

LEGAL STUDIES: *FAMILY LAW*

Family

The role of the law in encouraging compliance and resolving conflict in regard to family law

The law seeks for family conflict to be resolved through alternative dispute resolution.

- Succession Act 2006 (NSW) outlines that marriage cancels any pre-existing Will and divorce cancels any part of the will favouring the divorced spouse. Family Provision Order allowed for other family members to apply for Family Provision Orders, encouraging cooperation so Sherborne Estate Case (2005) doesn't exist where more was spent in litigation than was outlined in the will.
- 2006 Shared Parental Responsibility Act outlined need for ADR before court based litigation.
- Family Law Legislation (Family Violence and other Measures) Act 2011 enforces compulsory parenting plans to be developed and family dispute resolution to be undertaken before court based litigation to make a Parenting Order.
- Family Law Act 1975 encourages ADR before applying to the court for intervention. Reduces distress for children, increased protection and decreased cost. 2006 reforms made it mandatory, however Australian Institute of Family Studies found that families only underwent to get certificate to go to the court, lack of funding also limits. Cuts put family disputes back in court, The Australian 2010.
- Collaborative Law calls for each party to have a lawyer and a divorce coach is used to resolve conflicts outside of court. The Law Report, ABC National 2009 outlined features.

<p>Legal intervention is utilised as a last resort for resolving family conflict, however is necessary if ADR fails, and in the case of harm (ie. Domestic violence or protection of children).</p>	<ul style="list-style-type: none"> • Australian Institute of Family Services outlined that 95% of family cases are not resolved in court. • Children and Young Persons (Care and Protection) 1998 (NSW) allows the courts to remove a child if they are unsafe in their environment. • Case Re: Bernard 2009 was a common law case that overruled the parent's wishes and held that the child must receive a blood transfusion despite being a Jehovah Witness.
	<ul style="list-style-type: none"> • Crimes (Domestic Violence and Personal Violence) Act 2007 (NSW) gave domestic violence a stand-alone act, aims in encouraging compliance by creating specific circumstances for domestic crimes. • CROC outlines need for compliance to international law however not fully implemented, most included under Family Law Act 1975 however Family Law Legislation (Family Violence and other Measures) Act 2011 legislated to adopt more of the convention. • Family Court hears complex family law cases. Less adversarial system of trial, involves appointment of children's lawyers. Much of Evidence Act 1995 doesn't apply, but this can lead to irrelevant evidence being taken into account, Weston 2008. The Federal magistrates Court hears less serious cases. Children's Court is also utilised to encourage rehabilitation of young offenders under the Young Offenders Act 1997 (NSW).
<p>Family law is structured to protect the welfare, rights and responsibilities of families. This framework advocates for the avoidance of conflict in the first place.</p>	<p>Crimes (Domestic and Personal Violence) Act 2007 (NSW) gave domestic violence its own, stand-alone act, further enforcing Crimes Act 1999 which outlines provision of ADVO and APVOs.</p>

Issues of compliance and non-compliance	
Court intervention is a last resort as a result of non-compliance. Alternative dispute resolution measures are used before.	<ul style="list-style-type: none"> • Succession Act 2006 (NSW) allowed for mediation to be used before court based litigation. Non-compliance then results in court, Sherborne Estate 2005. • Family Law Act 1975 and amendments ensures that ADR is used before referral to the Family Court or Federal Magistrates Court. (Evidence Act 1995 doesn't apply) ICLs used.
ADVOs are one specific protection in place to protect vulnerable individuals from domestic violence however issues of non-compliance limit their effectiveness.	<ul style="list-style-type: none"> • BOCSAR found that approximately 10% of individuals do not comply with ADVO. However these statistics also rely on the will of individuals to report breaches, and many cases go unreported, The World Today "Courts Criminalising Youth over Domestic Violence Orders" 2012 report also found that these were ineffective when used in cases of children. • Crimes Act 1999 split into ADVOs and APVOS, Crimes (Domestic and Personal Violence) Act 2007 (NSW) provided a statute specifically protecting against domestic violence to aid in compliance. • Bail Act 1978 amendments took away the presumption of bail for individuals who breached AVOs.
The complexity of the federalist system may lead to breaches of compliance as commonwealth and state laws overlap.	<ul style="list-style-type: none"> • Marriage Act 1941 did not contain a definition of marriage, was established in the Hyde v Hyde case. 2004 Marriage Amendment defined marriage as between a man and a woman. • However power is held concurrently, so theoretically, the states could legalise gay marriage. "States could legalise Gay Marriage," SMH 2010.

<p>The court allows for non-compliance and provides alternative solutions to deal with these circumstances, which often arise due to the changing definition of family.</p>	<p>ATSI Customary Law Marriages do not comply with the Marriage Act 1961 (Cth) and subsequent amendments outlining the legal requirements for a valid marriage. Family Law Act 1975 instead allows for these marriages to be recognised as de-facto couples. Australian Law Reform Commission released a report on the importance of the recognition of children of these marriages and subsequently, the Status of Children Act (1996) (NSW) allows for their protection, and acknowledgement of their traditional culture.</p>
<p>Parents and Children both have outlined rights and obligations under family law. Non-compliance to these statutes, particularly in family conflict can result in court litigation.</p>	<ul style="list-style-type: none"> • Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) outlined the right for both parents to have a meaningful relationship with the child. In regard to divorce or separation, this has been criticised by the Australian Institute of Family Studies 2009 Report on Family Violence for highlighting the importance of this relationship over child protection. Failure to comply results in ADR and then court. • Family Law Legislation (Family Violence and Other Measures) 2011, switches this so protection is more important.

**Changes to family Law as a result of Changing Community Values
&
The role of law reform in achieving just outcomes for family members and society**

<p>Changing definition of family is one of the most prominent features of family law, thus the law must reform to reflect these values.</p>	<ul style="list-style-type: none"> • Recognition of ATSI customary law marriages under the Family Law Act 1961 (Cth) as de-facto arrangements has shown an increasing awareness of the law to protect alternative family arrangements. Australian Law Reform Commission released a report which indicated the need to protect children of these marriages, thus the Status of Children Act 1996 (NSW) was enacted to protect these children and recognise their culture. • Australian Law Reform Commission Report 2010 found that the key issue facing family law was fragmentation of legislation. "Huge gap between state agencies and the Family Court" • Family Law Legislation (Family Violence and other Measures) Act 2011 put balance back to protection of children over "shared parental responsibility". Also repealed clause relating to "friendly parents" and false allegations of abuse.
<p>While one of the initial requirements of marriage was that it was "for life", changing values have led to the introduction of "no fault divorce".</p>	<ul style="list-style-type: none"> • Marriage Act 1961, 2004 amendments and Hyde v Hyde set out the definition and requirements of marriage. • Family Law Act 1975 was amended in 1974, to abolish the Matrimonial Cause Act and dictate that the only ground for divorce is the "irretrievable breakdown of marriage. Still allows a "kiss and make up clause" of three months during the 12 months separation required.
<p>The law has reformed to reflect once entrenched values such as gender roles and the inability of single mothers to care for children.</p>	<ul style="list-style-type: none"> • Family Law Act 1975 outlines that during divorce procedures, both the financial and on-financial contributions of spouses must be taken into account. • "MPs get conscience vote on gay adoption" ABC News 2010 resulting in the enactment of Adoption Amendment (Same Sex-Couples Act) 2010 And the recent national apology for forced adoption policies show a reflection of changing values. Four Corners – Given or Taken 2012.

<p>Domestic violence is one area which has undergone dramatic reform as a result of changing community values. No longer seen as a “family issue behind closed doors” but rather as a societal responsibility to protect.</p>	<ul style="list-style-type: none"> • Crimes (Domestic and Personal Violence) Act 2007 (NSW) gave a stand-alone statute to aid in ensuring the protection of victims, and serving justice for offenders. • Crimes Act 1999 was amended to break AVOs into ADVO and APVOs to allow for specialized circumstances surrounding domestic violence.
	<ul style="list-style-type: none"> • Bail Act 1978 was amended to give a presumption against bail for offenders breaching • ADVOs. • Australian Institute of Family Studies Report on Family Violence 2009 showed that the “shared responsibility” component of The Family Law Act may have encroached on the protection of children from violence.
<p>Recognition of same-sex relationships is one ever evolving issue in law reform, constantly undergoing reform as a result of changing values in society.</p>	<ul style="list-style-type: none"> • Sex Discrimination Act 1984 (Cth) outlines illegitimacy of discriminating based on marital status, however homosexual couples are still not privy to the rights of heterosexual couples. • Marriage Amendment Act 2004 defined marriage as between a man and a woman. • 1999 De-Facto Relationships Act included same-sex couples as de-facto. • Australian Human Rights Commission released the Same-Sex Same Entitlements Report in 2008 which instigated a number of reforms. • Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth) amended a majority of commonwealth family law acts including those relating to health insurance, superannuation, tax concessions, social security. Repealed 84 discriminatory laws against homosexual couples. • Miscellaneous Acts Amendment (Same-Sex Relationships) Act 2008 (NSW) allowed both mothers of a child born to a same-sex relationship to be issued on the birth certificate.

	<ul style="list-style-type: none"> • Australian Christian Lobby are one NGO which appose these changes, generally religious groups, representative of varying views within society.
<p>The changing nature of parental responsibility provides a change in community values which requires law reform.</p>	<ul style="list-style-type: none"> • Family Law Act 1975 was amended in 2006 adding “shared parental responsibility” which was interpreted inappropriately in a number of cases to mean “Shared parental care”. Also showed a move towards the importance of a meaningful relationship with both parents, but a move away from the protection of children. • Family Law Legislation Amendment (Family Violence and other measures) Act 2011 was enacted to shift the balance back towards the protection of children in line with societal views.
<p>Generally, law reform occurs as a result of failure of existing laws, changes in society’s values or development of new technologies. Surrogacy and birth technologies have instigated reform on all of these counts.</p>	<ul style="list-style-type: none"> • In vitro fertilisation (IVF), artificial insemination or genetic manipulation techniques are now available for use. Artificial Reproductive Technology Act 2007 (NSW) governs these technologies. • Status of Children Act (1996) (NSW) presents “assumption of paternity” in which if donor sperm is used than the donor is not required to pay child support. • Failure of existing laws such as the case of Re: Michael over the legal parents of a child born under surrogacy. Surrogacy Act 2010 (NSW) bans commercial surrogacy but allows altruistic surrogacy. Allows parenting orders. “Ill-conceived Surrogacy Law” SMH 2011 outlines how it provides little protection for children born out of commercial surrogacy arrangements.

Care and protection of Children has remained an important societal value, law reform is constantly needed however to update protection for children as vulnerable members of society.

- Convention on the Rights of the Child outlines UN guidelines
- Children and Young Persons (Care and Protection) Act 1998 (NSW) was based on a legalised approach which forced teachers to report possible cases of DV which resulted in a huge number of claims, unable to be processed.
- Family Law Amendment (Shared Parental Responsibility) Act 2006 saw an increase in the reporting of abuse and domestic violence against children and was amended to the Family Law Legislation Amendment (Family Violence and Other Matters) Act 2011 which shifted the balance back.
- Wood Enquiry “Keep them Safe” which resulted in legislation implementing the inquiry’s recommendations to be introduced in 2009. Transferred a lot of responsibility to NGOs in order to be more resource effective.
- Family and Community Services (FACS) formally DOCS.

The effectiveness of legal and non-legal responses in achieving just outcomes for families

The family unit is constantly evolving and family law has been justified in its responses in order to achieve just outcomes for families.

- Australian Institute of Family Services (AIFS) released a report in 2012 which showed that although the definition of families is constantly evolving, families still form the basic units of society.
- ATSI Customary Marriages are not recognised under Marriage Act 1961 (Cth) however they are classified as de-facto relationships and the Status of Children Act (1996) (NSW) allows for the protection of children of these marriages and for a consideration of the child's culture. An effective remedy to ensure protection and just outcomes. BOS also outlines that 1/3 of children are ex-nuptial, these children are also protected under the Status of Children Act (1996) (NSW).
- Same Sex Property Relationships Act 1984 included same-sex couples in with de-facto to ensure protection and enforcement of legislation for homosexual couples.

The legal rights and responsibilities of parents and children provide protection by the law and family law has been effective in recent reforms at providing this.

- Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) shifted towards providing a "meaningful relationship" with both parents over the protection of children (outlined under Convention on the Rights of the Child). Ineffective in ensuring protection of children, resulted in an increase in number of domestic violence and child abuse cases. Family Law Legislation (Family Violence and other Matters) Act 2011 (Cth) was an effective reform which saw this balance shift back towards protection after Australian Law Reform Commission released a report on "Family Violence: A national Response".
- Family Law Act 1975 and subsequent amendments provide an effective and robust framework for the protection of children including an outline of parental responsibilities such as providing education, adequate food and shelter, access to healthcare.

<p>Family law has been somewhat effective in ensuring that court based litigation is a last resort in family conflict or relationship breakdown.</p>	<ul style="list-style-type: none"> • Family Law Act 1975 repealed the Matrimonial Causes Act to establish the only grounds of divorce as “the irretrievable breakdown of marriage”. This reflects a change in social values through no fault divorce, and the “kiss and make up clause” acknowledges the conflict and possible resolution of marriage. Also dictates that compulsory family counseling is required before court based litigation, effective in deferring cases from the court, increasing accessibility of the law and in resource efficiency. • Family Law Act 1975 and amendments outline that Alternative Dispute Resolution through Family Relationship Centres is compulsory before moving to court intervention. AIFS found however, that this has been relatively ineffective as mandatory resolution does not fit all circumstances, and often results in attendance “just to get the certificate to go to court”. 2010 budget also announced cuts to FRCs which could jeopardise its effectiveness. • Collaborative Law is another means of dispute resolution which has found to be effective in that it is much cheaper than court based litigation, but still applies rule of law using lawyers and a “divorce coach”.
<p>Common law has provided a number of landmark decisions to ensure that just outcomes for families are based on individual circumstances.</p>	<ul style="list-style-type: none"> • “Four sisters Await Landmark Challenge” SMH 2012 when the Family Court was involved in deciding the jurisdiction of a family court case, resulted in deportation to Italy of four daughters. • Parker v Parker (2012) outlined that financial agreements made before divorce were not binding if one individual had not sought legal advice. • The Family Court, The Federal Magistrates Court, The Children’s Court all provide special allowances which have increased effectiveness of serving justice. Less adversarial, (Evidence Act 1999 doesn’t apply, Weston 2008 however found that irrelevant evidence was taken into account).

	<ul style="list-style-type: none"> Magellan Cases – framework of prioritizing allowed issues of violence and abuse to be resolved much quicker. AIFS found 4-6 months faster by also cooperating with state welfare agencies.
The effectiveness of dealing with domestic violence has been questioned with changing views calling for stricter protection of victims.	<ul style="list-style-type: none"> Ineffectiveness of previous legislation, contained under the Crimes Act 1900 and the Family Law Act 1975 was highlighted by a myriad of reports including Australian Institute of Family Studies, Family Violence: A national Response in 2010 and Australian Law Reform Commission Report 2009 which found there was fragmentation between state and federal causing jurisdictional problems. Crimes (Domestic and Personal Violence) Act 2007 (NSW) has been found to be effective in halving the time it takes to move a case through the Family Court and also in increasing guilty pleas.
	<ul style="list-style-type: none"> Bail Act 1978 amended in 1993 removed the presumption of bail for offenders who breached ADVOs, increasing effectiveness in protection of society through enforcement. Family Law Legislation (Family Violence and Other Matters) Act 2011, too early to judge effectiveness but brought balance back for protection.
NGOs and the Media play an important role in serving justice for victim. Although they are limited in enforceability they provide appropriate avenues for seeking advice and publicising ineffectiveness of legislation.	<ul style="list-style-type: none"> Three major groups of NGOs, Religious, non-religious and applicable to all and specific groups. Eg. Anglicare and Catholic Care provide ADR, Relationships Australia available to all, Dads in Distress, Benevolent Society. The media is often limited in reporting family law as they cannot disclose the names of any parties involved. Arthur Freeman Case however involved both criminal and family cases, and the media was able to publicise. “Sisters await landmark challenge” SMH 2012 highlighted role of the family court, “States could legalise gay marriage” SMH 2010 effective in increasing awareness of the law and conveying changes in family values. “Ill-Conceived Surrogacy laws” SMH 2011 outlined failure of new surrogacy reforms.

<p>Same sex relationships are one contemporary issue which has initiated a number of recent legal and non-legal responses.</p>	<ul style="list-style-type: none"> • Australian HR Commission released Same Sex: Same Entitlements report in 2007, led to subsequent legislation which was effective in reflecting values of the community: Same Sex Relationships (Equal Treatment on Commonwealth Laws – General Reform) Act 2007 and Miscellaneous Acts Amendment (Same-Sex Relationships) Act 2008. Been effective in increasing equality and accessibility of the law however current bills to legalise same marriage have been blocked as a result of a lack of conscience vote. • NGOs are particularly effective in lobbying government to undertake reforms as are the media. Dividing specifically over the issue, Gay and Lesbian Rights Lobby and Australian Marriage Equality have been somewhat effective in increasing recognition of rights, however yet to achieve legalizing gay marriage. Mainly religious NGOs which oppose the move such as Australian Christian Lobby. Conservative newspapers such as The Telegraph or The Australian may also be influential in their reporting, States Could Legalise Same Sex Marriage, SMH 2012
<p>Birth technology and surrogacy have issues major responses from law reform to aid in achieving justice. Recent reforms have been much more effective than previous legislation however there is still a long way to go.</p>	<ul style="list-style-type: none"> • Artificial Reproductive Technologies Act 2007 (NSW) covers issues such as IVF and artificial insemination. Effective to a degree in increasing accessibility of the law, however a nation-wide approach would enforce the rule of law and allow for more uniformity. • Need for new legislation was highlighted by a number of cases such as Re Michael 2009 which saw confusion and a misserve of justice in debate over the child's parents. Status of Children Act 1996 saw a presumption of maternity which created a number of issues.

	<ul style="list-style-type: none"> • Surrogacy Act 2010 illegalises commercial surrogacy however provides some framework for altruistic surrogacy. However lacks enforceability or any protection for children born out of commercial surrogacy arrangements. “Ill -conceived Surrogacy law, SMH 2011” which provide harsh penalties not in the interests of the child. However, have given parenting orders, some framework. • NGOs , Gay and Lesbian Rights Lobby and Australian Christian Lobby have had an influence, media also allowed promoted need for new laws.
Care and Protection of children has been an area of law reform which requires a vigorous but balanced approach to ensure effectiveness.	<ul style="list-style-type: none"> • Children and Young Persons (Care and Protection) Act 1998 (NSW) introduced mandatory reporting. AIFS and Wood Enquiry found this to be extremely ineffective in that it resulted in enormous case loads, swamping the system. • Wood Enquiry led to subsequent legislation Children and Young Persons (Wood Enquiry Recommendations) Act 2009 which dramatically increased the ability of public service sectors and NGOs to ensure protection of children (FACS, previously known as DOCS). Reduced mandatory reporting to “risk of serious harm”, saw a move to outsourcing to NGOs, increasing resource efficiency. • “Children at risk miss out on \$1.3 billion” SMH 2011 after Liberal government announced DOCS funding cut in transferal to NGOs. Resource efficiency improvement but at the sacrifice of children’s lives? • Media provides coverage, initiating public outrage and leading to significant reform, Darcy Freeman case. • NGOs extremely important role in new legislation, collaboration and consultation with state agencies as they are now responsible for much of the care and protection services. Relationships Australia, “Keep them Safe”.