Re McBain; ex parte Australian Catholic Bishops Conference

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I. Introduction

The case of *Re McBain; ex parte Australian Catholic Bishops Conference*[1] is an unusual one. It was not an appeal from the Federal Court decision of July 2000[2] but a proceeding that sought to enliven the original jurisdiction of the High Court and to make an order under section 76 of the Constitution that the decision of Sundberg J was incorrect in law. The High Court dismissed the application and awarded costs against the applicants. Gleeson CJ, Gaudron, Gummow and Hayne JJ dismissed the application on the basis that there was no justiciable 'matter' that enlivened the jurisdiction of the High Court. McHugh and Kirby JJ, with Callinan J agreeing, held that there was a justiciable matter but that the exercise of discretion would prevent the grant of the writ of *certiorari*.

Contrary to the reports of the popular media, this case is not a vindication of the rights of single and lesbian women to access *in vitro* fertilisation ('IVF') and other reproductive technologies. It is, instead, a decision made on the basis of constitutional and procedural issues of equal but different import. The High Court consolidated and further entrenched the definition of 'matter' in sections 75 and 76 of the Constitution. The writ of *certioriari* was considered in a number of the judgments. In addition, the role of the Attorney General in proceedings in which he had granted a fiat was discussed. Finally, the case reiterated important points about the role of the judiciary in Australia.

II. Background

The facts, background and process of litigation are thoroughly canvassed in the joint judgment of Gaudron and Gummow JJ and the judgment of Kirby J. The original proceedings in the Federal Court concerned inconsistency between Victorian legislation[3] regulating the provision of IVF and other reproductive technologies services and sections 22 and 32 of the Federal *Sex Discrimination Act* 1984 (Cth).[4] The applicants in that proceeding were the providing doctor, Dr McBain, and the woman to whom he wished to provide IVF services. The respondents were the State of Victoria and the relevant ministers and authorities administering the State Act. The respondents took a 'neutral' stance — neither asserting nor impugning the validity of the State Act. Therefore, the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church (the 'Bishops') were granted *amicus curiae* status to provide contradictory arguments.

Sundberg J of the Federal Court held that s8 and other sections of the State Act, to the extent that they relied on the criterion of a marital relationship, whether *de jure* or *de facto*, were inconsistent with sections 22 and 32 of the SDA and were therefore invalid according to s109 of the Constitution. This resulted in the provision of IVF services to Ms Meldrum, and the dissemination in medical journals of Victoria[5] that it was not illegal to provide IVF services to single and lesbian women.

1 (also *re McBain; ex parte Attorney General*) [2002] HCA 16 (18 April 2002).
2 *McBain v State of Victoria & Anor* [2000] FCA 1009 (28 July 2000) ('*McBain v Victoria*').
3 *Infertility Treatment Act 1995* (Vic) (the 'State Act') ss8, 79, 80.
4 (the 'SDA') ss22, 32.
5 McHugh J para 118; Kirby J para 231.

The Bishops, as *amicus curiae*, had no standing to appeal. Instead they sought, and were granted, a fiat from the Federal Attorney-General to make submissions to the High Court to the effect that the Victorian law was not inconsistent with the SDA. The fiat was limited to submissions on this point only.[6] However, the Bishops also made submissions concerning the validity of the SDA. After the grant of the fiat, the Attorney-General brought further proceedings in his own name, to argue some contrary points with the ACBC, namely the validity of the SDA. It was pointed out by Kirby J that this was most unusual.[7]

1. 'Matter'

Gleeson CJ, Gaudron, Gummow and Hayne JJ followed *In re Judiciary and Navigation Act*.[8] The majority in *In re Judiciary and Navigation Act* held that 'matter' meant that 'there is some immediate right, duty or liability to be established by the determination of the Court'.[9] The majority in this case applied this principle. They stated that it meant that the court was not to decide abstract questions of law.[10] In doing so, this would infringe the separation of powers doctrine entrenched in the Constitution.

Gaudron and Gummow JJ stated that to identify a matter, three questions had to be asked. Firstly, what is the subject matter of the proceeding. The subject matter of this case was purging an alleged error of law from the Federal Court record. Secondly, whether the proceeding involved any rights, duties or liabilities of the parties. Finally, whether there was a controversy that needed to be quelled by the determination of the Court.[11]

As the Bishops were not parties to the proceedings in the Federal Court, they had no right, duty or liability nor was there a controversy that could be quelled, as the Federal Court proceedings were finalised and none of the parties affected appealed. The Attorney-General also had no right, duty or liability. Although, as federal Attorney-General and the first law officer of Australia, he was arguably representing the interests of the public, it was not upon him to uphold the validity of State laws, but upon the State Attorneys-General. Furthermore, the Attorney-General's role is to ensure a more cohesive federal system. It does not extend to advancing a desirable interaction between state and federal laws.[12]

In addition to Hayne's J agreement with the reasons of Gaudron and Gummow concerning the existence of a matter, he stated that considerations of standing were directly relevant to whether a person was interested in the subject matter (therefore taking the proceeding beyond mere 'hypotheticals'). Kirby J also considered issues of standing.

McHugh, Kirby, Callinan JJ held that there was a justiciable matter. They also followed *In re Judiciary and Navigation Act* but found that the controversy was whether the record of the federal court did show an error of law and the right was that of any person to assert that a record of a court is defective for want of jurisdiction or for an error of law.[13] Kirby J found that a legal controversy was presented.[14]

6 Commonwealth Attorney General's Office, *News Release: Catholic Bishops Granted a Fiat for High Court Case* <http://www.ag.gov.au/aghom/agnews/2001newsag/1025_01.htm, 14 August 2001>.
7 Note 1 at para 155–156 per Kirby J.
8 In *re Judiciary and Navigation Act* (1921) 29 CLR 257.
9 Note 8 at 265.
10 Note 1 at para 5 per Gleeson CJ; at para 78 per Gaudron & Gummow JJ.
11 Note 1 at para 62 per Gaudron & Gummow JJ.
12 Note 1 at para 76–77 per Gaudron & Gummow JJ; *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 331 per Dixon J.
13 Note 1 at para 92–93 per McHugh J.
14 Note 1 at para 208 per Kirby J.

2. 'Certiorari'

Although McHugh, Kirby and Callinan JJ found that there was a matter that enlivened the jurisdiction of the High Court, they nevertheless dismissed the appeal on the basis that the writ of *certiorari* was a discretionary remedy and should not be allowed in this case. Kirby J found that the writ of *certiorari* was available under sections 76 of the Constitution and section 32 of the Judiciary Act. Gleeson CJ in his obiter stated that *certiorari* was available.

In contradiction, in the obiter of Gaudron, Gummow and Hayne JJ, the writ of *certiorari* was held to be unavailable. Hayne J in particular stated that *certiorari* should only be available for want of jurisdiction or as a means for a superior court to supervise the proceedings of inferior courts.[15] Nevertheless, Gleeson CJ, Gaudron, Gummow, and Hayne JJ, in their obiter, discussed reasons why the writ of *certioriari* should not be granted.

In relation to the Bishops, four reasons were given. First, that they had not been parties to the proceedings before the Federal Court and therefore, neither their legal rights nor their economic interests were affected, nor could it be said that they suffered any injury or damage as a result of the Federal Court decision. Second, the Bishops failed to pursue their application to be joined as parties to the original proceedings. Had they persevered and succeeded, they would have had a right to appeal, which is a better remedy than *certiorari*.[16] Third, in this application, the Bishops were making arguments that they had not made at the Federal Court level.[17] Finally, the parties to the Federal Court decision, in particular the State of Victoria were uninterested in appealing the decision, evidencing acceptance of it.[18]

In relation to the Attorney-General, the most persuasive reason was that his application was well out of time.[19] Furthermore, he had an opportunity to properly intervene at an early stage and did not.[20]

It was highlighted that the grant of *certiorari* would potentially re-open litigation that was properly closed, and therefore persons who relied on the decision in *McBain v Victoria* would be at risk of prosecution for an offence under the Victorian laws.[21] Hayne J expressed this as subverting the orderly administration of justice.[22]

3. Relator Proceedings

Only Hayne J dealt with the issue of the grant of the fiat in any depth. He stated, in obiter, that as the proceedings were a result of the Attorney-General's grant of a fiat, he is always able to intervene as they are effectively his proceedings. However, the second proceeding, in which the Attorney-General sought to represent the Commonwealth against the Bishops, was unacceptable. The Attorney-General could not be allowed to be heard on both sides of the alleged dispute.

III. Conclusion

None of the judges found it necessary to decide the substantive question of whether the *Victorian Act* was inconsistent with the Federal *Sex Discrimination Act*. Thus, the decision

15 Note 1 at para 265 per Hayne J.
16 Note 1 at para 21 per Gleeson CJ, para 56–57 per Gaudron & Gummow JJ, para 119–120 per McHugh J, para 226 per Kirby J, and at para 238 per Hayne J.
17 Note 1 at para 228 per Kirby J.
18 Note 1 at para 121 per McHugh J, and para 229 per Kirby J.
19 Note 1 at para 128–129 per McHugh J, and para 232 per Kirby J.
20 Note 1 at para 130 per McHugh J, and para 227 per Kirby J.
21 Note 1 at para 118 per McHugh J, and para 230 per Kirby J.
22 Note 1 at para 285 per Hayne J.

of the Federal Court stands. Any law that attempts to regulate access to IVF and other reproductive technologies on the basis of marital status will be inconsistent with the SDA and hence, invalid. In 1996, the Supreme Court of South Australia also found that provisions similar to those impugned in *McBain v Victoria* were invalid.[23] The Howard government has indicated that it will reintroduce the *Sex Discrimination Amendment (No. 1) Bill 2000* so as to allow States to legislate to prevent access to reproductive technologies. This Bill was stalled in the Senate in 2000 and will undoubtedly be stalled again. It would appear that the law is settled, but as Kirby J presages[24] the possibility of later and properly brought proceedings on the same issue will present, given the controversial nature of the matter.

23 *Pearce v South Australian Health Commission* (1996) 66 SASR 486.
24 Note 1 at para 236.