

LEGAL STUDIES

Family Law: “Society moves ahead and the law limps behind.”

Society’s views and expectations of law are constantly changing due to factors such as increased education and international influences, thus the law is placed under immense pressure to conform and meet these expectations. However, in order for the law to be effective in regards to reform, the legal system must encompass the capability to quickly apply changes to the legal system. When one takes into account the strenuous process involved in law reform and the reality that statute law usually mimics the ideals of representatives who may only reflect a minority of society, thus, the area of law reform in regards to Family Law is often a slow and arduous process. Therefore the statement that the development of society often does not reflect the development of law is completely relevant in regards to many aspects of Family law such as **same sex relationships** and **birth technology**.

Under the landmark case of *Hyde v Hyde Woodmansee (1866)*, the legal definition of a marriage was established as a ‘union between a man and a woman voluntarily entered into for life, to the exclusion of all others.’ Although this definition still remains as an important piece of precedent, it has undergone vast transformation to reflect society’s expectations of the law. For instance, the prevalence of divorce in society required the dissolution of the ‘for life’ element of the definition, and now simply refers to the ‘life’ or duration of the marriage. However, as society continues to recognize and accept same sex couples, the law refuses to allow same sex marriages to occur.

This raises the question of whether the law is acting on behalf of society or is simply an attempt to maintain traditional values. A 2007 opinion poll run by ‘GetUp!’¹ found that seventy-one percent of participants agreed with same sex couples receiving the same rights as de facto relationships, reflecting the provisions of the Property (relationships) Act 1984 (NSW)² which now recognizes that same sex relationships have the same legal standing as de facto relationships. However, only fifty-seven percent supported same-sex marriages, sustaining a twenty percent increase since 2004, suggesting that the law had previously supported society’s expectations, but now has become outdated, highlighting the fact that the law is failing to keep up with society.

Supporters of same sex marriages believe it is a breach of Human rights and is “systematically excluding them from society and its institutions”³ and limits their rights to adopt, jointly purchase property and have a say in their partner’s medical treatment. Currently same-sex couples cannot jointly adopt a child, “one parent must adopt as an individual and the other has no legal standing as the co-parent, leaving their child in legal limbo”⁴, jeopardizing the best interest of the child.

The landmark case of *Re Kevin [2002]* challenged the legal definition of a marriage once again. In this case the ‘man and woman’ component was questioned as ‘Kevin’ was identified as a female at birth. However, prior to the date of his marriage he had undergone a total “hysterectomy with bilateral oophorectomy”, constituting as ‘sexual reassignment surgery’ under section 32A of the Birth, Deaths and Marriages Act 1995 (NSW), and therefore was no longer classified as a woman on the date of his marriage, validating the legal institution. This case is an example of the law complying with advancements in the medical field and synchronizing with the progress of society and knowledge.

¹ The Poll consisted of 1100 pupils over the age of 16

² The de facto relationships Act 1984 (NSW) was amended and renamed Property (relationships) Act 1984 (NSW) to accommodate the broader definition of the term ‘domestic relationships’

³ Act Now, Same sex Marriage debate

⁴ Clover Moore, Sydney Morning Herald, June 24, 2010

Over time, legislation has developed in an attempt to protect same sex couples; in 1984 heterosexual protection was included in the De facto relationships Act, and recently the Same sex Relationship (Equal treatment in Commonwealth Laws-superannuation) Act 2008, was enacted as a result of an inquiry which found that “at least 58 federal laws relating to financial and work-related entitlements discriminated against same-sex couples”.⁵

These slow advancements in legislation do not match the growing tolerance of same-sex relationships and therefore the statement that ‘society moves ahead’ and the law ‘limps behind’ is completely relevant. The law must, in order to ensure efficiency in reform, recognize the changing composition of society encompassing differing social values. It must also take into consideration the failure of existing law to provide equality for same-sex relationships, the severe restriction of their rights which has not been completely rectified. International trends to allow gay marriages has not been considered in a progressive way, but rather the contrary, specifically banning the right for gay and lesbian couples to marry in Australia through the Marriage Amendment Act 2004 (Cwlth).

The law may also be criticized in its treatment of homosexuals in regards to gaining access to birth technology, an area of law which in itself maintains ineffectiveness in regards to reform and a failure to recognize and consider the common trends in society. These advances in technology create the necessity for new laws to govern their use.

Under common law the mother of a child is recognized as the woman who gave birth to the child, and the father, one who accepts responsibility for the child, or if his fatherhood has been proven through the court. With the development of Birth technologies such as Artificial insemination donor (AID), gamete intra fallopian transfer (GIFT) and In vitro fertilization (IVF), the law can no longer assume the biological parents of a child via these means. The constant changes in medical developments raise the question whether laws regarding Birth technology and research mimic the social standards of the majority of society. The United Nations Convention of the rights of the Child (CROC) outlines the ‘right of the child to know his or her heritage’, which is inconsistent with the use of anonymous gamete, denying the right of a child to know their biological parents. This is highlighted in the case of *B v J (1996)*, where the court used the concept of ‘presumption of paternity’ to determine the father instead of the child’s biological parent, the sperm donor. In this case the legal father refused to pay maintenance as he argued his name was not on the birth certificate and therefore was not the father. The court held that he was automatically the child’s father as a result of the ‘presumption of paternity’. This case is an example of the law failing to consider a child’s rights and therefore would not reflect society’s expectations of the law.

Another ethical issue is brought into light as the possible commercialization of these services may develop, taking advantage of their infertile clients for primarily economical benefit, with the best interest of the patient following.

New birth technology has arguably created the greatest challenge for the efficiency of law reform, as this is a controversial area, the law may struggle to conclude an appropriate remedy which reflects society’s expectations and thus any attempts to enact legislation may take a long time as seen with the Assisted Reproductive Technology Act 2007.

Unlike the enactment of legislation, courts only encompass the power to create precedent after a matter is brought to court, and thus may be seen as inefficient itself in regards to reform as it requires society to advance beyond the law in order for common law to evolve. It may however, encourage legislative change to reflect societies views.

⁵ Australian Human Rights Commission

The ineffectiveness of reform derives from the changing social values of society, failing to quickly respond to changes in birth technology. These technologies exemplify the need for law reform to reflect changing social values, however as this area encompasses much controversy, it is impossible for the law to reflect society as a whole.

Law reform commissions play a major role in reviewing the law by undertaking inquiries in areas which may require alteration. The NSW law reform commission only encompasses the power to review laws within the state's jurisdiction regarding both birth technologies and same sex relationships, in which adoption and birth technologies may be reformed to allow greater access for same sex couples in New South Wales.

The Australian Law Reforms commission operates on a federal level and makes suggestions regarding areas of concern, such as suggesting reform to change legislation regarding same sex marriages.

Law reform, whether it be through statute or common law is a slow and arduous process in all aspects of law including Family Law. This is often due to conflicting attitudes towards many issues in this area, and therefore allowing for little change in the legal system, such as the incapability for the law to accept same-sex marriages and the slow development of legislation in regards to the controversial area of Birth technology. Thus, the statement that "...the law marches with medicine, but in the rear, limping a little..."⁶ reinforces this concept.

⁶ Justice Windeyer

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