

## LEGAL STUDIES

### Family Law Essay: Equality, protection accessibility and balancing individual and community rights in relation to the law.

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Family Law is one of the most dynamic areas of Australian Law, due to the continuity and change of the concept of a 'family' and the complications that can arise within a family unit. Despite minimal areas that must be developed in order to increase efficiency, the response of the law to these problems has generally succeeded in achieving justice for both individuals and society. This effectiveness can be measured based on equality, protection accessibility and balancing individual and community rights in relation to the law. These attempts are made primarily through the Family Court of Australia, The Children's Court, the Department of Community Services (DoCS) and The Joint Investigation Response Team (JIRT).

Equality is the chief aim of Australian legislation, seen in The *Family Law Act (1975)* [FLA], which outlines what should be taken into account when the Family and Children's Court decide on matters relating to children. These include: the wishes of the child; the need to protect the child from abuse; the effect of changing the child's living conditions; and any family violence involved. The last criterion was first introduced in 1995, which recognised that violence in the family, even if not directed at the child, can negatively affect the child and thus should be taken into account. Although this has been criticised as re-introducing fault into the dissolution of marriage, where the FLA introduced true 'no fault' divorce, it highlights the recognition of the individual rights of the child. This directly complies with the 1989 treaty *United Nations Declaration on the Rights of the Child*, ratified in Australia in 1991. It declares that all children should be able to grow in a normal manner and be free from exploitation, evidently illustrating equality and protection accessibility within the law. The effectiveness of the Children's Court is also reflected by the fact that it provides free legal aid to any child involved in court cases, who are exempt to sit a means or merit test.

Nevertheless, the Family Court has often been criticised for its gender bias in awarding mainly mothers child custody. This conflicts with the community's gradual disregarding of the view that it is the mother's role to care for children. In fact, in the case of *Sheppard v. Sheppard*, the court granted that it was in the child's best interests to live with the homosexual father and his partner. This abolished any beliefs that homosexual parents are not satisfactory parents or that their heterosexual counterparts can provide a more stable upbringing for a child. Equality in gender and tolerance of sexual preference is thus becoming more and more the prevailing philosophy of Australian family law. However, other family arrangements are not subject to the same rights, conflicting the balance of individual rights. For instance, Aboriginal and Torres Strait Islander marriages, and their customary law, have failed to be recognised by Australian Law, often because of the practice of polygamous marriages, thus hindering their access to the law.

Recent amendments through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* [SPR], emphasise the joint and shared responsibility of parents in raising their children, including after divorce. It identifies the rights of children to know their parents and be protected from harm, the primary factors for the court to consider in determining the "best interests" of the child. The Act also states that "both parties to a marriage are the guardians of any children of the marriage who have not attained the age of 18 years." These various rights and obligations demonstrate that the legal system has effectively responded to changing community values in achieving justice for family members. This was most effectively seen in the verdict of *D v. D*, where the mother was ordered to stop breastfeeding her son so his father could have overnight contact with him. Contact is now a right of the child with both parents under a responsibility to ensure that the child has regular contact with the non-resident parent, clearly a step towards entirely achieving justice. However, the lack of effectiveness of the law in this aspect can be seen in adoption issues, where the right of the adopted child to know their biological parents is challenged against the right of their birth parents to remain anonymous.

Under the *Crimes Act 1900 (NSW)* domestic violence refers to violence within a domestic relationship. Over the years the definition has widened to include “actual or threatened violence or harassment between partners”, which highlights the law reflecting changing community standards and expectations. The launch of the Family Court’s Family Violence Strategy (2004) addressed the fact that violence is a feature of more than 2/3 of marital breakdowns. The government responded in the same year by supporting the creation of 65 new Relationship Centres in capital cities, regional and rural areas across Australia, to assist parents to resolve parenting disputes. Also, the Domestic Violence Intervention education program (2001) was created by NSW parliament to educate young people about the issue. This, coupled with the establishment of Family Relationships Online and Advice Line, outlines improvement in accessibility in the law. Furthermore, a less adversarial and less costly approach to children’s matters was established through the Children’s Cases Program (2006). Its focus is on the future of the children where the court is not interested in views of the parents about each other. Additional initiatives such as Operation Paradox, Child Protection Investigative Units and Enforcement Agencies have further ensured greater protection of family members, allowing the prospect of achieving equality more realistic.

On the other hand, the article *Mother and Father of All Change* (2006) discusses the ineffectiveness of the SPR Act. It states, “The new law will raise fathers’ expectations to unrealistic levels, fuel more litigation, expose more children to danger and conflict, and... put renewed emphasis on parents’ rights rather than children’s needs.” In response to these criticisms, the Act endeavoured to place even more emphasis on children’s rights by removing the words ‘custody’, ‘access’ and ‘guardianship’ from the legislation. These words were seen as confrontational, emphasising the ‘victory’ of the parent who had ‘won’ custody of the child. However, other areas of the legislation still need a change in legal terminology to be more clear and concise, leaving no room for misinterpretation. Particularly, division 11 of the Act where Apprehended Domestic Violence Orders (ADVOs) clash with contact orders in relation to children. Furthermore, the introduction of video conferencing may be used as an instrument to allow non-residential parents to ‘visit’ their children via the internet. Thus, they may remain in close contact with their children without violating or breaching their AVOs, which may be seen as highly effective by providing accessibility, yet still maintaining enforceability of the law.

Children in domestic violence situations are further recognised by the *NSW Children and Young Persons (Care and protection) Act 1998*. Under the Act it is an offence to abuse a child as the protection of the child is of “paramount concern.” Whilst this does not provide formal equality under the law, it is in line with a transformed community perception that all children should be protected. However, the Act mainly relies on people with a duty of care (social workers, teachers, doctors) to report suspected violence victims to DoCS. As such, the NSW Bureau of Crime Statistics (2010) showed that 1 in 4 females and 1 in 8 males are still abused by the time they reach 18 years old. Further, 76% of domestic violence towards a child is direct and 24% indirect (child intervention). In light of the ineffectiveness detected, the JIRT joined with DoCS, the NSW police and the NSW health team to assess and investigate serious cases of child abuse where a criminal offence had occurred. JIRT is extremely effective in responding to children in violent or abusive families, as it links the risk assessment and protective interventions of DoCS with the criminal investigation of the NSW police and prosecutions of the Department of Public Prosecutions. It also incorporates medical examinations, crisis counseling and intervention services of the NSW Health Department. As DoCS is very busy and cannot investigate every case given to them thoroughly, JIRT was implemented to successfully aid this problem, and provide justice to individuals and society.

Conclusively, the concepts of equality and justice are difficult to apply in the context of family law, as socially, the different family units present today may not be in direct compliance with the legal system – and vice versa. Nevertheless, the Australian Governments have a wealth of legislation and subsequent law reforms that have been installed in an effort to comply with changing community standards and expectations of Australia. Thus, despite some inevitable flaws in the system, Family Law is extremely effective in providing justice for the individual, society and wider nation-state of Australia.