Comment

Reproductive Technology, Public Policy and Single Motherhood

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In mid 2000, the Australian community engaged in a national debate over access to infertility treatment services. The debate was sparked by a Federal Court decision in late July. That decision, by Justice Sundberg in the case of *McBain v State of Victoria*[1] held that the provisions of the *Infertility Treatment Act* 1995 (Vic) which limited eligibility for infertility treatment to women who were married or in heterosexual de facto relationships, were inconsistent with section 22 of the Commonwealth *Sex Discrimination Act* 1984 (Cth) which prohibits discrimination on the basis of marital status. Justice Sundberg held that, by virtue of section 109 of the *Constitution*,[2] the provisions of the Victorian Act were inoperative to the extent of the inconsistency between the State and Commonwealth legislation.

1. The Decision in McBain v State of Victoria

Dr McBain, the applicant in the proceedings, is a gynaecologist in Victoria, specialising in reproductive technology and in-vitro fertilisation procedures. He was consulted by Ms Meldrum who wished to have IVF treatment using donor sperm so that she could conceive a child. Dr McBain advised Ms Meldrum that he was unable to provide her with IVF treatment under the state legislation as she was single. Dr McBain brought proceedings in the Federal Court seeking a declaration that section 8 of the *Infertility Treatment Act* (the section limiting eligibility to women who were married or in heterosexual de facto relationships), was inoperative due to an inconsistency with section 22 of the *Sex Discrimination Act*.

The Victorian legislation regulates the provision of infertility treatment procedures by establishing a system for licensing of service providers, regulating research, prohibiting certain procedures, and setting out the requirements for information, counselling, and consent in relation to treatment procedures.[3] The Act also specifies the eligibility criteria for infertility treatment procedures in Victoria. Section 8(1) of the Act requires that the woman be married or in a heterosexual de facto relationship in order to be eligible for treatment. Section 8(1) provides:

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1 *McBain v State of Victoria* (2000) 99 FCR 116.

2 Section 109 of the *Constitution* states: '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

3 For discussion of the Victorian legislation and its history see Louis Waller, 'Regulating Birth Technology' (1998) 7 *Res Publica* 18.

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.

Both the woman and her husband must consent to the treatment procedure before it is performed.[4] In addition to the eligibility criteria set out in section 8(1), the Act also provides that prior to undergoing a treatment procedure, a doctor must be satisfied on reasonable grounds from an examination or treatment that he/she has performed, that the woman is unlikely to conceive naturally using her oocyte and her husband's sperm;[5] or a doctor with specialist qualifications in human genetics must have performed an examination and be satisfied that if the woman conceived using her oocyte and her husband's sperm, that 'a genetic abnormality or a disease might be transmitted to a person born as a result of the pregnancy.'[6] These provisions ensure that eligibility for treatment is limited to those who are clinically infertile or for whom IVF or related procedures are needed to avoid passing on an inherited condition. The Act also requires that a woman and her husband be provided with a list of approved counsellors and enough information about the procedure and alternatives to allow them to make an informed decision and must have received counselling from an approved counsellor.[7]

Under section 22 of the *Sex Discrimination Act* 1984 (Cth), it is unlawful to discriminate in the provision of goods or services on the ground of sex, marital status, pregnancy or potential pregnancy. 'Marital status' is defined as 'the status or condition of being: (a) single; (b) married; (c) married but living separately and apart from one's spouse; (d) divorced; (e) widowed; or (f) the de facto spouse of another person.'[8] Justice Sundberg held that infertility treatment procedures were 'services' for the purposes of the *Sex Discrimination Act*. An argument by the Catholic Church[9] that 'services' in section 22 of the *Sex Discrimination Act* should be read so as to be consistent with international instruments that recognise the right of a child to be born into a family, and to be raised by and to know its parents, was rejected. Justice Sundberg noted that the *Sex Discrimination Act* gave effect to the Convention on the Elimination of All Forms of Discrimination Against Women and that '[t]he 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.'[10] Furthermore, when the treaties are 'read as a whole, they tell against the existence of an untrammelled right of the kind for which the Catholic Church contends.'[11] Justice Sundberg held that the fact that some treaties assume that a child will be born into a family as a result of natural procreation between a

4 *Infertility Treatment Act* 1995 (Vic), s8(2).

5 Id, s8(3)(a).

6 Id, s8(3)(b).

7 Id, ss10–11.

8 *Sex Discrimination Act* 1984 (Cth) s4.

9 The Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church were heard as amici curiae in the case.

10 *McBain v State of Victoria* (2000) 99 FCR 116 at 120.

11 Ibid.

married couple '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.'[12]

Section 32 of the *Sex Discrimination Act* provides that the prohibition against discrimination on the grounds of sex in the provision of services does not apply to services which are of a kind that can only be provided to one sex. Justice Sundberg held that infertility treatment services can be provided to both sexes:

> 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.[13]

Justice Sundberg concluded that section 8 of the *Infertility Treatment Act* 'requires the applicant to treat Ms Meldrum less favourably than a married woman or one in a de facto relationship.'[14] Section 8 of the Victorian Act and section 22 of the *Sex Discrimination Act* were therefore 'directly inconsistent' and section 8 was inoperative to that extent due to section 109 of the *Constitution.* Other provisions in the Victorian Act were also declared to be inconsistent with section 22, to the extent that those provisions depended on section 8(1).

The Infertility Treatment Authority has provided information on the requirements for eligibility for infertility treatment in Victoria following the decision by Justice Sundberg.[15] The Authority has decided that 'the requirements of section 8 (2), (3) (a) and (b) of the *Infertility Treatment Act* 1995 remain valid, except where they refer to the requirement for a husband.'[16] This means that in order to be eligible for treatment a person must provide consent and must be either clinically infertile or at risk of passing on a genetic condition or disease. In addition, the existing provisions of the legislation will remain in force for a married or heterosexual de facto couple commencing treatment, including the requirements as to information, counselling, consent and record keeping.[17] A single woman who is eligible for treatment will also be subject to these requirements. The Authority has also decided that sperm donors with stored sperm should be advised of the effect of the Federal Court's decision.[18]

12 Id at 121.
13 Ibid.
14 Id at 123.
15 Infertility Treatment Authority, 'Eligibility to Infertility Treatment in Victoria' *News – August 2000* available at http://www.ita.org.au/new-aug0.htm.
16 Ibid.
17 Ibid.
18 Ibid.

2. *Eligibility for IVF*

Only two other states, South Australia and Western Australia, have legislation that specifically regulates the provision of reproductive technology services. In South Australia the provision of IVF and related services, including artificial insemination, is regulated by the *Reproductive Technology Act* 1988 (SA). Under that Act, access to assisted conception services is limited to couples who are married or in a long standing de facto relationship.[19] In addition, the couple must be infertile or at risk of passing on a genetic condition to a child conceived naturally.[20] The *Reproductive Technology Code of Ethical Clinical Practice* 1995[21] imposes additional eligibility criteria, including a requirement that the couple receive adequate counselling and specified information,[22] and a statutory declaration signed by both spouses stating: that neither of them is subject to a term of imprisonment or an outstanding charge for an offence that may be punishable by imprisonment on conviction,[23] and that neither of the couple has been found guilty of an offence involving violence or a sexual offence involving a child,[24] and whether either spouse has had a child permanently removed from his/her guardianship other than by adoption.[25]

The South Australian restrictions on eligibility for assisted conception services have been challenged. In *Pearce v South Australian Health Commission*[26] a Full Court of the South Australian Supreme Court declared that the South Australian Act was inconsistent with section 22 of the *Sex Discrimination Act* 1984 (Cth) because it discriminated on the basis of marital status. The Court declared that section 13(3)(b) of the *Reproductive Technology Act* 1988 (SA) was invalid to the extent of the inconsistency due to section 109 of the Constitution. Since the decision in *Pearce,* assisted conception services in South Australia have been available to single women and women in de facto relationships provided they are infertile and satisfy other eligibility criteria.[27]

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19 *Reproductive Technology Act* 1988 (SA) s13(3)(b). De facto relationships must be for the immediately preceding five years or an aggregate of five years in the previous six years: s13(4).

20 *Reproductive Technology Act* s13(3)(b).

21 Contained in the Schedule to the *Reproductive Technology (Code of Ethical Clinical Practice) Regulations* 1995 (SA).

22 *Reproductive Technology Code of Ethical Clinical Practice* 1995 (SA) cl11(4).

23 Id, cl11(1)(c)(i).

24 Id, cl11(1)(c)(ii). An appeal mechanism has now been included in the *Reproductive Technology Code of Ethical Clinical Practice* so that a couple who have been refused infertility treatment on the grounds that one or both of them have been found guilty of an offence involving violence, may apply for a review of the decision to refuse them infertility treatment: cl14A–14E. For discussion see, South Australian Council on Reproductive Technology, 'Appeal Mechanism' (March 2000) 10 *Quarterly Bulletin* 4, available at http://www.dhs.sa.gov.au/reproductive_technology/quarterly-bulletins.asp.

25 *Reproductive Technology Code of Ethical Clinical Practice* 1995 (SA), cl11(1)(c)(iii).

26 (1996) 66 SASR 486.

27 South Australian Council on Reproductive Technology, 'Changes to IVF Laws in Victoria' (September 2000) 12 *Quarterly Bulletin* 7, available at: http://www.dhs.sa.gov.au/reproductive_technology/quarterly-bulletins.asp.

In Western Australia, reproductive technology is regulated by the *Human Reproductive Technology Act* 1991 (WA). This Act restricts eligibility for IVF procedures (but not artificial insemination) to women who are married or in long standing heterosexual de facto relationships.[28] In addition, in order to be eligible under the West Australian Act, the persons must be infertile 'as a couple' or their child, if conceived naturally, would be 'likely to be affected by a genetic abnormality or disease.'[29] Age must not be the reason for the infertility.[30] Prior to the treatment being given, there must be effective consent from each of the participants,[31] and consideration must have been given to the welfare and interests of the participants and any child likely to be born from the procedure.[32] To date there has been no challenge to the West Australian legislation on the basis of its eligibility criteria regarding marital status, although arguably the West Australian legislation is also vulnerable to challenge on the grounds that restricting access on the grounds of marital status is contrary to the *Sex Discrimination Act* and thus invalid due to section 109 of the *Constitution*.[33]

Other States and Territories do not currently have legislation specifically regulating the provision of assisted conception services.[34] The National Health and Medical Research Council has published *Ethical Guidelines on Assisted Reproductive Technology*.[35] The Guidelines note:

> Access to ART [assisted reproductive technology] programs may be restricted by legislation in some States or by codes of practice. Such restrictions may be in conflict with the provisions in the *Commonwealth Sex Discrimination Act (SDA, 1984)*. ART programs which may be in breach of the SDA may seek exemption from this Act by application to the Human Rights and Equal Opportunity Commission.[36]

As is clear from the above discussion, eligibility criteria for access to IVF differ around Australia. In Victoria, South Australia and Western Australia the legislation regulating assisted conception services also sets out eligibility criteria that restrict access to IVF, although there have been some challenges to these

28 De facto couples must have been co-habiting for an aggregate of at least 5 years during the immediately preceding 6 years: *Human Reproductive Technology Act* 1991 (WA) s23(c)(ii).

29 *Human Reproductive Technology Act* 1991 (WA) s23(a).

30 Id, s23(d).

31 Id, s23(b).

32 Id, s23(e).

33 For discussion on this point see Stella Tarrant, 'Western Australia's Persistent Enforcement of an Invalid Law: Section 23(c) of the Human Reproductive Technology Act 1991 (WA)' (2000) 8 *Journal of Law and Medicine* 92.

34 For discussion of the Australian laws on reproductive technology see Belinda Bennett, 'Legal Regulation of Reproductive Technology in Australia' (2000) 1(2) *Journal of Women's Health & Law* 147; Helen Szoke, 'Regulation of Assisted Reproductive Technology: The State of Play in Australia' in Ian Freckelton and Kerry Petersen (eds), *Controversies in Health Law* (1999), 240–265.

35 National Health and Medical Research Council, *Ethical Guidelines on Assisted Reproductive Technology* (Canberra: AGPS, 1996).

36 Id at para 1.2.

restrictions. In other states and territories there are no statutory restrictions on access to IVF. Variations between state laws mean that there is unequal access for single women and lesbian women who wish to use assisted conception techniques.

3. *The Proposed Amendments to the* Sex Discrimination Act

The decision in the *McBain* case sparked national debate over whether single women should have access to IVF services. The decision in the case was condemned by the Catholic Church[37] and the Prime Minister announced that the Government would introduce amendments to the *Sex Discrimination Act* to prevent the Act being used to defeat state laws that exclude single women and lesbians from fertility treatment.[38] The Government's proposed amendments to the *Sex Discrimination Act*, set out in the Sex Discrimination Amendment Bill (No 1) 2000 were introduced in the House of Representatives on 17 August 2000, with the proposed amendments set out in Schedule 1 to the Bill.[39]

The proposed amendments would amend section 22 of the *Sex Discrimination Act* which is the section of the Act that prohibits sex discrimination or discrimination on the grounds of marital status in the provision of goods or services. Proposed section 22(1A) will qualify section 22(1) by providing that it would not be unlawful to refuse or restrict access to assisted reproductive technology services on the grounds of marital status if the refusal or restriction is 'imposed, required or permitted by or under a law of a State or Territory', regardless of whether that law is made before or after the commencement of the subsection. A state or territory anti-discrimination law will be taken to permit the refusal or restriction of assisted reproductive technology services if:

- the state or territory anti-discrimination law expressly excludes all or some assisted reproductive technology services from its coverage; and
- there is no other law of that state or territory that prohibits access to assisted reproductive technology services being restricted on the grounds of marital status.[40]

Proposed section 22(1D) defines 'assisted reproductive technology services' for the purposes of the proposed amendment, as in-vitro fertilisation, artificial insemination, gamete, zygote or embryo transfer, 'or any other services provided for the purpose of assisting in non-coital fertilisation.'

However, the proposed amendments attracted controversy. For some, the proposed amendments represented an attack on human rights and the protections given to freedom from discrimination on the grounds of marital status as embodied in the *Sex Discrimination Act*.[41] Furthermore, by permitting discrimination on the

37 Simon Johanson, 'Church Attacks IVF Ruling' *The Age*, 28 July 2000.

38 Mark Metherell & Judith Whelan, 'PM Fights IVF for Singles' *Sydney Morning Herald*, 2 August 2000.

39 For discussion of the Bill's provisions see: Parliamentary Library, *Bills Digest*, No 24, 2000–2001, Sex Discrimination Amendment Bill (No 1) 2000.

40 Sex Discrimination Amendment Bill (No 1) 2000 (Cth), Schedule 1, proposed section 22(1B).

41 For discussion of the main arguments that have been made in the debate see above n39 at 6–8.

grounds of marital status, there was concern that de facto couples could be denied access to assisted conception services.[42] The Government announced that it would amend the Bill,[43] although the requirement in South Australia and Western Australia that de facto couples must have lived together for five years prior to treatment could still be permitted.[44] The Bill has been referred to the Senate Legal and Constitutional Legislation Committee, which is due to report in December 2000. The Australian Catholic Bishops Conference has made an application to the High Court for writs of mandamus and certiorari relating to the case. Justice Callinan has ordered that the application is to be made by notice of motion to a Full Court of the High Court.[45]

4. *Legal Values and Family Values*

The desire for a child can be very strong, and the experience of infertility can be emotionally painful.[46] While many women are able to conceive and carry a pregnancy with few if any difficulties, not all are so lucky. The new reproductive technologies have given hope to many women and have helped many women to have children that they would not have had otherwise. However the debate over single women having access to assisted conception services is in many respects unsurprising. The new reproductive technologies have long been seen to hold the potential to cause considerable disruption to the idealised norm of the heterosexual nuclear family. Yet despite the potentially disruptive effects that might be seen to stem from the departure from natural conception, the intrusion of health professionals and technology into the marital relationship, and the introduction of a third party into the parenting relationship with the use of donated gametes, to a large degree we have come to terms with these aspects of the new reproductive technologies and the use of IVF and related procedures has become an accepted option for infertile couples. Indeed in the period 1979–1997, there were 22 950 live births from IVF or GIFT (gamete intra-fallopian transfer) in Australia and New Zealand.[47] Far from undermining the family, the new reproductive technologies are now seen as supporting the family by enabling infertile couples to have children.[48] As Valerie Hartouni has noted:

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42 Margo Kingston & Judith Whelan, 'IVF: Now States May Ban De Factos' *Sydney Morning Herald* 18 August 2000.

43 Margo Kingston, 'De Factos to Wait Five Years for Fertility Treatment' *Sydney Morning Herald*, 22 August 2000.

44 Ibid.

45 *Australian Catholic Bishops Conference & Anor, Ex parte The Hon Justice Sundberg*, High Court of Australia, C21/2000 (17 October 2000).

46 Linda J Lacey, '"O Wind, Remind Him That I have No Child": Infertility and Feminist Jurisprudence' (1998) 5 *Michigan Journal of Gender and Law* 163.

47 Australian Institute of Health and Welfare, National Perinatal Statistics Unit, *Assisted Conception, Australia and New Zealand 1997*, available at http://www.aihw.gov.au/npsu/ac4.htm. In the period 1979–97 there were 16 408 live births from IVF pregnancies and 6 542 live births from GIFT pregnancies in the period 1985–97.

48 Erica Haimes, 'Recreating the Family? Policy Considerations Relating to the "New" Reproductive Technologies' in Maureen McNeil, Ian Varcoe and Steven Yearley (eds), *The New Reproductive Technologies* (1990), 154–172.

> Over the course of the past twenty-five years, these new reproductive and genetic practices have been assimilated into the order of nature or brought into the service of precisely those institutions, relations, and relationships or ways of life they seemed destined to raze, their transgressive potential at least temporarily contained. They are no longer regarded as contrary to the work of nature, but rather as instruments that promote or assist nature's work, enabling, correcting, or improving natural processes that have gone awry and that, in any event, apparently, are highly mercurial and inefficient.[49]

The reinforcement of traditional notions of the nuclear family has been assisted by the statutory presumptions of parentage introduced to address the position of children conceived using donated gametes, which provide that the donor is not the legal parent of the child, and the infertile couple will be the child's legal parents, even if neither are biologically related to the child.[50] In addition, the traditional approach of maintaining the anonymity of donors has further minimised the potentially disruptive impact of these technologies on the family.[51] However, the rights of children born by donation to have access to identifying information about their biological parents has been the subject of some debate.[52] While legislation in South Australia and Western Australia provides for the anonymity of donors (although identifying information can be disclosed with the consent of the donor),[53] Victoria has taken the landmark step of permitting access to identifying information about donors and children born as a result of the use of donated gametes.[54]

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49 Valerie Hartouni, *Cultural Conceptions: On Reproductive Technologies and the Remaking of Life* (1997) 114.

50 See eg, *Status of Children Act* 1996 (NSW) s14. Helen Gamble has argued that the donor should be recognised as the parent of the child: Helen Gamble, 'Fathers and the New Reproductive Technologies: Recognition of the Donor as Parent' (1990) 4 *Australian Journal of Family Law* 131.

51 See Haimes above n48. As Haimes argues, anonymity 'helps to preserve as many as possible of the conventional features of the family by setting a barrier around the unit. No routes exist to provide a way through that barrier: the donor has no way back into the family, post-donation, and no member of the family has a route back out, to reach the donor. Each remains anonymous to the other. Explicable *perhaps* in terms of donors' wishes not to assume any sort of parental role, anonymity is also explicable by the desire to prevent donors *claiming* any such role and thus risking a distortion of the family structure and ideology.' Haimes, above n48 at 169.

52 See eg, Gamble, above n50; Michael Freeman, 'The New Birth Right? Identity and the Child of the Reproduction Revolution' (1996) 4 *International Journal of Children's Rights* 273; Katherine O'Donovan, 'A Right to Know One's Parentage?' (1988) 2 *International Journal of Law and the Family* 27; Erica Haimes, ' "Secrecy": What Can Artificial Reproduction Learn From Adoption?' (1988) 2 *International Journal of Law and the Family* 46; Melanie Roberts, 'A Right to Know for Children by Donation – Any Assistance from Down Under?' (2000) *Child and Family Law Quarterly* (Forthcoming).

53 *Reproductive Technology Act* 1988 (SA) s18(1); *Human Reproductive Technology Act* 1991 (WA) ss46, 49. A South Australian discussion paper has proposed that children by donation be entitled prospectively to access to identifying information about their donor(s): South Australian Council on Reproductive Technology, *Conception by Donation – Access to Identifying Information in the Use of Donated Sperm, Eggs and Embryos in Reproductive Technology in South Australia*, available at <www.dhs.sa.gov.au/reproductive_technology/literature.asp>

54 *Infertility Treatment Act* 1995 (Vic) ss74–80.

Despite the incorporation of the new reproductive technologies into the mainstream, these technologies can still be seen as posing a challenge to the heterosexual nuclear family, as the debate over single women and access to IVF shows. Single women may require access to IVF if they are unable to conceive naturally. However, even single women who are able to conceive naturally may seek access to assisted conception services such as artificial insemination. For women without a male partner, access to assisted conception services ensures that conception is medically supervised, and the procedure performed at the clinically optimal time. Furthermore, and most importantly, access to medically supervised assisted conception provides the woman with access to medically screened donated gametes, thus ensuring that the woman is not exposed to the risk of infectious diseases.

The perception of single motherhood as immoral, disruptive and against the interests of children is hardly new. Single motherhood has long been stigmatised. Teenage single motherhood, lesbian motherhood and unwed single motherhood in particular have been stigmatised. Single mothers have been discriminated against for their perceived immorality for having children outside of marriage,[55] for the economic disadvantage of their children,[56] and for the lack of a father in their children's lives.[57] The stigmatisation of single mothers stands in stark contrast to the position of single fathers who are generally not stigmatised.[58] Indeed, as Fineman has argued, the very fact that we refer to 'single mothers' reveals a distinction between other forms of motherhood that are defined by marital status. We do not after all, refer to a 'married mother'[59] – 'It is only the deviant form of motherhood that needs qualification and, by implication, justification.'[60]

While single motherhood is still stigmatised, even that stigmatisation has decreased dramatically in recent decades as the increase in the numbers of ex-nuptial births show.[61] Changes in divorce laws and trends in divorce have also impacted on single parenthood,[62] with 43 per cent of all marriages likely to end

55 Nancy Dowd, 'Stigmatising Single Parents' (1995) 18 *Harvard Women's Law Journal* 19 at 42.

56 Id at 26–35. See also, Martha Fineman, 'Images of Mothers in Poverty Discourses' (1991) *Duke Law Journal* 274.

57 As Nancy Dowd notes: 'As a proxy for poverty, father absence does provide a link to the problems faced by single-parent families, but not a cause.' Dowd, above n55 at 39. Yet while the presence of fathers is often argued to be essential for child development, even this assumption has been questioned. For discussion see Dowd, above n55 at 36. See also, Susan Golombok and John Rust, 'The Warnock Report and Single Women: What About the Children?' (1986) 12 *Journal of Medical Ethics* 182.

58 'Single fathers remain unacknowledged, or viewed as unusual, but are hardly condemned.': Dowd, above n55 at 50.

59 Fineman, above n56 at 291.

60 Ibid.

61 Dowd, above n55 at 43. In 1961, 4 per cent of live births were ex-nuptial. By 1997, 28.1 per cent of live births were ex-nuptial: Australian Bureau of Statistics, *Australian Now – A Statistical Profile: Population: Births,* table 5.22, available at www.abs.gov.au/Ausstats/.

62 Dowd, above n55 at 43. Australian Bureau of Statistics figures reveal that there were 52,600 divorces in Australia in 1999, and that the crude divorce rate in Australia is 2.8 per 1,000 population: Australian Bureau of Statistics, *3310.0 Marriages and Divorces, Australia, 1999,* available at www.abs.gov.au/Ausstats/.

with divorce.[63] While the heterosexual couple with their two or three children is still idealised in social ideology, approximately 16 per cent of Australian children under 18 years live in one-parent families.[64]

The stigmatisation of single motherhood occurs in a context that sees the family conceptualised in terms of the sexual bond between heterosexual adults.[65] Even in calls for a definition of the family that includes non-traditional unions the sexual bond between adults is central.[66] As Martha Fineman has noted: 'The form of argument is by analogy. Nontraditional unions are equated with the paradigmatic relationship of heterosexual marriage.'[67] It is this focus on the bond between adults as the basis for defining the family that facilitates the stigmatisation of single motherhood.

5. *Conclusion*

The debate over single women and access to reproductive technology draws a distinction between different types of infertility: the clinically infertile heterosexual couple or the couple at risk of having a child with a genetic condition on the one hand, and those women who do not have a male partner (who may or may not be clinically infertile) on the other. In a country where almost 10 per cent of families are single parent families,[68] to draw distinctions between deserving and undeserving recipients of assisted conception services on the basis of marital status seems quite remarkable. If infertility services are provided to the Australian community, and those services are provided publicly through the provision of Medicare benefits to recipients, then as a matter of public policy those services should be provided on a basis that is free from unnecessary discrimination. The Federal Government's proposed amendments to the *Sex Discrimination Act*, by providing a mechanism whereby discrimination on the basis of marital status would be permitted in state or territory legislation addressing access to assisted conception services, will mean that Australian women will potentially have

63 Australian Bureau of Statistics, *Australia Now – A Statistical Profile: Population: Divorces*, available at www.abs.gov.au/Ausstats.

64 Australian Bureau of Statistics, *Australia's Children*, available at www.abs.gov.au/Ausstats.

65 Martha Albertson Fineman, 'The Neutered Mother' (1992) 46 *University of Miami Law Review* 653 at 663.

66 Ibid.

67 Ibid. However, we could, as Fineman suggests, conceptualise the family differently: 'Instead, it might begin with the premise that the basic family unit consists of mother and child. Although this is the family form experienced for significant time periods by many women and children in our society, it has never been accepted as a positive ideological or rhetorical alternative to the sexual family. A woman and her children "alone" are considered an *incomplete*, and thus a deviant unit. They are identified as a source of pathology, the generators of problems such as poverty and crime.' Fineman, id at 664.

68 Australian Bureau of Statistics, *Australia Now – A Statistical Profile: Population: Households and Families*, table 5.43, showing that 9.9 per cent of families in 1996 were a one parent family with dependent children, available at www.abs.gov.au/Ausstats.

differential access to reproductive technology services. In some states or territories, single women and lesbian women will have access to reproductive technology services. In some other states or territories, they will not.

The debate over single women having access to IVF and related services is not simply a debate over reproductive technology. It is rather a debate over the very meanings of motherhood and the family in our society. Certainly the family (both its structure and its definition) is in transition. The new reproductive technologies have not created single motherhood. It is clear that these trends are occurring as part of broader social changes, and are not dependent on the availability of assisted conception procedures. However, it is also clear that the new reproductive technologies have, and will continue to, present us with new situations and dilemmas that challenge us to define the meaning of family,[69] and the appropriate regulatory framework for assisted conception services.

In determining that regulatory framework, we will need to work on the setting of limits. In determining where to set those limits, we will need to think through the meaning of reproductive autonomy. Traditionally, autonomy has been an individualised, rights-based concept. Yet if we conceptualise autonomy differently, in terms of our relationships with others,[70] we can move beyond a debate focused on individual rights and assess the potential effect of reform proposals in terms of their impact on our relationships, both within families and within the broader community. There are times when limits will need to be set, and we may as a community decide to impose limits in relation to reproductive technology. However, given the changing nature of the family, and the number of single parent families already living in the Australian community, it is not yet clear that we should be setting the limits at single parenthood.

69 Janet L Dolgin, 'The Law Debates the Family: Reproductive Transformations' (1995) 7 *Yale Journal of Law and Feminism* 37 at 39. See also, Barbara Kritchevsky, 'The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family' (1981) 4 *Harvard Women's Law Journal* 1; R Alta Charo, 'And Baby Makes Three – or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution' (1992–93) 7 *Wisconsin Women's Law Journal* 1; Anita Stuhmcke, 'Lesbian Access to In Vitro Fertilisation' (1997) 7 *Australasian Gay and Lesbian Law Journal* 15.

70 For an analysis of the meanings of autonomy see, Belinda Bennett, 'Posthumous Reproduction and the Meanings of Autonomy' (1999) 23 *MULR* 286; Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7; Carl Stychin, 'Body Talk: Rethinking Autonomy, Commodification and the Embodied Legal Self' in Sally Sheldon and Michael Thomson (eds), *Feminist Perspectives on Health Care Law* (1998).