

Mooters debate eligibility for IVF treatment

By Henrietta Champion de Crespigny

The 2012, 6th Annual Charter of Human Rights Moot competition gave law students a valuable opportunity to hone their research and advocacy skills and to debate topical issues surrounding Victoria's Charter of Human Rights and Responsibilities Act (2006). The problem concerned provisions of the Assisted Reproductive Treatment Act 2008 (Vic) ('ART Act') which were relied on to refuse IVF treatment for plaintiffs Bob and Jane, due to Bob's criminal record. Pursuant to s 15 of the ART Act Bob and Jane appealed the blanket exemption to the Patient Review Panel. The Panel rejected the appeal due to a concern for the child's potential welfare, health and the risk of abuse based on Bob's criminal record and bi-polar disorder. Whether the initial refusal and subsequent review process violated Bob and Jane's human rights was at issue.

In the preliminary rounds, 11 teams from both Victorian and – for the first time, interstate – universities performed to a high standard, especially given the short amount of time available between the release of the problem and the first round. The preliminary rounds were held at the Melbourne offices of Clayton Utz, with their lawyers acting as judges. After two rounds of fierce mooting, four teams reached the semi-final, namely: La Trobe, Deakin, Melbourne and Sydney universities. All four teams provided a high quality performance before the semi-final panel of four judges consisting of three members of the Victorian Bar – Ruth Shann, Alistair Pound, Richard Wilson – and Clayton Utz partner Kym Fraser.

The La Trobe University and Sydney University teams were victorious and proceeded to the Grand Final which was held in the Court of Appeal. The atmosphere was buzzing with a full crowd and a highly distinguished bench comprised of The Honourable Justice Pamela Tate of the Court of Appeal of the Supreme Court of Victoria, the Honourable Judge Felicity Hampel of the County Court and Professor Spencer Zifcak from Australian Catholic University.

La Trobe, representing Bob and Jane, challenged the negative decision of the Patient Review Panel and sought a declaration that the relevant sections of the ART Act were inconsistent with human rights. They argued that the blanket refusal to access IVF treatment on the basis of Bob's criminal record was an inherently discriminatory provision. Senior Counsel, Alana Thompson, supported by her instructing solicitor Jess Connolly, submitted that the discrimination against Bob was not justified because he was at a low risk of re-offending, had completed rehabilitation, and had a type of bi-polar that was unlikely to be hereditary.

Junior Counsel, Patrick Decaya, asked the Court to make a declaration of inconsistency. He adopted the Court of Appeal's

decision in *Momcilovic* to support his argument. This argument led to numerous animated exchanges with the bench on fine points of this complex problem.

After a very strong case from the appellants, the Sydney University team were ready to argue their case. Roisin McCarthy, Senior Counsel for the respondent, argued that the appeal should be dismissed. Even though the requisite rights were engaged, they contended this was a justified rather than an unlawful limitation. Sarah Bradbury, Junior Counsel for the appellants emphasised that there was no inconsistency between the ART Act and the Charter. Also following the Court of Appeal's 3-stage test in *Momcilovic*, they concluded that the discretion was a necessary and reasonable one. The bench interjected with a quick succession of questions that tested the respondents' ability to think on their feet, but they handled the questions with aplomb.

All three judges were extremely complimentary of the high quality of both teams' written and oral submissions and the human perspectives that were given to the case. After retiring to consider their decision, the judges awarded Roisin McCarthy best speaker, and awarded victory to the respondents from Sydney University. They took home the \$3,000 first prize, while the runners-up received \$1,000. The generous prize money was provided by Clayton Utz as part of its overall sponsorship of this event.

Professor Zifcak referred to the evening as a "reciprocal process of learning". The moot undoubtedly provided all those involved with both an enjoyable and educational experience that we look forward to repeating next year.



L-R The Grand Final judges: The Honourable Judge Felicity Hampel, the Honourable Justice Pamela Tate and Professor Spencer Zifcak