

LEGAL STUDIES

“The legal system needs to be adaptable to the changing needs of society”.

Evaluate this statement in relation to the role of law reform agencies and the conditions which give rise to the need for law reform in the area of family law.

The Family Law Act 1975 refers to a family as “the natural and fundamental group unit of society which is particularly responsible for the care and education of dependant children”. “The legal system needs to be adaptable to the changing needs of society” to ensure family laws are suitable and reflective of the current trends within its nation-state and to also ensure justice and compliance is achieved. The Australian legal system is continuously dealing with an array of family conditions which give rise to the need for law reform. Such conditions include the innovations of new technology, societies changing social values and the ratification of international laws. These conditions prompt the need for law reform which is dealt with by law reform agencies. These bodies have a vital role to ensure present laws are concurrent with society’s demands and ideals. Such agencies which deal with these emerging conditions consist of the Australian and New South Wales Law Reform Commission (ALRC and NSWLRC), parliament and the courts. These agencies are evaluated in terms of their resource efficiency and ability to introduce swift changes to the legal system on both state and federal levels.

Condition: New Technology

New technologies are constantly being innovated and often create moral and legal issues that are not yet addressed by the legal system. Therefore, the legal system must be aware of the constant technological advances that require family law reform. Birth technology is an example of a technological advancement that has required the attention of the parliament. Traditionally, children have only been able to be born through sexual intercourse. Consequently, it was clear who the legal mother and father of the child was. However, through the introduction of birth technologies such as artificial insemination (AI) and in-vitro fertilisation (IVF), such legal issues have arisen. According to the SMH 09 article “Age-old question of IVF funding”, “More than 3% of babies are born via reproductive technologies”, which have been allowed through significant family law reforms. The NSW legal system has adequately been concurrent with this condition as it was the first state to introduce legislation addressing it. In 1984, The Artificial Conceptions Act (NSW) was introduced which covered issues relating to AI and IVF using donated sperm. This law promoted equality as infertile individuals were able to have an equal right to start their own family. This law, however, was seen deficient to a degree as it did not cover children conceived via donor ova. These children were later covered in The Status of Children Act (NSW) (1996). This newly introduced Act was advantageous to the rights of children as it stated that naturally and assisted born children are by law, of equal status.

In the case of *WVG*, a lesbian woman was made to pay child support for two of her deceased partner’s children born via AI of whom she had no legal relation to. This case shows that birth technologies do create problems which are not adequately covered by legislation. Also, a case in Melbourne in 2003 investigated by the HREOC found that three unwedded women were denied access to IVF treatments due to their marital status. Such inequalities display that equality is not always achieved through the use of such technologies.

However, the NSW legal system has satisfactorily dealt with the condition of birth technology in a time-efficient manner through the swift introduction of relevant laws, and has consequently been “adaptable to the changing needs” of society.

Agent of Reform: The New South Wales and Australian Law Reform Commission

Law reform commission's play a vital role at closely analysing legal institutions to ensure they are effective. Although law reform commissions such as the ALRC and NSWLRC cannot directly amend legislation, such bodies prompt parliament to consider particular reforms.

As the court's procedures are adapted to that of interpreting cases, the courts cannot carry out investigations to ascertain whether particular common law rules are working well. Therefore, law reform commissions play an imperative role at ensuring the law is adapted to the changing needs of society.

The NSWLRC was formed in 1966 and proposes changes to NSW legislation due to an array of family law conditions. Its main aim is to ensure that the legal system is "adaptable to the changing needs of society". The functions of this commission are stated in section 10 (1) of the Law Reform Commission Act 1967. This Act states that the commission is required to:

- Eliminate defects in laws
- Revoke obsolete laws
- Simplifying and modernising the law

The NSWLRC's effectiveness is displayed through their investigations and proposed reforms on the condition of new technology. This is displayed through their most recent 1985 report, titled "Human Artificial Insemination". This report investigated key issues relating to birth technology that the government should explore when introducing and reforming legislation covering this area. In this report, the NSWLRC recommended for the government to allow homosexual couples to have collective access to birth technologies and to also allow single parents to gain access to such procedures. The commission also emphasised on the need for the government to integrate the needs and welfare of children when formulating legislation. The government has reasonably responded to this particular recommendation through the introduction of the Status of Children Act 2006 (NSW) which gave children born via reproductive technologies equal rights to those born via natural means. The NSWLRC can be seen to be partly resource-inefficient as they have not conducted any recent inquiries into the effectiveness of birth technology laws, thus have not identified current concerns, such as the desire for same sex couples to be the collective parents of children born via such technologies.

The ALRC was established in 1975 and operates under the ALRC Act 1996. This commission has the task of advising the reform of family laws on a federal level and states on its website that it has an aim of:

- "Bringing laws into line with current conditions."
- "Simplifying laws and removing defects in the law."

The ALRC holds a major role at ensuring the law is effective for all Australians. This is shown as in 1998; the commission released the 'Seen and Heard report' which was a two year inquiry to examine the effects of the legal system on children. The report made 286 recommendations to parliament to overcome problems including child abuse. This report displayed the ALRC's ability to promote equality for children colluded in the legal system. As stated on the ALRC website, "75% of the Commission's recommendations have been adopted by the federal government".

This prominent figure illustrates the commissions resource efficiency and ability to ensure "the legal system is adaptable to the changing need" and ideals within society caused by the changing social values of children.

Condition: Changing Social Values

Changing social values refers to the changing ideals within a nation-state and is another condition which has motivated law reform. The law must ensure that it is reflective of the current values and trends, and balances the rights of the individual with the community. This is done to ultimately ensure that the law is “adaptable to the changing needs of society”. Due to the changing social attitude towards homosexuality, gay relationships were decriminalised in all states. The Nicholas Toonen v Australia case dealt with a sexual relationship between two Tasmanian males. Toonen challenged the Tasmanian Criminal Code which criminalised homosexual activity. He took this matter to the United Nations which ruled in his favour. This landmark decision led to the introduction of The Property (Relationships) Act 1984 (NSW) which approved gay entitlements such as individuals gaining victims compensation on behalf of their partner and recognised gay couples as ‘Defacto partnerships’. Through the introduction of this law, gay couples were given the same rights as non-married heterosexual couples. The Property Relationships Legislation Amendment Act 1999 reformed this law and gave gay couples additional rights including inheritance rights and specific rights for if the relationship ceases. Through the introduction and reform of legislation allowing homosexual relationships, it is illustrated that the Australian legal system has finally promoted equality and has been “...adaptable to the changing needs of society”.

However, this statement can be criticised to a degree as under The Adoption Act 2000 (NSW), gay couples still cannot adopt a child collectively. Also, under The Marriage Act 1961, same-sex couples are not legally able to wed. Even though there was a move in July 2009 to legalise gay marriage, parliamentarians will be slow in addressing this issue as it is quite sensitive and controversial. Such overt discrimination suggests that the law is not completely reflective of the ‘needs’ of gay couples or community standards and has not adequately promoted equality or responded to changing social values within Australia.

Agent of Reform: Courts

The courts have always been relied upon to identify defects in family law. The process of common law allows courts to apply legislation to individual cases which can ultimately instigate the move for law reform. However, as the courts have to rely upon using the doctrine of precedent and are quite powerless to change the law, the courts prove to have a very narrow and limited scope in the area of law reform. The effectiveness of the court system in instigating the need for family law reform was evident in the case of Hope and Brown v NIB Health Fund Limited (1994) whereby the HREOC recognised the changing composition of society in relation to same sex couples and ordered that gay couples have the right to family health insurance. This case shows the resource efficiency of government bodies such as the HREOC and court system. Another case which has led to the reform of family legislation is the case of R v McEwen. This trial recognised the legitimacy of the defence of ‘battered women’s syndrome’ in same sex relationships. Even though at times, the court system proves to be a resource inefficient process characterised by the timely and costly nature of court proceedings, it is illustrated through such cases that the courts play a direct function, on a common law level at identifying imperfections in the law.

Therefore, the court system plays an imperative role on a state and federal level at ensuring family legislation is reformed so it is “... adaptable to the changing needs of society”.

Condition: International Law

International law refers to bodies of laws formed between nations. This is a further condition that has given the need for law reform. The Australian government signed the United Nations Convention on the Rights of the Child (CROC) in 1990. The ratification of this has been a prominent condition which has given the need for law reform. The Family Law Reform Act 1995 (Cth) was introduced in response to the ratification of the CROC. This law established principles for children including for all actions concerning children to be in ‘the best interests of the child’. The paramount

goal of this law was to abolish the traditional theory that children were to be seen and not heard. The Australian government has also reflected its interests in relation to the rights of children in the 1997 ALRC and HREOC report 'Seen and Heard: Priority for Children in the legal process' which critically examined the status of young people in Australia. This study revealed that the legal process inadequately dealt with various issues relating to children including the intimidating format of the legal system for children. This report led to the establishment of the NSW Office for Children. The ratification of the CROC also led to other legislative moves including the introduction of the Children and Young Persons (Care and Protection) Act 1997 and the Young Offenders Act 1998. Both of these laws emphasise on ensuring the needs and desires of all Australian children are of paramount importance. The FLRA introduced the notion that all children, in the event of a broken down marriage, should be entitled to shared parenting. This aspect was illustrated in the case of BvB (1997) where the court ordered two children to visit their father who resided in another state every school holidays to maintain a solid relationship with both parents as this was in the 'best interests of the children'. Even though, international law can be seen deficient as state sovereignty is the presiding power in any state, the Australian government has adequately addressed and incorporated this convention into domestic legislation. Through the various legislative moves which have responded to the ratification of the CROC, it is illustrated that family law has promoted equality for children and has adequately been reformed to cater for "the changing needs of society".

Agent of Reform: Parliament

Family law issues create jurisdictional concerns which are ultimately dealt with by parliament. Parliament is an agency that plays a vital role in reforming family law as they are the principal lawmakers.

Parliament has been effective in ensuring most legislation is concurrent with the present trends of society. This is seen through the ratification of the CROC which reflects the changing value of children. Due to the changing status of children, Parliament enacted legislation to recognise this condition. Through the introduction of the FLRA, YP (CP) Act and YO Act, parliament has displayed their resource efficiency and capability of ensuring children receive justice. However, Parliament is often criticised because they tend to be slow when amending and introducing new legislation due to the congestion of the legal system. Ultimately, parliament does however aim to ensure they adapt legislation so it is relevant to the "changing needs of society" and this is illustrated through the countless reforms of all family law issues throughout history including the introduction of The Young Persons Care and Protection Act 1998 after the CROC was ratified.

Overall, it is evident through conditions including technological advances, changing social values and international laws that law reform agencies must ensure family legislation is reflective of the ideals of citizens within its nation-state. Agencies which impel family law reform include the NSWLRC and ALRC, Parliament and the Courts. These bodies hold a large responsibility to ensure laws are up-to-date and effectively reflect "the changing needs of society".