Every sperm is sacred?

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Denying women access to fertility services on the basis of sexuality or marital status.

Marital status is a prohibited ground of discrimination in all Australian States and Territories, as well as at the federal level. Lesbian sexuality is a less protected status. It is a prohibited ground of discrimination in six of the eight States and Territories (Tasmania and Western Australia being the exceptions) and in very limited employment circumstances at the federal level. Such a blanket of legislative protection would seem to suggest that access to health services, including fertility services, would be on a relatively equal basis for all women regardless of their sexuality or marital status. Yet a rash of recent discrimination cases in this area illustrate the very opposite. Whether lawful or not, service providers and legislators have been quite unbridled in their attempts to impose their views of appropriate family forms onto the (infertile) Australian public. This article outlines three recent cases involving access to fertility services and explores briefly some of the reasons why opposition to female-headed families of choice remains so deep seated and fierce.

The landscape of regulation and rejection

Access to fertility services (which include the relatively simple and inexpensive process of donor insemination as well as the more complex and less successful process of in vitro fertilisation) is governed by a web of law, policy and practice. Legislation regulating who may have access to fertility services currently exists in only three Australian States: Victoria, South Australia and Western Australia. These States have statutes and regulations that licence service providers and direct who may have access to licensed providers. In South Australia and Western Australia access is limited to those who are married or have been in heterosexual de facto relationships of five years duration. In Victoria prior to June 1997 access was primarily restricted to married couples.[1] The new Victorian Act proposed including only legally married couples, but has apparently been changed to also cover heterosexual de facto couples following the cases discussed below. Inseminating a woman without a licence to do so, or in a manner in breach of the law is expressly prohibited in these three States. Thus, these laws not only prohibit lesbians and single heterosexual women from having access to such services, but potentially penalise (through licence loss and/or fines in all three States, and also imprisonment in WA and Victoria) service providers who refuse to discriminate, or individuals who self-inseminate.

In all other States and Territories in Australia there is no direct legal regulation of access to fertility services, but the National Health and Medical Research Council (NHMRC) issues federal guidelines and licences service providers through its Reproductive Accreditation Committee (RTAC). If NHMRC guidelines are breached by service providers, research funding could be withdrawn, although this has apparently never occurred. The guidelines, although not binding, are nevertheless considered to be very influential. From 1982 to 1996 the

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NHMRC guidelines advised that donor insemination should only be provided to those in 'accepted family relationships'.[2] Accepted by whom was not explained. In 1996 the NHMRC guidelines were revised. A draft discussion paper in April 1996 noted that the criterion of 'accepted family relationships' was ill defined and there was disagreement in submissions as to whether this did, or should, limit provision to 'heterosexual couples in stable, secure, committed relationships'.[3] The draft sidestepped the issue by stating that, 'Overall it was agreed that the rights and welfare of the children produced . . . continue to be of paramount importance when considering what constitutes an "accepted family relationship"' (at para. 40). The final NHMRC guidelines omit any mention of 'accepted family relationship', instead adopting the welfare centred approach in admonishing doctors to have 'serious regard for the long term welfare of any . . . children who may be born'.[4] This use of child centred language is also common in restrictive statutes, and will be discussed further below.

Although the 1996 NHMRC Guidelines may seem less restrictive in intent and effect than the 1982 guidelines, I suggest that they are not. In particular the 1996 guidelines note that restriction of access prescribed by statute or codes of practice may be in breach of the federal *Sex Discrimination Act 1984* (Cth) (following the decision in *Pearce* discussed below). However, instead of recommending compliance with the Act or a change to non-discriminatory practice so as to include unmarried women, the guidelines suggest instead that providers *seek exemptions from the Act* (paras 1.1 and 1.2).

In addition to legislation and policy guidelines, many or all service providers also have their own in house 'ethics' policy regarding access. Some may simply adopt the NHMRC guidelines, while others develop their own. It is notable from the cases discussed below that States without restrictive legislation do not necessarily have more liberal access to their services.

Women who complain too much

1996 and 1997 saw a trifecta of successful cases challenging discrimination in the provision of donor insemination; two were in States with restrictive legislation, where complaints were made by heterosexual women, and one was in a State without restrictive legislation, where a complaint was made by a lesbian. The first, and legally the most portentous, was *Pearce v South Australian Health Commission & Ors* in late 1996.[5] Gail Pearce is (presumably) a heterosexual woman who had separated from her husband, and sought access to in vitro fertilisation services in a public hospital. When denied access on the grounds that s.13 of the *Reproductive Technology Act 1988* (SA) restricted access to certain classes of married couples, Ms Pearce challenged the Act as inconsistent with the protection against marital status discrimination in the *Sex Discrimination Act 1984* (Cth) (SDA). Section 109 of *the* Australian Constitution 1901 holds that in cases of inconsistency federal law shall prevail over State law. The Full Court of the South Australian Supreme Court had little trouble in holding that there was such inconsistency thereby rendering s.13 invalid. The regulatory provisions in South Australia are currently in the process of being redrafted in order to comply with federal law.

In light of *Pearce* it is more than likely that challenges to *the Human Reproductive Technology Act 1991* (WA) or the *Infertility Treatment Act 1995* (Vic.) in the Supreme Courts of those States, or in the High Court, would also succeed in having the sections which discriminate on the basis of marital status declared invalid. However, because there have been no such challenges (yet!) in those States, the legislation still stands.

In early 1997 the Queensland Anti-Discrimination Board held that denial of donor insemination services to a lesbian was discrimination on the basis of lawful sexual activity under the *Anti-Discrimination Act 1991* (Qld) and ordered $7500 compensation for humiliation and offence suffered by JM.[6] JM is a lesbian who had approached a private clinic in Queensland because she wished to have a baby with her partner, who already had a child. The clinic in question initially accepted her, but on being informed that her partner was female, refused treatment. (JM subsequently conceived through private arrangements and had a year old baby at the time of the hearing). The case was a landmark in the sense that JM was the first lesbian to pursue a complaint in this area, despite anecdotal evidence suggesting that discrimination against lesbians in fertility services is extremely common. Moreover, the decision contains a thoughtful analysis of 'infertility' as the concept applies to lesbian couples,

which there is not space to explore here. (The decision is currently under appeal in the Queensland Supreme Court.)

In March 1997 the Human Rights and Equal Opportunity Commission held in *MW & Ors v Royal Women's Hospital & Ors*[7] that a denial of IVF services to three heterosexual women in long-term heterosexual de facto relationships in Victoria was marital status discrimination under the SDA, and ordered compensation. Ms MW and Ms DD had been denied treatment with their partners at a public hospital in Victoria. Ms DD and Ms AB had both been denied treatment at a private clinic in Victoria. As a result of the refusals, Ms MW and Ms DD both married their partners against their wishes and belief systems (after living unmarried for 20 and 10 years respectively) in order to obtain treatment, while Ms AB and her partner undertook travel to Sydney to obtain treatment.

The three separate complaints were joined and heard together. The first two complainants were awarded $4500 and $5000 damages for distress caused by treatment refusal, and also for the distress of having to marry against their wishes. The third complainant was awarded $2500 damages for distress caused by treatment refusal, and $14,700 for the costs of her travel to Sydney and lost income. (However, if the defendants choose not to pay further proceedings will need to be undertaken to collect the damages, as HREOC no longer has enforcement powers since the High Court decision in *Brandy* v *HREOC* (1995) 183 CLR 245.) The Tribunal noted that it did not have the power to hold the offensive sections of the Victorian statute invalid, as *Pearce* had done in SA.

Whether these three cases will have the effect of actually increasing access to fertility services remains to be seen. The level of opposition to lesbians and unmarried heterosexual women (especially if single) accessing fertility services has always been high, and appears to have increased as a result of these successful challenges. The shape such opposition is taking is explored below.

The eugenics of 'child's best interests' and restrictive access

The language used to decide who ought to reproduce with assistance is currently child-centred. Section 5 of the *Infertility Treatment Act 1995* (Vic.) demands that the 'welfare' of children conceived through donor insemination be the 'paramount consideration' for doctors determining access to donor insemination and IVF, and there is similar wording in ss.4 and 23 of the *Human Reproductive Technology Act 1991* (WA). As noted earlier, the revised NHMRC Guidelines have opted for child-centred welfare-focused language rather than outright categories of permitted applicants. Everybody believes in children's best interests, so it's a nice way of putting it. A welfare test is a nebulous criteria for access, and can readily be used as a smokescreen for discrimination. Given the presence of legislation in three States excluding unmarried women, the cases discussed above, and the former use of 'accepted family relationships' in NHMRC guidelines, the inference as to how children's interests are best served is clear. No Single Mums. And especially No Lezzos.

Moreover the use of the 'child's welfare' test means that doctors are being required by law or policy to decide on the future existence of hypothetical children, based on their projected well being, using a test most commonly implemented in Australia through the *Family Law Act 1975* (Cth). This situation borders on the bizarre, as doctors are determining not where real children should live on the breakdown of couples' relationships, but *which couples should be entitled to have children in the first place*. So it is an issue of the potential welfare of hypothetical children, to be judged by doctors acting as though they were judges. Furthermore, ethics committees are not open forums, and doctors are not required to identify the material on which they base their policies and decisions about the 'welfare' of potential children; decisions which are really about who they think will be good parents. It also is noteworthy that in *JM v QFG* the fertility service in question admitted that if a heterosexual couple went through their psychological assessment process and were determined to be 'completely unsuited' to being parents, they would nevertheless be given access to the service, while a lesbian couple would be denied regardless of suitability (at 8).

State interest in restricting access to fertility services is high. In both *Pearce* and *MW & Ors* the Court and Tribunal respectively invited the State Attorney-General to intervene; the Attorney-General of South Australia did so in *Pearce*, the Attorney-General of Victoria declined in *MW & Ors* but was nevertheless joined as a defendant. The success of the cases has raised the stakes considerably, especially with so called 'pro-family' Liberal and Coalition governments currently in power in all Australian jurisdictions except for NSW. A rash of legislative proposals were suggested by Liberal and National Party Ministers following *JM*, including Queensland legislation to restrict access to fertility services (specifically to prevent access by lesbians), amending the Queensland *Anti Discrimination Act 1991* to exempt fertility services and amending Medicare legislation to exclude rebates to lesbians who use fertility services. (These suggestions were all unlawful; some were in breach of State law, and most were in breach of the federal SDA.) The latest, and only lawful, proposal came from the federal Attorney-General. He is currently considering amending the *Sex Discrimination Act 1984* (Cth) itself in order to specifically exclude unmarried women from fertility services and also from adoption.[8] If passed, this would be the first time since its introduction that additional exemptions had been inserted in the SDA. Such an extreme promotion of heterosexual nuclear families as the 'right' families to raise children with the assistance of donor insemination and IVF services, and now adoption too, sounds very much like what used to be called eugenics.

These responses as a whole also suggest that rights for (some) women in Australia are extremely contingent. On the occasion of lesbians and unmarried women successfully invoking their right not to be discriminated against in this area, the overwhelming reaction of the State is to revoke such rights. This reaction, if carried through, says: You can have rights only as long as you don't use them. It remains to be seen what action will ultimately be taken by government. It is possible that they were simply 'playing to the camera' — as the level of media interest was extremely high.

Outright hatred

If the print media can be taken as any indication, the level of opposition to lesbians having access to donor insemination is far in excess of the opposition to unmarried heterosexual women having access to IVF. *Pearce* was greeted with only one newspaper article, in the *Adelaide Advertiser* (Sylvia Kriven, 11 September 1996). It was a short, positive piece, entitled, **Gail beats law that denied her a baby**.

JM was met with national coverage as relatively factual reports of the decision were followed by a bevy of politicians

and media columnists expressing fury at the decision and at lesbian families generally. In a 10-day period, over 40 articles appeared nationally in the print media in the form of 'news', and increasingly, opinions and editorials. This massive coverage was overwhelmingly negative, and included articles with headings such as **Lesbian Fertility Clinics 'Like Hitler's Super Race Scheme'** (a quote from the Queensland Health Minister no less), **Too Many Rights, Little Thought for Responsibilities** and **$12,000 Aid for Lesbian Families**.

The extremity of the media response to *JM* requires discussion. First was the rash of stories about politician's responses — as the Queensland Health Minister, the Federal Health Minister and the Deputy Prime Minister all expressed total opposition to the decision and proposed many ways to overrule it.[9] In a similar vein many opinion pieces argued that 'aggressive' and 'selfish' lesbians ought not to be permitted to have children because they would inevitably ruin kids lives — especially if they were boys.[10] Both opinion writers and politicians tended to argue that although they personally were tolerant of homosexuality, lesbians had 'chosen' a 'lifestyle' in which child bearing was difficult, and so they should not be entitled to raise children at all. Notably, many of the opinion pieces were commissioned from religious leaders and from right wing religious lobby groups, but there was not a single opinion piece published by a lesbian mother or from a group supportive of lesbians and gays.

There was also a series of articles on the 'funding crisis' regarding the mythical and huge amounts of Medicare funds, usually referred to as 'taxpayers money', which could be 'wasted' on lesbians accessing fertility services (also how politicians planned to prevent this from happening).[11] These articles contained a surface lie — that lesbians were using $12,000 in Medicare assistance. This amount is in fact the maximum amount payable to infertile couples who go through an extended course of fertility drugs and the complicated and risky process of IVF, whereas donor insemination in a very simple process and costs about $400 for each attempt. Such coverage also carried a clear implication that fertility services, no matter how scientifically and technologically sophisticated, are *natural* and desirable when it comes to 'helping infertile couples' or 'families'. The portion of 'taxpayers money', which supports such services is not a matter of public concern — what could be more natural than wanting kids. But the simple testing and provision of sperm is *unnatural* if lesbians are the recipients — because lesbians don't have families, they 'manufacture' children, or indulge in 'whims'.

A month later, the response to *MW & Ors*, although national and certainly more extensive than *Pearce*, was limited to less than a dozen relatively restrained pieces outlining the decision and connecting it to other recent developments. This contrast in coverage between the three cases, especially when considering the relative legal importance of the decisions, suggests a fear of female-centred families, particularly when they are seen to conceal lesbians or lesbian possibilities.

Conclusion

Following *JM*, a director of the discriminatory clinic in Queensland told the press, 'We're not a hot bread kitchen. We don't hand out sperm at the door' (see Sian Powell, *Australian*, 17 February 1997). This remark betrays a sense that service providers are charitable organisations, handing out their valuable resources in a discriminating (as in careful or prudent) manner, not in a free (as in random) manner. It also highlights that service providers do not see themselves as answerable to anti-discrimination laws, and do not see themselves as akin to other health services. The provision of fertility services is an area where doctors see themselves as capable of judging suitable applicants who will be permitted access to their service (and increasingly are being required to do this by law and policy). In this context the use of rights or equality discourse may not serve to change practice.

Lastly, the response of current State and Federal Governments to *Pearce*, *JM* and *MW & Ors* illustrates their express concern to perpetuate the heterosexual nuclear family by whatever means are at their disposal. Whatever response is ultimately undertaken, it must be scrutinised in light of lesbian and other women's equality rights and women's reproductive autonomy.

References

1. See *Human Reproductive Technology Act 1991* (WA) s.23; *Infertility (Medical Procedures) Act 1984* (Vic.) to be replaced in June 1997 by the substantially similar *Infertility Treatment Act 1995* (Vic.) s.8; *Reproductive Technology Act 1988* (SA) s.13.
2. See *Supplementary Note 4*, National Health and Medical Research Council, Canberra, 1982
3. See 'Draft Guidelines on Assisted Reproductive Technology', NHMRC, Canberra, 1996, para. 39.
4. See 'Ethical Guidelines on Assisted Reproductive Technology', NHMRC, Canberra, 1996.
5. (1996) SASR 486. See Stuhmcke, Anita, 'Access To Reproductive Technology — *Pearce v SA Health Commission and Ors*', (1996) 5 *Australian Health Law Bulletin* 39.
6. *JM v QFG, GK and State of Queensland*, Decision of R.G. Atkinson, President Queensland Anti-Discrimination Tribunal, 31 January 1997.
7. Decision of Ms Antonia Kohl, HREOC, Melbourne, 5 March 1997.
8. See Brough, Jodie, 'No marriage, no child: women face new ban' *Sydney Morning Herald*, 3 April 1997.
9. See e.g. 'Lesbian fertility clinics "like Hitler's super race scheme"', *Daily Telegraph*, 4 February 1997 (by the late edition the word 'lesbian' had disappeared from the title, presumably when it was pointed out that there are no such things as lesbian fertility clinics in Australia); 'Axe hangs over lesbians' fertility funding', *Australian*, 4 February 1997; Phillip and Jeffrey Sommerfield, 'Lesbian win angers Fischer', *Daily Telegraph*, 3 February 1997; Sid Mather, 'Angry Fischer hits lesbian baby ruling', *Sunday Mail*, 2 February 1997; Matt Robbins, 'State to ban lesbians from fertility programs', *Australian*, 3 February 1997, 'Qld may ban lesbians from access to sperm banks', *Canberra Times*, 14 February 1997. The unlawfulness of these suggestions did not escape all of the print media: see Sanderson, Wayne, 'Sperm bank change "doomed to failure"', *Courier Mail*, 8 February 1997; Powell, Sian, 'IVF services provide fertile ground for discrimination', *Australian*, 17 February 1997.
10. See e.g. Miranda Devine (regular columnist), 'Fertile grounds for dissent', *Daily Telegraph*, 4 February 1997; Bill Muehlenberg (a member of 'Focus on the Family' a right wing religious group), 'Too many rights, little thought for responsibilities', *Canberra Times*, 10 February 1997; Peter Hollingworth (Anglican Archbishop), 'Lesbian ruling opens ethical can of worms', *Sunday Mail*, 9 February 1997; Piers Akerman (regular columnist), 'Same sex couples condemn the young', *Daily Telegraph*, 6 February 1997; Mary Helen Woods (member of Australian Family Association, a right wing religious group), 'IVF babies need fathers', *Herald Sun*, 7 February 1997. See also Sarah Harris (regular columnist), 'Laughing all the way to the sperm bank' clothed as an article about how 'nice' lesbians disapprove of the decision, *Sunday Telegraph*, 9 February 1997. Only one opinion piece was supportive of the decision, Dr Kerryn Phelps (regular medical columnist) 'Medical discrimination', *Herald Sun*, 10 February 1997.
11. See e.g. Sue Dunlevy, '$12,000 aid for lesbian families', *Daily Telegraph*, 4 February 1997.