgments, dismissed the Bishops' and the Episcopal Conference's application. None of the judges reached the substantive issues—all the judges disposed of the case on procedural grounds, though for varying reasons. The substantive issues are nonetheless important. I will address those issues first, before turning to the procedural issues addressed in the judgments.

IV THE SUBSTANTIVE ISSUES: THE SCOPE OF THE SDA

Re McBain has left open two important questions about the operation of the SDA. First, there is some doubt about the extent to which the SDA prohibits discrimination on the basis of marital status. Second, there is also doubt about what services are excluded from the operation of the Act on the basis that they can only be provided to persons of one sex. These two issues will be addressed below. I also note that Callinan J expressed a 'reservation' as to the constitutional validity of the entire SDA.27 This appears to reflect a view that the external affairs power is insufficient to provide the constitutional foundation for the implementation of a treaty obligation. On this issue, Callinan J seems to be out on a rather long limb; it is exceedingly doubtful that a majority of the High Court will overturn the now settled principle that the external affairs power provides the Commonwealth with the legislative power to implement Australia's treaty obligations. The 4–3 majority in Commonwealth v Tasmania28 has been upheld in a series of cases29 and has more recently become a 5–1 majority.30

1 The extent to which marital status discrimination is prohibited by the SDA

On its face, s 22 of the SDA prohibits all discrimination on the basis of marital status in the provision of services. However, the relevant provisions of the SDA are expressed to apply 'to the extent that [they] give effect to the Convention' and 'not otherwise'.31 Thus the scope of the legislation depends on the scope of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).32 The relevant provisions of the SDA would not be invalid if some forms of marital status discrimination were outside the ambit of CEDAW—the SDA simply would not

27 Re McBain [294].
28 (1983) 158 CLR 1 (‘Tasmanian Dam Case’). Indeed, a broad approach to the use of treaties to enliven the external affairs power had been taken as early as 1921 by Higgins J in Roche v Kronheimer (1921) 29 CLR 329 and in 1936 by a majority of the Court in R v Burgess; Ex parte Henry (1936) 55 CLR 608.
30 Victoria v Commonwealth (‘Industrial Relations Act Case’) (1996) 187 CLR 416. In that case, Dawson J concurred in the result as he accepted the precedential weight of the Tasmanian Dam Case, though he nonetheless continued to adhere to his view that it was wrongly decided.
31 See ss 9(4) and 9(10) SDA. The reason for this restriction is that in part the SDA is based on the external affairs power. Other parts of the SDA effectively prohibit marital status discrimination using other constitutional powers, but these did not cover the services provided by Dr McBain.
prohibit such discrimination and there could thus be no inconsistency with the Victorian legislation.

This argument turned primarily on whether CEDAW prohibits all kinds of marital status discrimination, or whether it simply protects all women from sex discrimination—that is, differential treatment when compared with men—regardless of their marital status. The Convention itself, in art 1, defines 'discrimination against women' as:

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 (emphasis added).

The Bishops and the Episcopalian Conference argued that this provision indicated that CEDAW is concerned about equality between men and women only, and not discrimination between women on the basis of marital status, which is what occurred in relation to access to assisted reproductive services. WEL and the Commonwealth Attorney, on the other hand, argued that CEDAW is concerned with two different kinds of discrimination: sex discrimination and marital status discrimination. WEL and the Attorney pointed to other provisions of CEDAW that evinced a concern with marital status discrimination (such as Article 16\(^{33}\) and a more general concern with 'all forms of discrimination against women' (Article 2\(^{34}\)). WEL also referred to General

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\(^{33}\) Article 16 relevantly provides (emphasis added):

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

   (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

   (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

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\(^{34}\) Article 2 relevantly provides (emphasis added):

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
Recommendation 24 of the CEDAW Committee, the body that oversees CEDAW's implementation. That recommendation states that:

States Parties should not restrict women's access to health services ... on the ground that women do not have the authorisation of husbands, partners, parents or health authorities, because they are unmarried or because they are women.

HREOC supported this approach and provided references to the travaux préparatoires for CEDAW that indicated a concern amongst the drafters to eliminate discrimination on the basis of marital status. Thus WEL, HREOC and the Attorney argued that CEDAW, and hence the SDA, prohibited discrimination between women on the basis of marital status—that is, treating single women differently from married women—as well as discrimination between women and men on the basis of marital status—treating married women differently from single men, for example.

The Bishops' and the Episcopal Conference's argument has potentially far-reaching consequences for the protection of individuals from discrimination on the basis of marital status in Australia. If they are correct, then that protection is much more limited than has been thought for many services, not just assisted reproductive services. There is little doubt that this issue will be brought before the courts in the future in a properly instituted case involving discrimination on the basis of marital status. In my view, the construction adopted by WEL, HREOC and the Attorney is correct and is supported by other articles of CEDAW, by General Recommendation 24 and by the travaux préparatoires. I note also that the Senate Legal and Constitutional

35 The Recommendations of the CEDAW Committee are generally regarded as highly persuasive statements as to the appropriate interpretation of CEDAW. This is similar to the status of recommendations of other treaty bodies. See Andrew Byrnes, 'The Committee on the Elimination of Discrimination Against Women' in Philip Alston (ed), The United Nations and Human Rights: A Critical Appraisal (2nd ed, forthcoming 2003); also extracted in Henry Steiner and Philip Alston, International Human Rights in Context: Law, Politics, Morals (2nd ed, 2000) 188, 190.


37 Marital status discrimination in the broad sense will be validly and effectively prohibited in relation to many services using the corporations power and various other s 51 powers such as banking, insurance and interstate and international trade and commerce (see SDA ss 9(11)-(18)). But these powers do not support the legislation comprehensively in relation to provision of goods and services. Medical services are one key example where the external affairs power and CEDAW are required to give support to the reach of the SDA. There are no doubt other services carried out by persons who are not within the reach of the legislation except by virtue of the external affairs power.

38 These may legitimately be referred to where there is ambiguity in the plain meaning of the text of the treaty Vienna Convention on the Law of Treaties opened for signature 23 May 1969, 1155 UNTS 331, art 32 (entered into force 27 January 1980). The High Court has permitted the use of the Vienna Convention on the Law of Treaties in interpreting treaties: see, eg, Koowarta v Bjelke-Petersen (1982) 153 CLR 168, 265 (Brennan J); Riley v The Commonwealth (1985) 159 CLR
Committee expressed a similar view in its majority report on the Sex Discrimination Amendment Bill (No 1) 2000.\textsuperscript{39} 

2. Services that can only be provided to persons of one sex

The second substantive argument turned on the application of s 32 of the SDA. That section provides that the prohibitions on discrimination in s 22—including the prohibition on marital status discrimination—do not apply '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'.\textsuperscript{40} If assisted reproductive services are services that can only be provided to members of one sex, then it is lawful to discriminate on the basis of marital status in providing those services. The Bishops and the Episcopal Conference, supported by the Commonwealth, argued that the service in question was transferring an embryo to a woman's body, a service that can only be provided to women. WEL, supported by HREOC, argued that the service in question was 'infertility treatment' or, more generally, assisted reproductive services, which can and are provided to men and women, particularly where the reason for seeking treatment is that the male is infertile. The argument thus turned on the appropriate level of generality at which to define the services provided by Dr McBain. This argument, too, has potentially far reaching consequences, because if a low level of generality is adopted then services such as treatment for breast cancer—only able to be provided to women—may be denied to single women (or married women) with impunity, even though such services might also be described more generally as treatment for cancer.

The parliamentary debates on the SDA indicate that s 32 was included to allay the fears of anti-abortion groups and politicians that s 22 of the SDA would somehow enshrine in legislation a woman's right to abortion.\textsuperscript{41} Because s 22 prohibits discrimination on the basis of pregnancy, Senator Harradine argued that, if a doctor provided services such as curettage to non-pregnant women, a refusal to provide such a service to a pregnant woman might constitute discrimination on the basis of pregnancy.\textsuperscript{42} Section 32 was introduced to make it clear that the SDA would not apply to abortion.\textsuperscript{43} The drafting of the section, however, goes much further that and
excludes from the operation of the Act any services that can only be applied to members of one sex.

In my view, the parliamentary debates reveal that Parliament’s intention in including s 32 was to ensure that doctors and hospitals did not have to provide abortion and other services that could only be provided to one sex if they did not wish to. Thus a refusal to provide a woman with an abortion, or other services such as pregnancy testing, would not constitute unlawful discrimination. However, in so far as s 22 contains not only the pregnancy and sex discrimination prohibitions, but also the prohibition on marital status, the broad language of s 32 is problematic. Applying it according to its terms, a person who provides abortion or pregnancy testing may choose to provide those services only to married women—the discrimination involved in such a scenario does not attract the operation of s 22 because these services can only be provided to women. And, on the Bishops’ and the Episcopal Conference’s approach, the section would allow marital status discrimination in relation to a broad range of services that can be defined at a low level of generality to apply only to one sex, such as treatment for breast cancer, prostate cancer, cervical cancer and so on. Yet it is by no means clear that Parliament intended such a result. HREOC argued that s 32 simply did not apply to marital status discrimination, but such an argument is difficult to support given the way the Act is drafted.

Somewhat ironically, Senator Harradine’s suggested amendments to the Sex Discrimination Bill, prior to its enactment, were narrowly tailored to achieve his desired objective concerning abortion and would not have opened up the potential for the argument put by the Bishops and the Episcopal Conference in this case. Ultimately, the operation of s 32 remains open for further examination in future cases involving marital status discrimination. In my view the preferred construction of s 32 should be a narrow one, so as to limit its operation. As Kirby J pointed out in argument, the SDA is a key piece of human rights legislation and a construction that protects rights rather than limits them should be adopted. Ultimately, it would be desirable for s 32 to be amended to narrow its potential operation, but this seems unlikely to occur in the near future given the current political climate.

V THE PROCEDURAL ISSUES

While the substantive issues have been left open by the High Court, the various judgments have shed some light on the procedural questions that arise when a party seeks to re-open concluded litigation between parties. Although the Court unanimously dismissed the Bishops’ and the Episcopal Conference’s application, there was a split in the Court on the basis for that rejection. Four judges concluded that the Court had no jurisdiction to hear the case, whereas three judges concluded that jurisdiction existed but the Court should exercise its discretion to refuse relief.

The first of the procedural issues concerned the Bishops’ and the Episcopal Conference’s standing. This was in part defused by the grant of the fiat, though not entirely so due to the limited nature of the fiat and the fact that the relator proceedings were instituted out of time and so an extension was required in order for them to succeed. The Bishops and the Episcopal Conference argued first, that a stranger could

44 Senator Harradine, above n 42.
45 Transcript of Proceedings Re McBain (High Court of Australia, Kirby J, 4 September 2001).
obtain certiorari—that is, that there was no standing requirement attached to the remedy. They also argued that the Church provided various services, such as adoption and obstetric services, to married couples only and that this gave them a sufficient interest in the proceedings. WEL argued that, as the Bishops and the Episcopal Conference did not provide assisted reproductive services to any persons, their interest was simply 'intellectual and emotional' and thus not sufficient, on the present state of the authorities, to give them standing.

The second procedural issue that agitated the Court during oral argument was the odd position of the Commonwealth Attorney-General. The Attorney, by granting the fiat, was formally a party to the case, yet also sought to intervene and then sought to argue both for and against the Bishops and the Episcopal Conference.

The third procedural issue of concern to some members of the Court was the fact that the Bishops and the Episcopal Conference were attempting to use the Court's original jurisdiction to bypass the ordinary appeals process in circumstances where the parties did not wish to appeal the original judgment. As Gaudron J put it in oral argument, the Church and the Bishops 'sought to interfere in ... litigation that is completed'.

These three procedural issues together raised the question of whether there was a 'matter' involved in the proceedings, as required by the Constitution in order to found the Court's jurisdiction. Further, even if there was a 'matter' and relief could be granted to the Bishops and the Episcopal Conference, there remained the question of whether the Court should grant such relief in the exercise of its discretion. I will deal first with the question of 'matter' and then turn to the discretion question.

1 Was there a 'matter'?

(a) The Bishops' and the Episcopal Conference's application

A majority of the Court—Gleeson CJ, Gaudron and Gummow JJ in a joint judgment, and Hayne J—concluded that there was no matter involved in the Bishops' and the Episcopal Conference's application for relief. These judges viewed the application as an attempt to have the court determine an abstract question of law. The Court has long held that it is not permitted to give advisory opinions and the majority approach is another step in this line of authority.

The starting point for the reasoning of the majority was the fact that no jurisdictional error on the part of Sundberg J was alleged by the Bishops and the Episcopal Conference. This was important as the majority appeared to be of the view that, had a jurisdictional error been asserted, there may well have been a matter.
properly constituted under s 75(v), concerning whether Sundberg J exceeded his jurisdiction in making the orders he made. Section 75(v) relief, however, is only available for jurisdictional error, and was thus not available in this case.

Rather than being concerned with an excess of power by Sundberg J, the Bishops and the Episcopal Conference were concerned with the process of reasoning adopted by the judge in the original litigation. This concern was insufficient to give rise to a matter. As Gleeson CJ put it:

People who were not parties to litigation do not have a claim of right to have judicial decisions quashed because they are erroneous.

As can be seen, integral to the Chief Justice's reasoning (and that of Gaudron and Gummow JJ, with whom Hayne J agreed) was the fact that the Bishops and the Episcopal Conference were not parties to the proceedings in the Federal Court. Of course, had they been parties they would have been able to exercise the right of appeal to the Full Federal Court and then, by special leave, to the High Court and would not have needed to seek relief in the Court's original jurisdiction. The majority judges noted the existence of adequate appellate avenues. As Gaudron and Gummow JJ (with whom Hayne J agreed) commented:

The circumstance that appellate standing was limited to parties to the Federal Court litigation cannot render those appellate processes inadequate because strangers lack the standing to meddle in concluded litigation.

All judges in the majority also emphasised that there was no controversy between the Bishops and the Episcopal Conference on the one hand and either Sundberg J or Dr McBain on the other. The judge had discharged his function by exercising his jurisdiction and had no other interest in the matter. Dr McBain obtained protection against action against him by Victoria or its authorities, but no relief was ultimately sought against him and he had no legal dispute with the Bishops or the Episcopal Conference. In the absence of a controversy between the parties, the case involved no matter.

Further, according to Gaudron and Gummow JJ (with whom Hayne J agreed), in order to found jurisdiction under s 76(i) of the Constitution, the Bishops and the Episcopal Conference had to assert some right, title, privilege or immunity under the Constitution. No such right, title, privilege or immunity was involved here, as the Bishops and the Episcopal Conference did not dispute the valid operation of the State law—to the contrary, they sought to uphold it and had no interest in relief from its requirements. Although not mentioned by Gaudron and Gummow JJ, this is especially so as the Bishops and the Episcopal Conference do not provide any services that fall...
within the operation of the IT Act. The Catholic Church is opposed to the use of all assisted reproductive services in all circumstances, even within marriage.\(^{59}\) Thus what the Bishops and the Episcopal Conference were seeking was to make others obey the IT Act—they themselves were not affected by that Act at all.

Also bound up in the question of matter was the Bishops’ and the Episcopal Conference’s standing—or lack thereof. Implicit in the discussion of the majority judges was a concern that the Bishops and the Episcopal Conference did not have a sufficient interest in the case to amount to standing and so to constitute a matter. However, the issue of standing was not discussed in detail, in part because to some extent the standing problem had been cured by the issue of the fiat. But Gaudron and Gummow JJ (with whom Hayne J agreed) concluded with a quote from Griffith CJ in the *Union Label Case*:

> The first condition of any litigation in a Court of Justice is that there should be a competent plaintiff, i.e., a person who has a direct material interest in the determination of the question sought to be decided. The Court will not decide abstract questions, nor will it decide any question except when raised by some person entitled by reason of his interest to claim a decision. This doctrine should certainly not be relaxed for the purpose of bringing in question the validity of Statutes passed either by the Commonwealth Parliament or by a State legislature.\(^{60}\)

For the majority judges, the policy consideration driving their judgments was the interest in the finality of litigation between parties, a concern that concluded proceedings not be re-opened by strangers to those proceedings.

In contrast to the majority, McHugh J, with whom Callinan J agreed, was driven by a different policy consideration: the proper administration of justice.\(^{61}\) That is, the law should be correctly interpreted and applied. He held that there was a “matter” involved in the litigation and the Court thus had jurisdiction to deal with the Bishops’ and the Episcopal Conference’s claim. McHugh J took the view that a claim for certiorari to quash an order of a lower court was sufficient to constitute a matter, as there was a controversy between the decision-maker and those who sought to support his decision, on the one hand, and the applicant for certiorari on the other.\(^{62}\) It was irrelevant that the order of the lower court had settled litigation between other parties—the claim for certiorari constituted a new and separate matter.\(^{63}\) McHugh J also took the view that the issue of standing was no obstacle, as a stranger—that is, someone without a special interest in the subject matter and who was not a party to the proceedings below—could seek certiorari.\(^{64}\) Importantly, McHugh J held that there was no constitutional requirement that a person must have a ‘special interest’ in the subject matter of the litigation in order to bring proceedings.\(^{65}\)

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60 Attorney-General (NSW); Ex rel Tooth & Co Ltd v Brewery Employees Union of New South Wales (1908) 6 CLR 469, 491. Quoted in Re McBain, [78].

61 Re McBain, [89]–[90].

62 Ibid, [87].

63 Ibid.

64 Ibid.

65 Ibid [92].
The other minority judge, Kirby J, based his decision on the question of 'matter' largely on the fact that the Attorney-General's fiat had cured the standing problem and thus resolved the issue of whether there was a matter. Kirby J thus seems simply to equate the issues of standing and matter—if there is a party with standing, then there is a matter. Although he assumed for the purposes of argument that the Bishops and the Episcopal Conference had no standing to bring their claim, he indicated that he might have held that they did have standing, as he was not convinced that their interest was merely 'intellectual or emotional'.

This view stemmed, it seems, from the fact that the Bishops and the Episcopal Conference 'do not presently provide IVF services to unmarried persons' and therefore wished to confirm that the law 'does not, in Victoria, impose any legal duty on their interests, or anyone else, to provide fertilisation procedures to single women such as Ms Meldrum'. With respect, this statement ignores the fact that the Bishops and the Episcopal Conference provide IVF and related services to no one, married or unmarried, nor did they assert the provision of such services in their affidavits or submissions. Had they provided such services, they almost certainly would have had standing. But given that they do not, it cannot be suggested that they are at risk of suit for marital status discrimination in relation to those services. Nor are they affected by the Victorian law, as it applies only to those who do provide IVF and related services. Thus Kirby J's suggestion that the Bishops and the Episcopal Conference have standing is problematic and perhaps based on a misunderstanding of what their activities in fact involve. Kirby J also took the view that the Court should take a broader view of standing, 'sufficient to secure a decision of a court on a constitutional and legal point of importance to it'. This would essentially remove the need for standing altogether, as advocated by the Australian

66 Ibid [207], [216].
67 Ibid [205].
68 Ibid.
69 See above n 59. Some Catholic hospitals, which are entities separate from the Bishops and the Episcopal Conference and were not parties to the litigation, do provide some forms of fertility treatment, such as fertility tracking, ovulation induction and gamete intra-fallopian transfer (the latter of which is covered by the Infertility Treatment Act 1995 (Vic)). Inquiries suggest that they provide at least some of these services to single women. But they do not, as I understand it, provide IVF (which was the service in issue in the McBain litigation) or donor insemination. The Melbourne Assisted Conception Centre, associated with the Mercy Hospital, for example, 'works within the ethical guidelines as set out by the Catholic Church and endeavours to take on a more natural approach toward Reproductive Medicine'.<http://www.assistedconception.com.au/> at 21 November 2002. It does not offer IVF.

70 Rather, the Bishops and the Episcopal Conference asserted the provision of various other services, such as adoption services and family planning services to married couples only: see Prosecutors' Submissions in Reply (copy on file with author). The Bishops and the Episcopal Conference may have standing to challenge the application of the SDA to them in relation to those services, but that does not mean that they have standing to challenge the application of the SDA to Dr McBain and the operation of the IT Act in relation to IVF and related services.
71 Though not necessarily the ability to bring these proceedings to re-open the litigation between Dr McBain and the Victorian authorities.
72 Re McBain, [206].
Law Reform Commission in its most recent examination of the rules of standing, Beyond the Door-Keeper: Standing to Sue For Public Remedies. Like McHugh J, Kirby J also held that there was a new matter, constituted by the proceedings for certiorari brought by the Attorney-General against Sundberg J and Dr McBain, though obviously it was related to the matter raised in the Federal Court between Dr McBain and the Victorian authorities. Perhaps ironically, the intervention of WEL to put arguments against the Bishops and the Episcopal Conference ensured that there was a live controversy to be determined by the Court. Furthermore, Kirby J explained that the grant of jurisdiction in s 76(i) of the Constitution should be construed broadly and not in any narrow technical sense. Nor was the use of that jurisdiction in this fashion a subversion of the appeals process—indeed, Kirby J pointed out various advantages of having an original jurisdiction running to some extent parallel with the Court's appellate jurisdiction.

(b) The Attorney-General's application

Although the question of whether a matter existed was common to both applications, the relator action brought by the Attorney-General raised some distinct issues that are appropriately considered separately. Of particular interest is the question of whether the Attorney-General's fiat could create a matter where there would not otherwise be one, because of the special position of the Attorney-General. The argument that the Attorney-General's proceeding involved a matter even if the Bishops' and the Episcopal Conference's proceeding did not arise from the fact that traditionally the Attorney-General has been granted standing to bring cases even in the absence of a concrete fact situation, as the guardian of the public interest. In this case there was a concrete fact situation—Dr McBain's proposed treatment of Leesa Meldrum—and so the Attorney's position appeared quite strong. The anomaly, however, was that this case involved the Commonwealth Attorney-General seeking to uphold the law of a State, something usually undertaken by the relevant State Attorney-General. Dixon J's justification for the special position of the Attorneys-General in the Pharmaceutical Benefits Case was as follows:

It is the traditional duty of the Attorney-General to protect public rights and to complain of excesses of a power bestowed by law and in our Federal system the result has been to give the Attorney-General of a State a locus standi to sue for a declaration wherever his...
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... public is or may be affected by what he says is an ultra vires act on the part of the Commonwealth or of another State.\(^79\)

Thus the attempt by the Commonwealth Attorney in this case was unusual and was the subject of some discussion by the Court.

The majority took the view that the special position of the Commonwealth Attorney-General did not extend to seeking to uphold the validity of a State law.\(^80\) In Gleeson CJ's view, the Attorney was not attempting to administer or enforce the law of Victoria; nor had any attempt to administer or enforce any law of the Commonwealth been impeded. Thus the Attorney's complaint that a law of a State had been held invalid did not give rise to a matter.\(^81\) Gaudron and Gummow JJ (with whom Hayne J agreed) took the view that the "particular right" of each Attorney lies in the enlisting of the judicial power of the Commonwealth to ensure observance by the other polities of the requirements of the federal compact expressed in the Constitution.\(^82\) Furthermore, Gaudron and Gummow JJ stated that:

the Attorney-General, consistently with Ch III, cannot have a roving commission to initiate litigation to disrupt settled outcomes in earlier cases, so as to rid the law reports of what are considered unsatisfactory decisions respecting constitutional law.\(^83\)

In contrast, Kirby J found no difficulty in the fact that the Attorney's fiat concerned the validity of a State Act, as a s 109 case necessarily involves the operation of a Commonwealth law.\(^84\) Kirby J's approach is, in my opinion, persuasive. If the Commonwealth Attorney considers that a Commonwealth law has been misconstrued so as to render a State law invalid, the Commonwealth Attorney would seem to have an interest in the correct interpretation and application of the Commonwealth law, notwithstanding that the result of the Commonwealth Attorney's application will be the upholding of a State law. The Attorney's interest here is in the proper administration of the Commonwealth law. Of course, the mere fact that the Attorney may have an appropriate interest is not sufficient to give the Court jurisdiction—jurisdiction must be established under one of the heads of jurisdiction in ss 75 or 76 of the Constitution. Section 76(i) was the jurisdiction invoked in this case, and Kirby J's conclusion that a case concerning s 109 inconsistency is a case 'arising under this Constitution'\(^85\) seems to be correct.

(c) 'Matter' and the rule of law

KIRBY J: I think we have to be very careful in this case because of the complications of its history not to impose a very narrow view on the rights of the Attorney-General and on the facility of constitutional review and of other review under the Constitution. I think we have to be very careful about that; because this review upholds the rule of law in our country.

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\(^79\) Attorney-General (Vic): Ex rel Dale v The Commonwealth (1945) 71 CLR 237, 272.
\(^80\) Re McBain, [25-26] (Gleeson CJ), [75] (Gaudron and Gummow J J, with whom Hayne J agreed).
\(^81\) Ibid [26] (Gleeson CJ).
\(^82\) Ibid [75].
\(^83\) Ibid [76].
\(^84\) Ibid [215].
\(^85\) Ibid [216].
GUMMOW J: The rule of law is bound up with parties, not philosopher kings.\textsuperscript{86} John Williams has argued that the question of when a 'matter' exists should be determined by reference to the fundamental concept of the rule of law.\textsuperscript{87} I agree with Williams, but argue that both the minority and majority can draw support from the rule of law for their approach to the question, as the rule of law is a composite concept made up of several different features. The rule of law is a somewhat slippery term, but it has been used to reflect what Lon Fuller termed the 'inner morality of law'.\textsuperscript{88} This inner morality has eight features: law must be general, knowable, prospective, clear, consistent, possible of compliance, reasonably stable, and enforced as enacted.\textsuperscript{89} Williams uses Joseph Raz's work on the rule of law to postulate a slightly longer set of principles:

- (1) all laws should be prospective, open and clear;
- (2) law should be relatively stable;
- (3) the making of particular laws should be guided by open, stable, clear and general rules;
- (4) the independence of the judiciary must be guaranteed;
- (5) the principles of natural justice must be observed;
- (6) the courts should have review powers over implementation of other principles;
- (7) the courts should be easily accessible; and
- (8) the discretion of the crime preventing agencies should not be allowed to pervert the law.\textsuperscript{90}

These different aspects of the rule of law may be given different weight, and it is my argument that both the majority and minority judges in \textit{Re McBain} are concerned with the rule of law, but the majority gives greater weight to the value of stability and the minority gives greater weight to Fuller's final value of enforcement of the law as enacted and to the need for the courts to engage in review.

For the majority, finality of concluded litigation between parties—and hence certainty for those who had had a matter adjudicated—was of principal concern, rather than the correctness of the decision below. The majority judges stressed that the orders of the Federal Court bound only the parties to it and thus interference by a non-party was seen as inappropriate meddling in concluded litigation that had no effect on either the Bishops and the Episcopal Conference or on anyone else. The precedent effect in future cases of the Federal Court's reasoning was not sufficient to generate a 'matter'.\textsuperscript{91}

In contrast, the minority judges took the view that incorrect interpretations of the law by lower courts and tribunals need to be able to be corrected. They saw the judgment of the Federal Court as significant in public law terms in so far as it set a precedent and involved a declaration that the State law was invalid that would be

\textsuperscript{88} Lon Fuller, \textit{The Morality of Law} (1969), 42.
\textsuperscript{89} Ibid ch 2.
\textsuperscript{90} Williams, above n 87, 206.
\textsuperscript{91} \textit{Re McBain}, [22] (Gleeson CJ), [71] (Gaudron and Gummow JJ, with whom Hayne J agreed).
relied upon not simply by the parties but by many others in Victoria and perhaps elsewhere. In those circumstances, the ability of the High Court to correct errors in lower courts was important, even where the parties themselves were content with the outcome. As McHugh J put it, 'permitting strangers to apply for certiorari helps to ensure that "the prescribed order of the administration of justice" is not disobeyed' Kirby J was even more explicit:

if a party can demonstrate an error in the interpretation of federal and State legislation that has resulted in an order by a federal judge, purporting to invalidate in large part a public statute of a State, the correction of that error in properly constituted proceedings is not merely a matter of interest to the immediate parties. It is also one that affects all of the people of the Commonwealth living under its Constitution and laws. By covering cl 5 of the Constitution, all courts, judges and people of every State and of every part of the Commonwealth are bound by the Constitution and laws made by the Federal Parliament. If it could be shown that, erroneously, a State law has been held unconstitutional, the sooner that error is corrected, one might say, the better.

He also rejected the contention that the Bishops and the Episcopal Conference were intermeddling:

To provide … relief … does not amount to "intermeddling" in the exercise of the Federal Court's jurisdiction. It amounts to no more than ensuring that, in all matters arising under the Constitution or involving its interpretation, the Federal Court and its judges conform to their constitutional and legal duties.

The majority approach reflects a more formal approach to the rule of law—a concern with certainty and stability rather than with law's substantive content. In contrast, the minority reflects a more substantive approach to the rule of law—a concern that law should be enforced as it is enacted and a view that the incorrect interpretation and application of legal rules constitutes a form of injustice that is contrary to the rule of law.

The majority approach has a certain appeal, in that stability is an important value. Further, to permit the re-opening of concluded litigation by a third party appears to permit meddling by a stranger in the affairs of the parties, something that is generally undesirable. In this case, the meddling is even more problematic, as it amounts to an attempt by the Catholic Church to give effect to religious doctrine not adhered to by any of the parties, something to be wary of in a secular state. However, stability is not the only value that needs to be considered—and it may be that intermeddling, while generally undesirable, will in some circumstances be appropriate if it allows us to give effect to other values inherent in the rule of law.

The majority's approach means that, in similarly constituted cases, the Court simply has no jurisdiction, regardless of whether granting relief might be highly desirable in a particular situation. In contrast, the minority's conclusion that the Court had jurisdiction to deal with the Bishops' and the Episcopal Conference's case retains

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92 Ibid [90] (McHugh J, with whom Callinan J agreed), [220] (Kirby J).
93 Ibid [89].
94 Ibid [220] (footnote omitted).
95 Ibid [195].
flexibility for the Court in the future and enables the Court to ensure, where appropriate, that lower courts are applying correct interpretations of the law—including the Constitution. As Kirby J pointed out, it will often be highly desirable to correct legal errors sooner rather than later before too many people have relied upon the erroneous judgment. Of course, the minority's approach to jurisdiction did not mean that it would necessarily grant the relief sought—relief remained within the discretion of the Court. As Simon Evans has pointed out, the virtue of judicial discretion 'is its potential to produce morally sensitive and morally nuanced decisions and to mediate effectively between competing values'.

2 Should certiorari issue? The Court's discretion

(a) The factors relevant to the exercise of discretion

McHugh J spent some time outlining the history of certiorari in order to demonstrate that certiorari is a discretionary writ, and not one available as of right, even where the Attorney is the moving party. Other judges seemed to take this as given. All judges turned their minds to the question of the Court's discretion whether to issue certiorari, although for the majority judges this was strictly speaking obiter dicta, as they had concluded they had no jurisdiction in the absence of a matter. Gleeson CJ said very little, and I will return to his comments below. From the various other judgments, several factors can be drawn that suggested the Court should exercise its discretion against the grant of relief:

- the Bishops' and the Episcopal Conference's lack of a special interest in the subject matter of the proceedings (considered relevant to the exercise of the discretion by five judges);
- the fact that the Bishops and the Episcopal Conference had elected not to seek to intervene in the Federal Court proceedings, and that the Attorney, although served with a s 78B notice, had not sought as of right to intervene in those proceedings under s 78A of the Judiciary Act (considered relevant by six judges);
- the absence of an appeal by any of the parties to the Federal Court proceedings, indicating that the parties were content with the decision (considered relevant by six judges);
- the effect of quashing the Federal Court orders on third parties who may have relied upon those orders (considered relevant by three judges);

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98 Re McBain, [220]. It certainly was not argued that the substantive issues before the court could not come before the courts in the future, in properly constituted litigation. Given that, Kirby J's point is that there is virtue in these issues should be resolved now, not later.
100 Re McBain, [106] (McHugh J).
101 Ibid [21] (Gleeson CJ), [281] (Hayne J, with whom Gaudron and Gummow JJ agreed), [160] (Kirby J).
103 Ibid [282-3] (Hayne J, with whom Gaudron and Gummow JJ agreed) [119-20], [130] (McHugh J, with whom Callinan J agreed), [226-7] (Kirby J).
104 Ibid [285] (Hayne J, with whom Gaudron and Gummow JJ agreed), [121] (McHugh J, with whom Callinan J agreed), [229] (Kirby J).
• the effect of quashing the Federal Court orders on Dr McBain (considered relevant by one judge, Kirby J\textsuperscript{106}); and
• the raising of new arguments for the first time in the High Court proceedings (considered relevant only by Kirby J\textsuperscript{107}).

McHugh J and Kirby J also mentioned factors that suggested that relief should be granted:
• if a State law has been erroneously held to be invalid, the sooner that error is corrected the better\textsuperscript{108};
• the substantive issues were clearly important\textsuperscript{109}; and
• the prospect of further litigation on this issue should be removed by a decision on the substantive issues\textsuperscript{110}.

However, they concluded that the factors against granting relief outweighed those in favour of granting relief.

The identification of factors relevant to the Court's exercise of its discretion to grant the remedies sought by the Bishops and Episcopal Conference is important as it provides guidance for the courts in future cases, and guidance for those who seek to use the courts. As Kit Barker has noted in a different remedial context, transparency about the basis on which discretionary remedies are granted or denied is important\textsuperscript{111}.

Gleeson CJ was more cryptic in his comments about the Court's discretion, but seemed less convinced that relief should be refused if that issue were reached. He took the view that in order to consider the discretion issue properly an assessment of whether the Bishops and the Episcopal Conference would have been permitted to intervene under O 6 r 8 of the Federal Court Rules would have been required\textsuperscript{112}.

If O 6 r 8 did not apply to their position, and they had no realistic prospect of becoming parties to the proceedings, then their decision to confine their role in the Federal Court to that of amici curiae, with the consequence that they had no right of appeal, would, in my mind, have a discretionary significance different from that which it might otherwise have.

\textsuperscript{105} Ibid [118] (McHugh J, with whom Callinan J agreed), [230] (Kirby J). Notably, McHugh J thought that the Bishops and the Episcopal Conference needed to show that no single woman had received IVF in Victoria since Sundberg J's order (ibid [118]), a task that the Bishops and the Conference did not attempt to undertake and which would have been impossible, as single women have been treated in Victoria since Sundberg J's decision.

\textsuperscript{106} Ibid [230].

\textsuperscript{107} Ibid [228].

\textsuperscript{108} Ibid [220] (Kirby J).

\textsuperscript{109} Ibid [117] (McHugh J), [221] (Kirby J).

\textsuperscript{110} Ibid [221] (Kirby J).


\textsuperscript{112} Re McBain [21].

\textsuperscript{113} Ibid.
This seems to suggest that the Bishops' and the Episcopal Conference’s election not to seek to intervene would only have worked against relief had they a right to intervene. If there was no right to intervene, then the Bishops ought not to have been criticised for not pursuing it. Gleeson CJ went on to note an additional factor that also seems to hint at the grant of relief:

Furthermore, a full appreciation of their position would require attention to the significance of the fact that the Victorian authorities did not seek, by argument, to uphold the Victorian legislation.114

(b) The effect of Sundberg J’s orders

The approaches to the question of discretion again reflect the difference in perspective of the majority and minority judges outlined above—that is, the emphasis on finality of proceedings between parties in the majority approach, and the emphasis on application of correct legal principle in the minority approach. The majority judges’ analysis of discretion made no mention of the possible impact on third parties of quashing Sundberg J’s orders; this is entirely consistent with their view of the proceedings as simply private litigation between private parties that bound only those parties. In contrast, the effect on third parties was clearly of some significance for the minority judges, who saw the Federal Court judgment as having a much broader significance. In terms of the reaction to the judgment by those involved in assisted reproductive services in Victoria (including doctors, clinics, patients and authorities such as the Infertility Treatment Authority (‘ITA’)), the minority are clearly correct in their assumption that doctors other than Dr McBain will have acted on the Federal Court’s judgment and provided treatment to single women and lesbian couples seeking it. The ITA, too, has acted on the judgment in its dealings with all doctors who provide assisted reproductive services in Victoria, by informing doctors and others that the services are now available to women who do not fall within s 8(1) of the IT Act.[115] I will now turn to consider the legal position of those who have relied upon Sundberg J’s decision—including both Dr McBain and other doctors. I will consider both the present situation, where Sundberg J’s orders stand, and also the position if Sundberg J was to be overruled in future litigation.[116]

(i) Dr McBain’s reliance on Sundberg J’s decision

Dr McBain is, in my view, protected from prosecution for treating single women unless and until Sundberg J’s orders are set aside on appeal or otherwise.117 This is because the orders of the Federal Court are binding on the parties until set aside, even if made

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114 Ibid.
116 Such proceedings could certainly be brought in the High Court’s original jurisdiction by the Victorian Attorney-General, either of his or her own motion or on relation, seeking a declaration to uphold the validity of the IT Act under ss 75(iii), (v) or 76(i). This is a possible scenario if there is a change in government. Alternatively, proceedings could be brought by a doctor who provided assisted reproductive services in Victoria and wished to deny those services to single women and/ or lesbian couples and thus abide by the IT Act and not the SDA.
117 The time for lodging an appeal has now expired and given Dr McBain’s reliance on the Federal Court’s orders, it is unlikely that a Court would grant an extension of time.
in excess of jurisdiction. There is, in his case, a res judicata between him and the State of Victoria and those of its agents who administer the IT Act—as between them, the sections of the IT Act declared invalid cannot operate to criminalise Dr McBain’s conduct while the orders stand. If the Victorian authorities sought in the future to prosecute Dr McBain, such an attempt would most likely be dismissed as an abuse of process.

If Sundberg J is later overruled, but his orders are not set aside, Dr McBain will remain protected by the orders. If the orders were ever to be set aside (which seems unlikely), then Dr McBain would, in my view, remain protected in relation to actions undertaken during the life of the orders, but would be unprotected in relation to any subsequent contraventions of the IT Act.

(ii) The position of other infertility service providers

The position of other doctors in a similar position to Dr McBain is not so clear. Although such doctors’ reliance on the Federal Court orders was in good faith and reasonable, and also involved reliance on advice from the ITA, they would not necessarily be protected from prosecution if Sundberg J’s orders were to be quashed or set aside or his decision was later overruled.

Indeed, there is a question whether such doctors are even protected from prosecution while those orders stand. Several of Sundberg J’s orders are couched in general language, applicable beyond the particular circumstances of Dr McBain’s

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119 I note that Kirby J is of the view that, if Sundberg J’s orders were quashed, Dr McBain would be at risk of ‘investigation for breach of a law or of his professional obligations in Victoria’ (Re McBain, [230]). In my view, to the extent that this suggests that Dr McBain could be convicted of an offence under the IT Act if Sundberg J’s orders were quashed, it is at odds with the views expressed in other cases concerning the effect of Federal Court orders; see above n 118.

120 As Kirby J says: ‘Moreover, [the quashing of Sundberg J’s orders] by this Court would expose to possible investigation and disciplinary or other proceedings other medical practitioners who, although not parties to the proceedings before Sundberg J or beneficiaries of his order, relied upon the declarations as to the law, given effect by that order, and offered IVF treatment and reproductive therapy to single women in Victoria’. Re McBain, [230].

121 The order was as follows:

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
treatment of Ms Meldrum. On one view—that of McHugh J—while the orders stand they prevent the prosecution of any doctor for breaching the relevant sections of the IT Act. Yet the majority's view of the Federal Court orders may suggest otherwise. For the majority, the orders operate only as between the parties and do not directly affect the position of anyone else. As Hayne J put it:

Those who now apply for orders quashing them were not parties to the proceedings in the Federal Court. For that reason, they are not in any way bound by the outcome of those proceedings.

This is, of course, the orthodox technical view of the effect of judicial orders, yet it seems to ignore the way in which declarations in constitutional matters such as this are treated by the community, particularly those who are affected by the laws declared invalid. Many doctors have relied upon Sundberg J's judgment—yet if they are not, strictly speaking, bound by it in their dealings with the relevant Victorian authorities, it is possible they are not in fact protected by the Federal Court's decision. If a change in attitude of the Victorian government were to occur, and a prosecution were to be initiated against a doctor—Dr X—for violation of the IT Act, could Dr X call in aid Sundberg J's decision as a defence? On a very technical approach, the answer may be 'no'—that decision did not bind Dr X, who was not a party to it, and thus it is not a defence. Nor would it bind the court before which Dr X was tried, though judicial comity would suggest it would be likely to be followed.

However, Dr X might also argue that the decision did bind the Victorian authorities and thus it would provide a defence in that the relevant sections were inoperative vis-à-vis Victoria in relation to the Victorian authorities whilst Sundberg J's orders remain on foot. Whether this would succeed, however, is unclear. Certainly, a doctor being convicted for actions taken in reliance on a decision of the Federal Court would be entirely unjust and at odds with the way in which both the legal and lay communities think about the effect of such decisions. But a different judge might conclude that Sundberg J was wrong and the relevant sections of the IT Act were not inoperative at all. On the majority approach, such a prospect is not out of the question.

One may of course ask whether doctors in this position would have any other defence. Essentially, if Sundberg J was wrong, they relied on a mistaken enunciation of the law by the Federal Court. Generally, of course, mistake of law is no defence. This has to date been raised in the context of unpublished statutes or regulations. But it may be possible to argue that, so long as Sundberg J's orders were in existence it was impossible to ascertain that the law was other than that stated by the judge. Yet one response to this is that other doctors should simply do what Dr McBain did: seek a declaration relevant to their own situation that would then bind as between

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122 Re McBain, [118].
123 Ibid [22-4] (Gleeson CJ), [40] (Gaudron and Gummow JJ), [246] (Hayne J).
124 Ibid [246].
126 Ibid 367.
them and the relevant authorities. This, of course, would be cumbersome and could
clog the courts with what should be unnecessary duplication of proceedings. What is
more likely is that any attempt at prosecution would be stayed as an abuse of process,
particularly as doctors have relied upon an authoritative statement of the law from the
Federal Court, as well as on statements by the ITA concerning their legal
obligations.127

The legal issues for doctors in Victoria are potentially significant, even though
prosecution or other disciplinary proceedings seem unlikely to materialise at this point
in time. This indicates, in my view, that there is a problem with the majority's
approach to the effect of declarations in public law cases, if my extrapolation of that
approach is correct. Given the role of the courts in interpreting legislation and
pronouncing on its constitutional validity, the rule of law requires that persons
affected by laws be entitled to rely upon the orders of judges concerning validity even
when those persons are not parties to the particular case. To view such orders as
applying only between the parties and having no operation in respect of non-parties is
to neglect the effect that judicial decisions in public law have in the minds of the public
and, indeed, in much of the legal profession. It also undermines the rule of law to the
extent that the law remains unclear and uncertain for those not parties to the original
proceedings. Thus the minority view of the way in which the Federal Court's judgment
operates is to be preferred to that of the majority.

V ACCESS TO ASSISTED REPRODUCTIVE SERVICES: WHERE ARE WE NOW?

Although the High Court decision was a great victory for WEL, it has not in fact
altered the legal position for many women in Victoria seeking access to assisted
reproductive services. The High Court's decision allows Sundberg J's decision to stand,
so that, in my view, s 8(1) of the IT Act is inoperative generally, as are certain other
sections in so far as they require a woman to be married or in a heterosexual de facto
relationship to access assisted reproductive services. However, the Victorian
government and the ITA have taken a very narrow view of the way in which Sundberg
J's decision operates. Based on advice from Dr Gavan Griffith QC128 the ITA has
concluded that only medically infertile single women or lesbian couples may access
assisted reproductive services in Victoria. This opinion is based on the operation of
s 8(3)(a) of the IT Act, which provides as follows:

Before a woman undergoes a treatment procedure—

(a) a doctor must be satisfied, on reasonable grounds, from an examination or from
treatment he or she has carried out that the woman is unlikely to become pregnant
from an oocyte produced by her and sperm produced by her husband other than
by a treatment procedure;129

Griffith concluded that s 8(3)(a), read in light of the Federal Court decision, continues
to apply to a married woman so that either she or her husband must be clinically

127 Infertility Treatment Authority, above n 115.
128 Opinion of Gavan Griffith QC for the Infertility Treatment Authority, 4 August 2000;
available from the ITA; copy on file with the author.
129 Note that 'husband' includes a woman's de facto male partner with whom she lives;
'oocyte' means 'an ovum from a woman' Infertility Treatment Act 1995 (Vic), s 3(1).
infertile in order to receive treatment. In relation to single women or lesbian couples, he took the view that the words 'with the sperm of her husband' were simply to be excised from the Act, so that a doctor needed to be satisfied that the woman in question was unlikely to become pregnant with her own oocyte without the assistance of a treatment procedure. In Griffith's view, this imposed a requirement that a woman seeking either IVF or DI be 'clinically infertile'.

The primary flaw in Griffith's reasoning is that this interpretation simply continues the discrimination on the basis of marital status that Sundberg J ruled invalid. Under Griffith's interpretation, a married woman or a woman in a heterosexual de facto relationship who is not 'clinically' infertile may obtain assisted reproductive services because her husband is infertile and she is considered to be unlikely to become pregnant from her own oocyte without a treatment procedure. This is because as a society, we do not expect a woman in that position to attempt to become pregnant by engaging in sexual intercourse with a fertile man who is not her husband or partner. In contrast, an unmarried woman who is not 'clinically' infertile cannot obtain such services, because on Griffiths' approach it cannot be said that she is unlikely to become pregnant from her own oocyte without a treatment procedure, as she could engage in unprotected sexual intercourse with a fertile man and become pregnant. The difference in treatment of these women is based not on their medical position, but on the social expectations surrounding marriage and committed de facto relationships and the absence of social legitimacy given to those who are not in such relationships.

As an illustration, let us imagine a heterosexual couple, Sally and Tom, who are not married and do not cohabit (and thus do not fall within the terms of s 8(1)(b)). Sally is regarded in law as single. If she is fertile and Tom is infertile, they cannot obtain treatment. But if Sally and Tom got married or cohabited, they would immediately be eligible for treatment. Similarly, a 'clinically' fertile lesbian couple would be denied treatment—and they, of course, cannot choose to marry or cohabit to avoid the restriction. Single women, too, are denied treatment. However, as discussed, a 'clinically' fertile married woman would be able to receive treatment. This is direct discrimination on the basis of marital status. It is therefore inconsistent with the requirements of the SDA and thus invalid to the extent of the inconsistency.

A 'clinically' fertile married woman who cannot conceive as a result of her husband's infertility could become pregnant if she found an alternative, fertile male sexual partner. However we do not, as a society, expect her to take this step; rather, she will be provided with medical assistance. Yet a clinically fertile single woman or lesbian is expected to find an alternative sexual partner if she wishes to become pregnant. Such women have three choices: abandon any attempt to have a child; travel interstate to obtain assisted reproductive services, if possible within financial and employment constraints; or engage in a potentially unsafe casual sexual encounter.

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130 Griffith, above n 128.
131 Ibid. 'Clinical infertility' is an imprecise term that is difficult to define, but appears to mean that there is some medical reason why a woman cannot conceive. Infertility specialists have traditionally considered a woman to be infertile if, after 12 months of unprotected sexual intercourse, she has not conceived, even if there is no apparent reason for this failure such as blocked fallopian tubes.
132 The Fertility Access Rights Lobby has received legal advice to this effect from Peter Hanks QC (copy on file with the author).
Not only is this discriminatory, it also fails to respect the sexual choices of single women and the relationships of lesbian couples. Finally, it has possible negative health consequences for women and their children.  

Notwithstanding that Griffith's advice continues discrimination on the basis of marital status, the ITA has written to all licensed clinics in Victoria indicating that it accepts Griffith's advice and considers that s 8(3) of the Act permits only treatment of 'clinically' infertile single or lesbian women. The requirements of s 8(3) are incorporated into the licences the ITA issues to all clinics and a violation of those conditions would provide grounds for the revocation of the licence. Thus it is most unlikely that any clinic will act in contravention of the ITA's advice.

The outcome of the McBain litigation for women in Victoria has thus been mixed. For some women—those who can demonstrate 'clinical' infertility—the decisions have enabled them to obtain treatment in Victoria. But for many women—those who cannot demonstrate 'clinical' infertility and who seek donor insemination—the McBain litigation has made no difference to their lives and ability to have a child.

Finally, it should be noted that even for those women who are 'clinically' infertile, the battle is not yet over. Although Sundberg J's decision stands for the time being, the Federal government has announced plans to reintroduce the Sex Discrimination Amendment (No 1) Bill 2000 (Cth), which would amend the SDA so as to permit the States to discriminate against single women and lesbians in their regulation of access to assisted reproductive services. The Bill has been condemned by HREOC and, in its initial form, was criticised by the majority report of the Senate Legal and Constitutional Committee. It remains to be seen whether it will pass the Senate if it is reintroduced.

CONCLUSION

The High Court's decision in Re McBain ends the McBain litigation but leaves a number of issues unresolved. The extent to which the SDA protects us from marital status discrimination in various services is uncertain and the operation of the SDA in relation to various medical services that can only be provided to one sex is also uncertain. Furthermore, the Victorian authorities have continued to apply the IT Act in a discriminatory fashion, notwithstanding the Federal Court's decision. The High Court did resolve the procedural issues concerning the ability of third parties such as the

136 The Bill was originally introduced shortly after Sundberg J's decision, on 18 August 2000. It lapsed when Parliament was prorogued for the 2001 election.
138 Senate Legal and Constitutional Committee, above n 9, [5.15].
Bishops and the Attorney-General to re-open settled litigation with which the parties are content, but it did so with a distinct split in the court over the jurisdictional issue, meaning that that issue may emerge again in the future. The split in the court reflected different policy concerns—finality of litigation versus the correct interpretation of the law—each of which is important. The minority approach, however, enables the court to give effect to both of these policy values through the exercise of discretion, whereas the majority approach locks the court into rejecting cases of this kind, regardless of the circumstances. The different judgments also reflected different views of the way in which judicial decisions operate, and again the minority view that the Federal Court's judgment is of significance beyond the parties is, in my view to be preferred.

Of course, this is not the end of the attempts to prevent access to assisted reproductive services by lesbian couples and single women—that much is clear from the Federal government's promise to again attempt to amend the SDA to permit States to discriminate. It remains possible, too, that the substantive issues could be raised again in the future in different proceedings properly brought, and the resolution of those issues is by no means a forgone conclusion.