

LEGAL STUDIES

Contemporary Issues Concerning Family Law

RECOGNITION FOR SAME-SEX RELATIONSHIPS

Between 2005 and 2010, the rights of same-sex couples in Australia were significantly advanced. This was done firstly by bringing same-sex relationships within the broader definition of 'de facto'; and then, by wide-ranging legislative change that removed much of the discrimination against de facto couples and their families that previously existed in many areas of the law. However, this has not been extended to the right to get married. Giving same-sex couples the right to legally marry appears to be the last frontier in terms of their bundle of legal rights, along with rights of adoption, which are still recognised in only a minority of jurisdictions.

Legal Responses

Human Rights and Equal Opportunity's report entitled 'Same-Sex: Same Entitlements' in 2007 – important report stimulated understanding that additional and significant formal change was required to remove discrimination against same-sex de facto couples and their families.

The Rudd Government passed 'umbrella' legislation that recognised and extended equal rights to same-sex de facto partners and their families across about 100 different areas of the law where discrimination had previously existed.

- The areas of the law addressed included superannuation, workers' compensation, hospital visitation rights, immigration, inheritance, Medicare, Centrelink benefits etc.
- Same-Sex Relationships Act 2008 – covered superannuation and general law reform

The Relationship Register Act 2010 (NSW) – allows same sex couples to register their relationship with the NSW registry of births, deaths and marriage's and assume all the rights provided to a de facto couple under the law.

Non-legal Responses

Lobby and campaign for the legal rights and social equality of gay and lesbian couples

- Australian Marriage Equality (www.australianmarriageequality.com)
- Gay and Lesbian Rights Lobby (<http://glrl.org.au/>)

The media gives a voice to both sides of the argument, and allows certain groups to apply pressure for same sex equality.

- Q&A invite well known Australian figures (PM) to talk about gay marriage, raising awareness in the society and inviting ordinary Australians to voice their opinions, providing an effective path to eventually achieving widespread recognition of justice for same sex couples.
- SMH, 'Same-sex marriage could lead to polygamy, says Jensen' – Christian perspective, emphasising the negatives associated with same sex marriage

Most of the lobby groups that oppose equal rights for homosexual couples have a religious affiliation, such as the Australian Christian Lobby.

Australian Marriage Equality argues that the legally recognized institution of marriage should not exclude these couples. Justice requires changing the law to make marriage available to all Australians who choose it; not classifying same-sex couples as de factos or permitting them only to form 'civil unions'.

The Gay and Lesbian Rights Lobby has a wide-ranging agenda, including advocacy, lobbying government and the media to address discrimination, hosting consultations, educating the gay and lesbian community on their rights and providing referrals to legal and welfare services.

Australian Christian Lobby (www.acl.org.au/) → opposes same-sex marriage → Under the current discrimination laws, religious groups continue to be able to discriminate on the basis of sex, sexuality, race, disability and age. This allows these organisations to withhold services to individuals.

ADOPTION

The Adoption Amendment (Same Sex Couples) Bill 2010 has been passed by the NSW Parliament after considerable debate, allowing same-sex couples the right to adopt a child. However, it was amended so that couples relinquishing their child for adoption can indicate whether they are prepared to have a same-sex couple adopt their child.

- "NSW adoption bill passed", 9 September 2010, SMH – NSW is now the third state or territory to allow same-sex adoption, after the ACT and Western Australia - responsiveness is slow but effective
- "Barnados welcomes same-sex adoptions" by Malcolm Brown, 11 September 2010, SMH - Barnardos, along with Anglicare and Catholic Care, is a sanctioned adoption agency funded by the state government. It supported the same-sex adoption bill and made a submission to the parliamentary inquiry advocating its adoption.

MARRIAGE

In 2004, the Commonwealth Government reaffirmed the traditional concept of marriage as 'the union of a man and a woman' when it passed the Marriage Amendment Act amending the definition by adding those words to s 5(1) of the Marriage Act. The purpose of the amendment was to clarify that parties to a marriage must be one man and one woman (institutional discrimination). This means that any same- sex marriage is automatically void in Australia, including the marriage of any same-sex couple who had previously married in a country that granted same-sex marriages legal status.

- 'Gay debate delayed to lift support' by Stephanie Peatling, SMH, 5 February 2012 - responsiveness is slow, ineffective
- Proposed bills to gay marriage, but nothing has changed – ineffective

Arguments against the recognition of same-sex relationships continue to exert an influence in the public sphere. The legislative changes to de facto entitlements by the Rudd government in 2008, while welcomed, sat alongside a continuing refusal to amend the Marriage Act to permit same- sex marriage.

THE CHANGING NATURE OF PARENTAL RESPONSIBILITY

Due to extensive law reform, the courts are less concerned with parental rights and more concerned with parental responsibility. The focus of the law is on ensuring that parents fulfill their legal obligations towards their children.

In more than 60% of parenting plans and orders, children spend more than half of their time with their mother. The main reason cited for spending no time or very little with the male parent is a concern about abuse or family violence, however financial or geographical constraints can also be to blame.

LEGAL RESPONSES

Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) included 'primary' and 'additional' considerations to be taken into account.

- Primary: a positive and meaningful relationship with both parents and the need to protect the child from abuse and family violence.
- Additional: the child's wishes, the nature of the relationship between the child and the parent, the financial ability of the parent to care for the child and the ability of the parent to provide for the intellectual and emotional needs of the child.
- Change of 'substantial and significant time' to be shared by each parent, where equal time is not considered to be in the best interests of the child.

Non-legal Responses

Community and Church-based institutions as well as National Organisations such as Relationships Australia help separating parents with parenting agreements, information and referrals, counseling, education and parenting skills.

- The National Council of Women of Australia
- DadsLink
- Dads in Distress
- Women's Resource Centre

"Family law changes anger men's groups" – SMH March 2011

Conclusion

The emphasis on children's rights reflects the idea that children are vulnerable members of our society and need greater protection. All decisions must be in the best interest of the child and the interests of their parents or caregivers are secondary. It is important to protect the child's right to maintain a quality relationship with both parents. But the law also needs to ensure that parental responsibility entails more than the child merely spending half his or her time with each parent.

SURROGACY AND BIRTH TECHNOLOGIES

Under Common Law, the mother of the child is the woman who gave birth to the child.

Birth Technologies

Advances in birth technology means that it is no longer possible to presume the identity of the biological parents.

- Artificial Insemination (sperm is donated)
- IVF (fertilisation outside the uterus)
- Genetic Manipulation (alter the fetus)

Legal Responses

Artificial insemination or IVF – the parents are considered to be legal and natural parents of the child and have all obligations of maintaining the care of the child. Under the Status of Children Act 1996 (NSW) these children are granted the same rights as children who are conceived naturally.

- Created the 'presumption of paternity' which means when a women uses any form of birth technology whereby the sperm used is not from her husband, then the man is presumed not the be the father of the child.

CASE: B v J (1996) 21 Fam LR 186

- The father refused to pay maintenance, arguing that the child was not his child and that maintenance was the responsibility of the sperm donor because the donor's name appeared on the child's birth certificate.
- The court rejected this argument.
- Under the 'presumption of paternity' he automatically became the child's father because he was in a relationship with the child's mother.

SURROGACY

Surrogacy involves an agreement between a commissioning couple and a woman, where the woman agrees to bear a child for the commissioning couple and then give the baby to the couple when the child is born.

Legal Responses

Laws concerning surrogacy are state or territory based.

Human Tissue Act 1983 (NSW) and Adoption Act 2000 (NSW) – surrogacy and adoption.

Family Law Act 1975 (Cth) - Section 60HB states that if a court has made an order about the parentage of a child, then that order is determinative.

Surrogacy Act 2010 (NSW) prohibits commercial surrogacy however allows altruistic surrogacy, crime to get a surrogate from overseas.

CASE: R v Michael 2009

- Two biological parents sought an order to adopt their child after the surrogate mother had given birth to Michael.
- There was no dispute over Michael and who should have custody and responsibility over the child however, the court had to determine who was Michael's legal parents.
- Under the family law act if no orders had been made under state law regarding parentage then the child is deemed to be the child of the birth mother. The court could not make an order for Sharon and Paul's adoption of Michael. However they could apply to the supreme court of NSW for an adoption order under the adoption act 2000.

It is illegal for the surrogate mother to give her child to the commissioning parents. Placing a child with a person who is not a relative for more than 28 days is illegal under the Children Care and Protection Act.

Non-legal Responses

A slippery slope argument has also been employed, for example the Australian Christian Lobby's 2009 claim that surrogacy 'would pave the way for two men or two women to "order" a baby they are not even genetically connected to', also denying the child either a male or a female parent and role model.

Surrogacy Australia

Responsiveness of law

The federal government has been slow to pass laws relating to surrogacy issues and the courts are constrained by existing legislation.

Wide inconsistencies in surrogacy laws between the states and territories – in NSW previous laws were inadequate and people who seek to become parents under surrogacy arrangements were forced to deal with legal schemes that are not designed for surrogacy situations.

New framework – important development in increasing legal certainty for parties to a surrogacy arrangement.

- Because they are otherwise unable to have children.
- Plus, protecting the interests of children who are born into surrogacy arrangements.

Surrogacy Act 2010

- Encourages parties to a surrogacy arrangement to take steps to thoroughly understand the psychological, social and legal complexities of their decision
- And the impact of the child

The framework does deny legal recognition to children born under arrangements of commercial surrogacy, in NSW and overseas + can see the parties to such an arrangement criminalized.

- May fail to reflect the increasing reality of such arrangements in Australia.

MEDIA ARTICLE:

Booming surrogacy demand sparks exploitation fears

- Law has deterred 7% of prospective parents.
- Purpose of law – to protect individual rights of Australians to not be exploited – ineffective due to legal loophole - have baby and claim adoption and citizenship (will be granted if genetic link proven)
- International law – state sovereignty – Australia ineffective
- UN Hague convention – developing issue.
- Cases: Sylvia – positive, Saffron – negative, Mackenzie – positive

Care and Protection of Children

Children are considered to be vulnerable members of our society and therefore deserving of greater levels of protection. The legal system has responded by strengthening legislation surrounding the care and protection of children. Neglect and the abuse of children are now considered serious crimes and parents who are found guilty of such crimes can ultimately be charged with murder if their child dies in their care.

Legal Responses

Children and Young Persons (Care and Protection) Act 1998 (NSW)

- Main piece of legislation which protects children from physical, mental and emotional abuse
- DOCS are responsible for the enforcement and protection of children's rights under the act

Family Law Act 1975 (Cth) + Family Law (Shared Responsibility) Act 2006 (Cth)

- Ineffective in caring and protecting children as they may be put at undue risk
- Greater potential for a child to be exposed to family violence.

Wood Inquiry (Special Commission of Inquiry into Child Protection Services) NSW 2007

- 2006 → Over 240 000 reports made about the concerns for a child's or young person's safety
- 2007 → the number of reports increased by 19% to 286 022.

Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 (NSW)

- Protection of a child is the paramount concern
- Police officers and community workers can remove a child from harmful situations
- Parents have the duty to be responsible for their children
- Teachers and counselors must report children to docs if they are in a harmful or dangerous situation.
- R v BW & SW (No 3) [2009] NSWSC 1043 → this case of the starvation of a girl led to changes recommended by the Wood Inquiry into Child Protection Services.

JOINT INVESTIGATION RESPONSE TEAM

DOCS

- Once a child is reported DOCS must investigate the situation, they can choose to do nothing if the situation is managed or they can possibly remove the child from the dangerous situation and report the parents to the police to face criminal charges.
- 'Out of Home Care' → Up to three months, which then the child will be returned to their parents if they are compliant with DOCS.

POLICE

- Decide that there is evidence of a crime, the suspect will be charged, the child will be assigned a caseworker, and the child will receive medical attention if needed.
- Effective if requested

NSW Dept. of Health

- Offer medical assistance if needed

Non-legal Responses

Non-legal responses through NGO's such as Anglicare, Centre care and Youth off the streets all provide assistance financially, physical and mentally for children suffering from abuse.

EFFECTIVENESS

- By working together the JIRT provide a more effective investigative process and better understand each agency's role so the best outcome for the child or young person is achieved.
- However, they are too slow in protecting children as there are increasing numbers of children on care and protection orders.

R v BW & SW (No 3) [2009] NSWSC 1043 → System is too slow

- Starvation of a child
- How can a little girl literally starve to death and not be noticed by the school, the Department of Community Services, the Department of Housing, the Department of Education and Training and the medical profession.
- NSW Ombudsmen declared that there is the need for an effective interagency response to children at risk

Australian Institute of Children (2009) + A Picture of Australia's Children (2009)

- Over 25 000, 88% increase since 2002
- In 2007, more than 150 children died as a result of abusive parents. Worst of all, is that a significant amount of these children had already been reported to DOC's.
- While some would argue that this indicates that people, once they are aware of their rights, will seek ADVOs to protect themselves and their children from actual harm, it also indicates that support and counseling services provided to perpetrators have been less than successful in encouraging them to modify their abusive behaviors.

DOCS → Can be ineffective

- 'Keisha Abrahams mother Kristie jailed for 16 years' (The Australian, July 18 2010)
- R v Abrahams [2013] NSWSC 729
- DOC's had already been reported for a previous incident involving the mother, no effective action was taken, and the child eventually died → thus, ineffective...

Children's Commissioner Report (2006)

- There needs to be a national framework for child protection
- By having a uniform child protection code and set of laws, there will be a greater focus on early intervention and thus preventing children from abuse.

The federal government has recognised child abuse and neglect as a major issue and is seeking to create a national framework for protecting children. This will necessitate the coordination of government and non-government organisations, the creation of uniform child protection laws, and a focus on early intervention and prevention strategies to protect children from abuse and reduce the harmful effects that abuse has on children.