

LEGAL STUDIES

Family Law

As society continues to evolve and develops, the values, morals and ethical standards that were once important to a particular generation can be significantly altered. Therefore, it is imperative that the legal system evolves and reforms to meet the needs of society, thus balancing individual and community rights.

Law reform is a significant element in the Australian legal system because the effectiveness of the level of protection a society is subject to is dictated by the ability of the legal system to respond quickly to the changing needs of society. There are several agents for law reform, and one of these is new technology. The development of alternative reproductive technology (ART) has led to the need for law reform as groups in society want access to ART's. One example of ART is surrogacy, which involves the commissioning couple allowing or asking another female to carry their baby, as a couple is infertile. In Australia, commercial surrogacy which involves surrogacy for money, is illegal and outlawed, however, the use of intrusive surrogacy is legal. Another form of ART is in-vitro fertilisation (IVF) and involves a female being inseminated with donor sperm. The increasing development of such technologies has seen great debate in society. This is because laws in each state differ, leading to inconsistencies in the law, and thus, some individual alternative family arrangements are discriminated against.

This was evidenced by the landmark case, *McBain Vs State of Victoria 2000*. Dr McBain, a gynecologist specializing in ART's, came across an inconsistency in laws. The Victorian **Fertilization Act 1985 (Vic)** was inconsistent with section 22 of the **Sex Discrimination Act 1984 (Cth)**, which stipulated that it was illegal to discriminate on the basis of marital status or sexuality, which the Victorian law did. Dr McBain argued this case against the state of Victoria in the Federal Court after being approached by a single woman who wanted to use IVF. The Federal court found that the **Victorian Fertilization Act 1986 (VIC)** was inconsistent with the **Sex Discrimination Act 1984 (Cth)** and granted McBain the right to use IVF on his patient. However in 2002 Prime Minister John Howard stepped in and allowed the **Sex Discrimination Act 1984 (Cth)** to discriminate against single women and homosexual couples. This reform aimed to protect and balance the interests of the community by ensuring that children were entitled to both a mother and a father. This shows the ineffectiveness of the law in achieving justice for single individuals and homosexuals.

The law also reforms due to changing social values of society and the changing composition of society. Recent developments in society such as the increase in alternative family arrangements, have thus led to law reform. The increasing prevalence of de facto families and single sex families, has called for reforms in the law to protect these individuals. This saw the passing of new legislation, the **De Facto (Relationships) Act 1984 (NSW)** which officially recognized de facto relationships.

The law was then further reformed to become the **Property (Relationship) Act in 1984 (NSW)**. Under these laws, de facto couples became recognized and in an event of separation, they were given the right to seek legal advice on property division, making their access to the legal system more equal.

Another aspect of the law that raises law reform is the failure of existing laws. In protecting family members, the law has become more effective. An example of this is the reform to the **Crimes Act 1900 (Cth)**. Under this amendment, **Crimes (Domestic Violence) Amendment Act 1982 (NSW)** and also the **Crimes (Sexual Abuse) Amendment Act 1982 (NSW)**, the law has made it increasingly more effective for individuals to achieve justice and be protected. These laws limit violence between spouses and

children, showing how the law has responded to social change. In the early 1900's it was acceptable for a husband to abuse his wife for correctional purposes, however under the reform to the **Crimes Act 1900 (NSW)** women are protected, and creating equality.

Law reform occurs through the Parliament and the Law Reform Commission (LRC). Under both these institutions, the **Family Law Act 1975 (Cth)** has continually been reformed to ensure that all family members are adequately protected. The **Family Law Reform Act 1995 (Cth)** was amended to reflect the changing value of society and protect family members. Under the reform, one of the principle aims was to increase peaceful resolution between separating parties. It was also reformed to include Australia's ratification to the **Convention on the rights of the Child (CROC)** which outlined the basic rights of all children such as adequate shelter, food and education. The most recent development in family law was the **Family Law Amendment (shared Parental Responsibility) Act 2006**. Under this new law, those individuals involved in the dissolution of a marriage were given equal parenting rights. The reform established that children would be protected and would be entitled to equal access to both parents. This was effective as it reformed the need for children to have equal access to their parents and relatives in the event of a divorce.

Courts also play a fundamental role in the development of law reform. Judges use their discretion on the situations that arise in court. The Family Court, established under the **Family Law Act 1975 (Cth)** is fundamental in achieving law reform. The Family court has jurisdiction in all family matters and as such has employed mechanisms such as mediation services to create greater access to family members in the event of divorce. The court also is unbound by precedents thus giving each case a more individual analysis allowing for greater equality. The court provides mediation and counseling services for couples divorcing to discuss the most effective outcomes for the children involved.

The increasing level of alternative family arrangements has led to the growth in law reform. The nuclear family is no longer the 'norm' of society and newly emerging family types include blended families, single sex, de facto, single parents and many others.

Today there are fewer stigmas associated to single parent families which result from many different events.

In the case of single parents families having children without marriage, that is, ex nuptial children, the rights of the children have been protected by the law under the **Children (equality of Status) Act 1976 (Cth)**. This ensures that children born in and out of marriage are given access to the same rights, promoting equality.

Child maintenance and spousal maintenance are covered under the **Family Law Act 1975 (Cth)** which outlines the need for parents and ex spouses to pay maintenance for the welfare of the family.

The most controversial issue in society is that relating to same sex unions. Regardless of the several introduced legislation that serve to recognize de facto and same sex relations, same sex couples are discriminated against. The **Adoption Act 2000 (NSW)** makes it illegal for same sex couples to adopt as the law requires adoption by a man and a woman. An example of how same sex couples are disadvantaged is evidenced in the case of **Hope and Brian vs. NIB Health Fund 1995**. Mr. Hope and Mr. Brian were denied a family health care package based of their sexuality. Their case went to the High Court which ruled that NIB was discriminatory. This is just one example of how same sex couples have been discriminated against.

Therefore, it is evident that law reform has both negative and positive consequences. In some aspects of law reform outcomes have been advantages and successful however, this is not the case in all reforms. In relation to alternative family arrangements there has been significant change made to the law of which some are effective and others fail to protect society and family members.