HOT TOPICS
LEGAL ISSUES IN PLAIN LANGUAGE

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Families

This is the eighty-second issue in the series *Hot Topics: legal issues in plain language*, published by the Legal Information Access Centre (LIAC). *Hot Topics* aims to give an accessible introduction to an area of law that is subject of change or public debate.

AUTHOR NOTE

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Government and family

Like most people throughout the world, Australians believe that members of a family should care for and support one another, be loyal to one another and share family resources for the maintenance and benefit of all. We believe it is the proper role of parents to care for, protect and to guide the development of our children.

DEVELOPING POLICIES OF SUPPORT FOR FAMILY

There are many circumstances, however, in which a family becomes vulnerable, or may even break apart, and be unable to perform its usual role. Statistics show that when daily practices of care, affection, protection and support break down, there is increased risk that family members will experience separation, poverty, violence and abuse, addiction, poor health or even death.

Law and policy about families in Australia have developed from an earlier traditional and conservative view – that private homes should not be subjected to any form of governmental control – to reflect more contemporary ideas about government having a proper role in the support of family wellbeing, particularly in times of need. Since Federation, there has been a slow accumulation of law and policy that regulates aspects of forming and dissolving relationships and assists parents and carers to meet their children's needs. There are also laws to provide care and support where other family members are unable or are not present to provide care and support for each other, special laws that apply only to children, and laws to provide support to families and to members of families that have may special needs; such as Indigenous families, families living with disability, families from other cultures, men, women and youth.

Government support to families occurs in many forms including in the provision of income support; protection from violence and abuse; assistance with childcare, housing, health care, education and employment; and support in formulating financial, property and parenting arrangements after relationship breakdown.

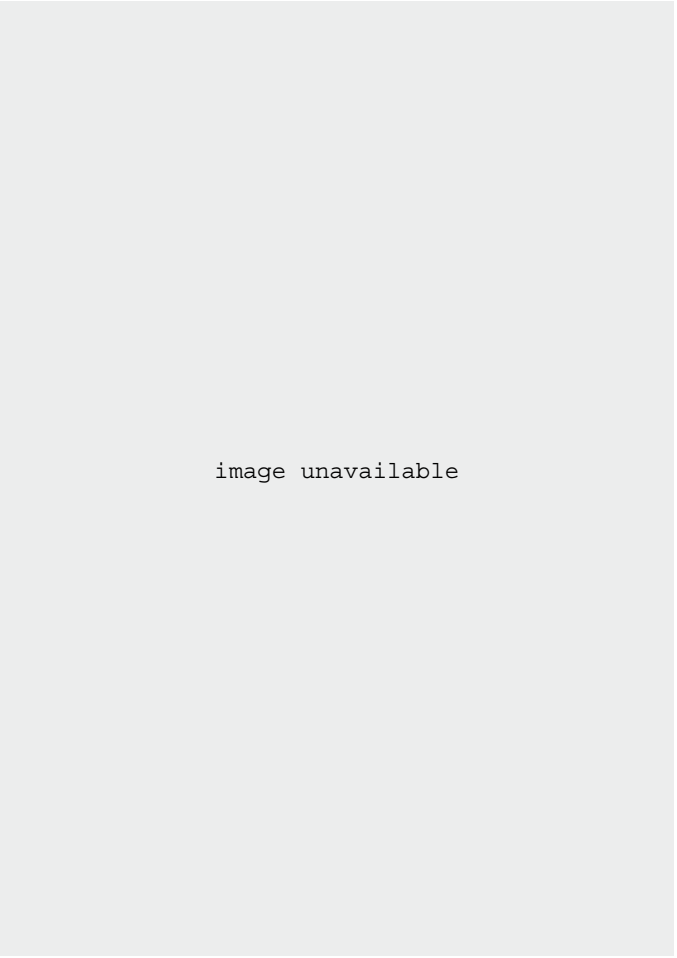
JURISDICTION

Although the Commonwealth's *Family Law Act,* passed by Parliament in 1975, was a big step towards consistent treatment of marriage and divorce issues around Australia, many other family- and child-related legal issues arise in our complex, modern social environment. Responsibility for dealing with these issues is split across Commonwealth, state and territory governments. This split continues to cause significant difficulties.

The current, rather awkward arrangement of laws for dealing with family-related issues in Australia is a product of our system of federalism, and also of the Australian Constitution, which was drafted in bygone social age and yet has proved hard to change.

The nub of the problem is that the Commonwealth's involvement in family law is restricted under the Constitution to the power and authority (jurisdiction) to make laws about *marriage, divorce and related issues only.* Jurisdiction for all family issues that are not allocated specifically to the Commonwealth belongs with the states and territories. There are many legal issues around children and families that cannot be related to marriage or marriage breakdown (eg child protection, adoption). The states and territories have jurisdiction to make laws in these areas.

Important developments in recent years have involved the states transferring some of their powers in family-related issues to the Commonwealth. This has had the effect of enlarging the Commonwealth's family law jurisdiction without the necessity for an amendment to the Constitution. For further details see ***Parenting and property after separation***, page 11.



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Fundamental concepts

WHAT IS A FAMILY?

The traditional family unit in Australia is the so-called 'nuclear family', consisting of a mother, a father and one or more children who are the direct biological descendants of (and are physically born to) their parents. Nevertheless, a large and increasing proportion of families in Australia do not fit this definition. There are increasing numbers of children born as a result of fertility treatments or surrogacy arrangements. Single-parent families, step-families, same-sex-parent families, blended families, and families with adopted children are also very common. Many children have powerful social, cultural, psychological and even biological ties to adults other than the people who care for them on a day-to-day basis.

Development of a non-discriminatory notion of 'family' under the law

The law has been slow to recognise the changing shape of Australian families. Recent years have seen very significant change to the law to remove discrimination against de facto (including same-sex) partners and their families, and to better recognise non-biological parent-and -child relationships and the relationships of children born under surrogacy arrangements. The recent changes and areas for likely future change are detailed in the sections below.

LEGAL STATUS OF MARRIED PEOPLE

Traditional Western marriage

The modern law of marriage has developed from ancient English law that regarded the legal status of married people as fused or unified. This particular history continues to be reflected in our approach to family law matters in Australia – for example in the way that, under the *Family Law Act*, all the property owned either jointly or even solely by either spouse may be divided up between the parties after marital breakdown.

The law of marriage in Australia is contained in the *Marriage Act 1961*. It contains provisions about null or void marriages, marriageable age, authorised celebrants, marriages of defence force personnel, the legitimacy of children, and marriage offences (such as bigamy). Apart from requirements about the authority of celebrant and the marriage certificate, the law allows significant freedom in the form of the marriage ceremony itself.

Marriage under Aboriginal customary law

Aboriginal customary law is not formally recognised in the Australian legal system. In practical terms, however, the courts will usually strive to acknowledge important Indigenous family relationships, especially when they affect children. The *Family Law Act* provides that in making an assessment about the best interests of a child, their Aboriginal cultural background should be taken into account.[1]

Marriages made overseas

Generally a marriage which can be proved to have been legally made overseas will be upheld as valid in Australia. This will be the case even for marriages that would not have been legal if made in Australia, eg a polygamous marriage. However, same-sex marriages made overseas are not recognised.

LEGAL STATUS OF A DE FACTO RELATIONSHIP

A de facto couple is unmarried and may be a heterosexual couple or a same-sex couple. A de facto partnership may, in practical terms, look exactly like marriage. De facto partners usually live in the same residence together, form traditional household and family arrangements and they often have children.

But there has been no continuing recognition of legal status in a de facto relationship under the common law. That status is now being created under new laws being made by our modern parliaments.

Major reforms in 2008 to the *Family Law Act,* recognising de facto partnerships for the purposes of making property and financial orders under the Act. Although the *parenting status* of de facto partners had long been recognised in Australian family law, there were complications about the Commonwealth obtaining authority to intervene in property issues (constitutionally, an area for 'states only'). These were resolved, finally, with the delegation of the necessary powers by the states, one-by-one up to 2010, when de facto partners in all states and territories in Australia (except WA which maintains its own legislation) gained access to the provisions of the *Family Law Act* to resolve issues relating to property distribution after relationship breakdown. For more details see ***Parenting and property after separation***, page 11.

1. Section 60CC(3)(h) *Family Law Act 1975*.

RECOGNITION FOR SAME-SEX DE FACTO 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.

Removing discrimination in Commonwealth law

The place of same-sex de facto relationships within Australian law has been slowly developing since the 1980s, despite complications arising from the Constitution. Additional impetus was provided by the delivery of the Human Rights and Equal Opportunity's report entitled '*Same-Sex: Same Entitlements'* in 2007. This important report catalysed understanding that additional and significant formal change was required to remove discrimination against same-sex de facto couples and their families.

Committing to a program of major reform, 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 such diverse areas as superannuation, workers' compensation, hospital visitation rights, immigration, inheritance, Medicare, Centrelink benefits and many others. The landmark pieces of 'umbrella' legislation were: the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008*.

Changes in state and territory law

Discrimination in state and territory law against de facto couples (including same-sex couples) has also been virtually removed from the law in all Australian states and territories. However, the forms of legal recognition of the de facto relationship itself (which must be through legislation as there is no common law recognition of a de facto union) differ between jurisdictions.

There are no Australian jurisdictions that permit marriage between same-sex de facto couples. In addition, there are many de facto couples, including same-sex couples, who do not want to be married, and yet have a relationship that requires a recognition for legal purposes in a variety of contexts. There are three basic mechanisms employed by the states and territories for legal recognition of de facto relationships.

These are:

- a relationship register;
- a domestic partnership agreement; and
- de facto definitions within individual laws.

NSW, Victoria, Queensland, the ACT and Tasmania all have 'relationship (or civil partnership) registers'. The law creating the NSW register is the *Relationships Register Act 2010*. Once registered, a de facto couple can assume all the rights provided to a de facto couple under the law, over time, without needing to formally prove their de facto relationship on each occasion the issue becomes relevant. The rights of a de facto couple in these jurisdictions are closely aligned now with those of married spouses, with only some differences as between jurisdictions in isolated areas of law (particularly in relation to adoption and surrogacy.

South Australia has a system of 'domestic partnership agreements' where a couple seeking to be recognised as 'domestic partners' (a term used instead of de facto) must make a written agreement about their status. If the agreement is validly made, and they satisfy additional 'commitment' requirements, they will be recognised as 'domestic partners' under South Australian law.

Under the law in force in Western Australia, the Northern Territory and Norfolk Island, access to de facto status is defined by specific criteria (such as length of relationship) within individual laws, without any additional mechanism such as a register or agreement to streamline claims to de facto status in different situations.

See also ***Same-sex couples and adoption***, page 6.

LEGAL STATUS OF PARENTHOOD

Who is a parent?

This apparently simple question is becoming increasingly difficult to answer. In the contemporary world, the list of people with arguable claims to parenthood include not only the traditional 'Mums and Dads' who provide genetic material, give birth to and then raise a child, it also includes parents who provide genetic material but who don't give birth to a child (artificial conception); mothers who give birth to but are not the biological mother of a child (surrogacy); adoptive parents; step-parents; and parents who care for and raise a child, but are neither birth or biological parents. The courts hear cases where people are in dispute with each other about who has the better claim to be 'The Parents' of a particular child. Australian law has been working hard through continuing reform efforts to provide guidelines to determine 'who is the parent?' The level of complexity is high however, and at this stage, the law has not been prepared to consider that a child might in fact have *more* than two parents. Again, also, the interface between state and federal law is problematic.

Parenthood under state and territory law

Each Australian state and territory has legislation to guide decisions about who is a parent for the purposes of other of their laws that refer to the obligations or 'rights' of a parent. These differ significantly between jurisdictions, especially at this time when most jurisdictions are engaged somewhere in the process of law reform on the issue.

In NSW, the *Status of Children Act 1988* (NSW) states that the Supreme Court may, on the application of a person, make a declaration about who is and who is not a parent of a particular child. Once this has happened – or if an order of any other recognised court makes an order that a person is a parent – then evidence cannot be led in a NSW case to argue for a different result. The declaration or order then takes effect as one of a number of 'presumptions of parentage': section 12. The other presumptions, contained in sections 9 to 14 of the Act, include that:

- a man is a father because he is married to a woman who has given birth to a child;
- a man is a father because he has lived with the mother for a certain period of time;
- a person is a parent because their name is on the birth certificate;
- a man is a father who has made a formal paternity acknowledgement; and
- a person is a parent in certain circumstances arising from the birth of a child following an in vitro fertilisation procedure.

The presumptions arising from the declaration of a court and the use of a fertilisation procedure are 'irrebuttable' (meaning 'non-arguable in court'). The *other* presumptions, however, *are* rebuttable which means the party disputing the presumed parentage can evidence into court (eg DNA evidence) that the parenting presumption does not lead to the correct outcome.

An order that a person is a parent can also be made in NSW under the *Surrogacy Act 2010* (NSW). This deals with the circumstance, undertaken sometimes by gay and other couples unable or unwilling to give birth themselves, that biological material from one or both of the intended parents of a child born under the arrangement is implanted by an artificial conception process in the uterus of another woman who then becomes pregnant with, and gives birth to, a child. The *Surrogacy Act* is intended to facilitate the transfer of legal parentage from the birth mother to the intended parent if certain stringent conditions are met. These include (among other requirements) that:

- the arrangements are in the best interests of the child;
- the surrogacy arrangement is 'altruistic' (not for money);
- the intended parents are of a certain age and/or of demonstrated maturity;
- the agreement in writing;
- there is medical or social need for the surrogacy;
- parties have been counselled; and
- everyone concerned, *including the birth mother*, consents to the parentage order being made.

See Division 4 of the *Surrogacy Act 2010* (NSW) for more detail.

NSW law also sets out who may be an adoptive parent and establishes the process by which adoption formally takes place: the *Adoption Act 2000* (NSW).

Commonwealth law: the Family Law Act 1975

The definition of 'parent' under the *Family Law Act* includes 'natural' parents and adoptive parents. Step-parents and other adults performing in parent-type roles (eg some grandparents), are not included within the definition of 'parent' under the *Family Law Act* unless they have legally adopted the child. They may obtain responsibility and authority in relation to the care and control of children only by obtaining a parenting order from a court. For more information see ***Parenting orders***, page 15.

One of the objects of the *Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008* was to remove discrimination against same-sex de facto couples who wish to have children using artificial conception. It provides that if a child is born to a woman in a married or de facto relationship with an 'intended parent' at the time of artificial conception, then that person is the parent, not the sperm donor: section 60H of the *Family Law Act*. Similarly, under section 60HB, the Act states that if a state or territory law provides that a person is a parent under a surrogacy arrangement, then that order will be upheld for family law purposes.

As in the state and territory legislation, presumptions of parentage apply also for the purposes of the Commonwealth's *Family Law Act*: see sections 69P-69U. By contrast with the state law presumptions, however, all of the presumptions in the *Family Law Act* are rebuttable (arguable by presentation of alternative evidence).

A parenting presumption can be overturned if evidence is presented to the court that proves it to be incorrect. This occurs most frequently by the use of DNA parentage testing. Also, the parenting presumptions do not apply where the biological parents have had only a short or casual relationship. In such cases, DNA parentage testing may be necessary to prove the identity of a birth parent and establish the legal allocation of responsibility and authority for care and support of a child (such as responsibility to pay child support).

SURROGACY ARRANGEMENTS FAIL FOR 'INTENDED PARENTS'

The case of *Re Michael: Surrogacy Arrangements* [2009] FamCA 691 illustrates the complexity of contemporary family formation, and the difficulty of the interaction of state and federal law about parenthood.

The case centred around Sharon and Paul who wanted a child. Sharon was unable to carry a child. An embryo was produced as a result of artificial fertilisation procedure involving an egg from Sharon and sperm from Paul. Sharon's mother Lauren offered to carry and give birth to the child on behalf of her daughter. At the time the embryo was implanted, Lauren was in a de facto relationship with Clive. A baby, Michael, was born. The birth certificate showed that Paul was Michael's father.

The parties came to the Family Court. The court decided that, at law, Lauren and Clive were 'the parents'. Although section 60HB of the Commonwealth's *Family Law Act* has scope to allocate parental status to 'intended parents' under a surrogacy arrangement, the activation of that scope depends on the prescribed law of the relevant state or territory having a similar provision. In NSW at the time, the prescribed law was the *Status of Children Act 2000,* which does not recognise 'intended parents' under a surrogacy arrangement. So section 60HB could not operate. This left all the legal effect in the situation to arise from section 60H of the *Family Law Act*, which deems parental status for mothers (and their partners) who conceive through 'a fertilisation process' (which covered, effectively, what had happened to Lauren). It was decided that this provision, which gave parental status to Lauren and Clive, 'trumped' the rebuttable parentage presumption arising from Paul's name on the birth certificate.

DOES 'WHO IS A PARENT' MATTER?

The majority of children in Australia grow up in circumstances where there is at least one adult involved in caring for and supporting them. That adult may also take responsibility for decisions concerning the child – such as where the child lives or goes to school, and what medical treatment the child may have. This authority, along with the responsibility for care, welfare and proper development of the child is known as 'parental responsibility'. This legal concept replaced the concept of guardianship in an amendment in 1995 to the *Family Law Act*.

Under Australian family law, the only adults legally authorised to exercise parental responsibility *without a court order* are the 'parents' of a child under the Act. These would include birth parents, adoptive parents, those presumed to be parents by the operation of the parentage presumptions, and those deemed to be parents by the operation of the provisions for artificial conception and surrogacy.

Although other adults, such as a step-parent, may be involved in the care and support of a child, only these parents (who possess innate parental responsibility), or others who possess a court order for parental responsibility, can be held accountable, and have the ultimate authority, for making decisions about a child.

Any adult concerned with the care, welfare and development of a child can apply for a family law order granting them parental responsibility, or an aspect of parental responsibility. In cases of abuse or neglect, parental responsibility can be formally granted to a government Minister – in NSW, the Minister for the Department of Family and Community Services. See ***Hot Topics 81: Child care and protection*** for more detail.

The government and the courts encourage parents to share in the exercise of their parental responsibility for a child, even after they separate. Adults in dispute about who should make decisions concerning a child, or who cannot agree on a particular decision together, can apply to a family law court for a parenting order that formally separates and allocates aspects of parental responsibility, or decides an issue in dispute, according to an assessment of what is in the best interests of the child. For more detail about parenting orders see ***Parenting and property after separation***, page 11.

Stuart Pearce, Pixtal.

RIGHTS OF PARENTS?

Interestingly, the Australian Constitution (at section 51) mentions the phrase 'parents' rights' and makes a specific allocation of power and responsibility to the Commonwealth Government to make laws for 'parents' rights'. But the trend in development of the *Family Law Act,* ever since its inception, has been to move away from the idea that parents have rights – like ownership rights – to have custody of, or contact with, children.

There are individuals and groups in Australia who argue that parents *do* have such rights in respect of their children. In the lead-up to the major amendments to the *Family Law Act* in 2006, there was renewed lobbying for recognition of parental rights, including ideas about the existence of a parental right to have a child spend time with the parent after separation. The Senate Committee examining the proposed reforms rejected these views, deciding that was simply not possible to reconcile the idea of parents' rights with the principle of the 'best interests of a child', the main consideration enshrined in the *Family Law Act* for deciding matters about children. For more detail about 'best interests' see ***Parenting and property after separation*** page 11.

ADOPTION LAW

What is adoption?

Through the process of adoption, a child stops being the child of one or both of the child's birth parents or under the guardianship of the state, and becomes instead the child of one or two adoptive parents.

Technically, adoption actually occurs when the relevant state or territory court – in NSW, the Supreme Court – makes an adoption order. The effect of an adoption order is that parental responsibility for a child is transferred from one party or parties to a new parent or set of parents. In NSW, the process of adoption is governed by the *Adoption Act, 2000* (NSW).

Who can be adopted?

An adoption order can be made in relation to a person who is under 18 years of age, but also to a person over 18 who has been in the care of the person or people applying for the adoption order.

Who can adopt?

In NSW, a single person can adopt a child, as well as a 'couple'. A couple is defined as a man and woman who are either married or have a de facto relationship.[2]

Purpose of adoption

In earlier times in Australia, adoption was mainly considered as a means of providing childless couples with a child.

The focus now has shifted to the benefits of adoption for the child. A court will order an adoption only when it is clear that adoption (rather than another parenting arrangement) will provide the safest, most secure form of family for the child. Courts are now more careful about entirely severing relations between birth parents and their children.

Since the reformed Act was introduced in 2000, birth parents can agree to an adoption plan that provides for exchange of information and a form of continuing contact between the child, the birth parents and the adoptive parents.

Adoptive parents are now also encouraged to foster and maintain the development of a healthy cultural identity for children adopted from families internationally, or within Australia from birth parents of another culture.

Right to information

One of the key reforms to the *Adoption Act* in 2000 was the removal of much of the secrecy surrounding the adoption process. Procedures are now in place to allow supply to an adopted child, once the child reaches the age of 18, of information about their birth and birth parents. The birth parents also can apply for details of the child's adoptive name and adoptive parents.

Both the adopted child and the birth parents can register a 'contact veto' with the Department of Family and Community Services (FaCS) if they don't want to be contacted at all. FaCS also administers a 'reunion information register' for birth parents and adoptees who do want to reconnect.

SAME-SEX COUPLES AND ADOPTION

Adoption remains one of the areas of the law in which same-sex couples do not enjoy the same rights as heterosexual de facto couples – although, as in other areas of same-sex and de facto law, reforms have recently been made and more are proposed.

Adoption is an area of state and territory authority and laws as between the various Australian jurisdictions differ significantly. At the time of writing same-sex adoptions are permitted in the ACT, in NSW and in WA. The NSW law changed with an amendment to the *Adoption Act 2000* (NSW) in 2010.

Tasmania and South Australia do not permit adoption by same-sex couples but their governments at the time of writing have proposed likely future change.

Queensland, Victoria and Northern Territory do not permit same-sex adoption and have not, at the date of writing, proposed reform.

LEGAL STATUS OF CHILDHOOD

Who is 'a child'?

There are special laws about children at both state and Commonwealth levels. It may be surprising however that though it is often considered that a child is any person aged under 18-years-of-age, there is no single, over-arching law that states this to be the case. As a consequence,

2. See the *Adoption of Children Act 2000* (NSW), sections 4 and 26.

the 18-years threshold does not apply in many areas of the law. The age of transition to adulthood differs between areas of law, and between the states and territories.

ILLEGITIMACY

For many years, and as a function of our inheritance of ancient English law, children not born to a married couple (ex-nuptial children) were considered to be *illegitimate*. This affected their rights in a number of key areas (eg under the law of wills). All states and territories passed legislation in the early 1970s abolishing the status of illegitimacy and banning discrimination against ex-nuptial children. Constitutional difficulties that prevented the Commonwealth from including ex-nuptial children in coverage under the *Family Law Act* were resolved in the 1980s. For further details see ***Parenting and property after separation***, page 11.)

In NSW, *the Status of Children Act 1996* describes the right of 'ex-nuptial' children to be treated the same as children born within a marriage for all legal purposes, including in relation to the division of property after the death of a parent. By amendments to the *Status of Children Act 1996* (NSW) in 2008 and the passing of the *Surrogacy Act 2010* (NSW), the ex-nuptial children of same-sex parents are now similarly included.

CHILDREN WHO ARE PARENTS

Any law that refers to parents applies equally to parents who are aged under 18 years.

RIGHTS OF CHILDREN

In one of the few pieces of Australian legislation in which the rights of any person, or group of people, are defined, the *Family Law Act* defines the rights of children to include:

- the right of children to know and be cared for by both of their parents;
- to spend time and communicate on a regular basis with both of their parents and other people significant to them; and
- to enjoy their culture and to enjoy it with others of their culture.

The court uses these principles to help it decide what parenting orders will be in the best interests of children.

INTERNATIONAL OBLIGATIONS

International law on family and children is brought into Australian law through our participation in international treaties. Treaties are international agreements between countries and international organisations (such as the United Nations and the International Labour Organisation) that are binding under international law when ratified by the countries signing the treaty. The agreements may take a variety of forms and use different titles (e.g. treaty, convention, agreement and protocol).

The value of international law lies almost entirely in how fully it is implemented into domestic law, as there is little capacity for enforcement of most international treaty obligations. It is Australian policy that treaties will not be ratified until they are incorporated directly into Australian law through legislation passed by Parliament. Then Commonwealth and state and territory governments must carry out a check of all existing laws, policies and administrative practices to identify areas of non-compliance with the treaty, and make the necessary changes in laws, policies and procedures to comply**.** This process can take several years to complete.

Treaties about children ratified by Australia

Australia has ratified the following United Nations conventions that deal with issues about children and family:

- Convention on the Rights of the Child (December 1990);
- Hague Convention on the Civil Aspects of International Child Abduction (December 1993);
- Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption (August 1998);
- Child Protection Convention (April 2003);
- Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (September 2006);
- ILO Convention 182 – to Eliminate the Worst Forms of Child Labour (December 2006); and
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (January 2007).

Convention on the Rights of the Child (CROC)

The United Nations Convention on the Rights of the Child (CROC) imposes certain obligations on signatory countries to protect the essential rights of children, and to provide certain assistance to children and families. As a central concern, countries must treat the best interests of the child as a primary consideration (Article 3). Furthermore, the country must ensure that children are given the opportunity to express their wishes and to have these heard and given due weight in accordance with their age and maturity in all matters (Article 12).

CROC is the most widely accepted international agreement and has been signed by all member countries of the United Nations. The Australian Government has made a statement claiming that its laws and practices are generally consistent with the provisions of CROC. The Government has been criticised however, for making only a limited incorporation of CROC into Australian domestic law. This has been done by making CROC an 'international instrument' under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) which means that, though breaches of CROC can be reported to the Commission, Australian courts cannot enforce its provisions.

LAWS APPLYING TO YOUNG PEOPLE

FEDERAL AND COMMON LAW	
Area of law	***Age of transition – child to adult***
Payment of Centrelink benefits eg Youth allowance	Usually 15
Marriageable age	18 without parental consent 16-17 with consent
Informed consent to medical treatment (including receipt of contraception prescription and consent to lawful abortion)	About 14
Voting	18
Suing and being sued (with an adult 'next friend' named additionally in the proceedings)	Any age
Suing and being sued independently	18
Parent's legal authority to make decisions for a child	18
Being subject to parenting arrangements ordered under *Family Law Act*	18
To pay income tax (where income is over certain threshold)	No minimum age

NSW LAW	
Area of law	***Age of transition – child to adult***
The age of criminal responsibility (special provisions for aged 10-14)	15 and up
Remand or sentence in adult prison	Possible from age 16
School attendance mandatory From 2010, students aged 17 or under must be: a. in school, or registered for home schooling OR b. in approved education or training OR c. in full-time, paid employment (average 25 hours/week) OR d. in a combination of these.	Until age 17
Removal of child or young person from a family under care and protection legislation	Until age 18
Employment	Usually 15
Legal consent to have sexual intercourse	16
Change own name without parental consent	18
Possession or consumption of alcohol in a public place	18
Presence in a restricted area of licensed premises	18
Purchase of cigarettes	18
L plates	16
Provisional driver's license	17
Being liable under fair, non-exploitative contract or lease entered into with informed consent	Generally age 18 but younger, mature person may be bound.
Purchase of contraception	Any age

Courts dealing with family issues

There are several courts – at both state and federal level – that deal with issues concerning families and children. Each court has jurisdiction to deal with specific types of cases, although there are several areas of overlap. Court policy about the sharing of cases can also affect which court will actually hear a particular case.

FAMILY COURT OF AUSTRALIA

The Family Court of Australia was created by the *Family Law Act 1975* (Cth). It currently has jurisdiction to hear and decide on disputes in relation to parenting arrangements after separation, and also in relation to the sharing of property and financial resources after marital breakdown. It also has jurisdiction to hear certain applications under the *Child Support Act* and *Marriage Act*. The Family Court also has an additional special child welfare jurisdiction, not often exercised, that originated in the Crown's obligation to protect children under ancient British law. For more details see ***Commonwealth special welfare jurisdiction***, page 24.

Quite apart from these areas of its 'inherent jurisdiction' the Family Court has entered into case-sharing administrative arrangements with the Federal Circuit Court. Under these arrangements, the Family Court will usually only deal with the following more specialised types of cases within its jurisdiction:

- international child abduction and relocation and other international disputes;
- special medical procedures (such as gender reassignment and sterilisation);
- serious contravention of parenting orders (made by the Family Court);
- serious allegations of abuse of a child or of controlling family violence;
- complex questions of jurisdiction or law or likely lengthy hearing;
- adoption; and
- validity of a marriage or of a divorce.

FEDERAL CIRCUIT COURT

The Federal Circuit Court is a federal court. It was created as the 'Federal Magistrates Court' in 1999 and renamed in 2012. Under the administrative arrangements with the Family Court, it is now the court in which all applications under the *Family Law Act* must first be made (unless they involve one of the issues of Family Court specialisation: see above). The Federal Circuit Court exercises jurisdiction in both parenting and property cases, and is the Court principally responsible now for granting divorce applications.

FAMILY COURT OF WESTERN AUSTRALIA

Western Australia is the only state with a 'one-stop-shop' for family cases. The Family Court of Western Australia can deal with the Commonwealth and with the state areas of jurisdiction in all family-related matters.

The Family Court of Western Australia has special authority to hear cases and make final orders for all cases that can be heard in the Commonwealth's Family Court of Australia. It can grant divorces, deal with parenting matters for children of both married and unmarried parents, and deal with property cases of both married and de facto couples. The Court also exercises jurisdiction in child welfare and adoption.

LOCAL (OR MAGISTRATES) COURTS

The Local or Magistrates Court in each state and territory (other than Western Australia where different arrangements apply), have been authorised under the *Family Law Act:*

- to make interim (temporary) orders for property cases for both married and eligible de facto parties, or even final orders where the total value of the property is less than $20,000 (or more, if both parties agree);
- to make interim orders for parenting cases, or even final orders (if both parties agree; or if the case is about resolving inconsistency between existing parenting orders and family violence orders);
- to make 'consent orders' for both property and parenting matters, having the effect of formalising an agreement already reached in private by the parties; and
- to make orders about family violence.

The Local or Magistrates Courts can also deal with property cases involving assets up to $100,000 for de facto partners who are *not* eligible for coverage under the *Family Law Act,* but who *are* eligible under the relevant state or territory law (in NSW this is the *Property (Relationships) Act 1984*). They also deal with family violence matters under the relevant state or territory legislation (for details see ***Family violence and child abuse***, page 24).

CHILDREN'S COURTS

In most states and territories, Children's Courts deal with juvenile crime and care and protection issues for children at risk of harm.[3]

DISTRICT (OR COUNTY) COURTS

In addition to a heavy load in criminal and non-family-related civil law cases, District (or County) Courts do also hear some property distribution cases for separating de facto couples (in NSW, where property value is between $100,000 and $750,000) where the relationship is not eligible for coverage under the Commonwealth's family law legislation. In each state except WA, District Courts can also hear adoption matters.

SUPREME COURTS

The Supreme Court in each state and territory (except WA) hears the highest-value de facto couple property cases that do not meet the criteria for coverage under the Commonwealth's scheme (in NSW, where property value is exceeds $750,000).

APPEAL COURTS

Supreme Courts in each state and territory can hear appeals on cases originally decided in their lower courts (District and Local).

A second appeal on an appeal first heard in the Supreme Court on a case under the *Family Law Act* goes to the Family Court of Australia.

Appeals from cases heard in the Federal Circuit Court and the Family Court of WA go to the Family Court of Australia.

An appeal from a case heard by the full bench of the Family Court of Australia or a Supreme Court may be heard in the High Court of Australia if permission is granted.

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The Lionel Bowen Building in Goulburn Street, Sydney, is the location of the Sydney Family Law Registry which services the Family Court of Australia and the Federal Circuit Court of Australia.

Family Court of Australia.

3. For more detail on these areas see *Hot Topics 73: Young people and crime*, available at http://www.legalanswers.sl.nsw.gov.au/hot_topics/pdf/youngpeople_crime_73.pdf; and Hot Topics 81: Child care and protection.

Divorce and separation

GROUNDS FOR DIVORCE

With the *Family Law Act* in 1975 came the concept of the 'no-fault divorce'. There is now only a single ground for divorce – 'irretrievable breakdown' of the marriage. The court is no longer concerned about the reasons behind the breakdown of the marriage – such as whether a spouse has committed adultery, or who left who and how.

WHAT IS SEPARATION?

To prove that there has been irretrievable breakdown of a marriage, a couple must be legally separated for no less than 12 months. The law does not try to define what the final separation of married people must look like, as marriage itself can take many forms. There must be evidence however that the marital relationship, in whatever individual form it took, was 'severed' (ended) as from a particular date. Normally this would involve some significant practical change in the way the parties live (eg one party moves out of the marital home). There is sufficient 'severance', however, if at least one party has formed an intention to end the marriage and that party clearly tells the other party that the marriage is over.

FACTS ABOUT DIVORCE

- Divorce was rare in Australia before World War II – only 300-400 in total across the country.
- There was a minor peak in divorces in 1947, reflecting the instability of hastily-entered wartime marriages and the damaging effect of war on marriage.
- There was a major peak in the divorce rate in 1975 (not since matched) when the new *Family Law Act* introduced the no-fault divorce. Many long-term separations were formalised by divorce.
- The rate of divorce has increased steadily since the 1980s.
- The number of couples cohabiting (living together in a de facto relationship) rather than getting married continues to increase.
- Cohabitation is becoming more unstable with less than 10% of cohabitations continuing for more than 10 years. Only slightly more de facto relationships end in marriage rather than separation.
- Overall, trends in couple formation and separation show a progressive increase in the number of Australians who have no partner.

Source: 'Family Statistics and Trends: Trends in Couple Dissolution' by R Weston and L Qu in *Family Relationships Quarterly* 2, Australian Institute of Family Studies.

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Tetra.

THE PROCESS OF DIVORCE

Divorces are now rarely disputed and are relatively easy to apply for without the assistance of a lawyer. It is possible to make an online application for divorce from the Family Law Courts website at: www.familylawcourts.com.au

All divorce applications will be given a hearing date. At the divorce hearing, the court will consider the jurisdiction of the court, the marriage, the period of separation and whether there are proper arrangements in place for any children of the marriage under 18 years-of-age.

When a divorce order is made it occurs in two stages. At the divorce hearing, the court makes an order called a 'decree nisi'. This is an interim (temporary) order. The couple will not be legally divorced until one month and one day later, when the decree nisi becomes 'absolute'. This means that the order becomes final.

Although a divorce marks the legal end of a marriage, it does not automatically settle other issues related to parenting or to the division of the parties' property, income and debt. If these issues are disputed and cannot be resolved privately, they must be addressed to the court in a separate case. It is important to note that an application to the court for property orders may be made at any time between separation and divorce but must (ordinarily) be made within 12 months of the divorce.

PARENTING AND PROPERTY AFTER SEPARATION

Towards consistent, national family law

Throughout Australian history, many people have maintained that family relationships are a private matter; that 'governments make poor parents', and overall, that governments should simply not interfere in family and relationship issues.

In 1901, the Commonwealth government obtained powers under the newly-made Constitution to make laws about marriage, divorce and related children's issues. Following a policy of non-interference, however, the Commonwealth refused to make any laws about family issues for many decades. Instead, the states' complex set of marriage and divorce laws continued. These were based on old English marriage law and varied confusingly from state to state, leading one commentator in 1910 to note, with some frustration, that it was possible to be a married person by the laws of one state and a single person by the laws of another.[4]

By the 1950s, there were strong calls for a consistent, national approach to marriage and divorce law. In response, the Commonwealth stepped into the family law field, firstly with the *Matrimonial Causes Act* in 1959, regulating divorce law, and then in 1961, with the *Marriage Act,* a single legal code applying in all states and territories to regulate marriage and annulment.

In the years following, the Commonwealth made more laws in the family area, its intervention reaching a pivotal point in 1975 with the introduction of the *Family Law Act*, a huge step forward towards national integration and streamlining of Australian family law.

FAMILY LAW ACT 1975

The original *Family Law Act* was a radical social instrument in its time. Its features, which reflected updated and contemporary ideas about family breakdown, included:

- the 'no-fault divorce';
- that the best interests of the child must be the 'paramount consideration' in deciding parenting arrangements after divorce;
- equal valuation of the homemaker's and breadwinner's contribution to family life (in deciding on property distribution);
- equality of position as between father and mother in relation to custody of a child after separation; and
- provision for a comprehensive new system of court-based marital counselling.

However, a serious problem remained. The limitation of the Commonwealth's powers under the Australian Constitution meant that the new *Family Law Act* could only apply to the children and breakdown of family relationships of *married* couples.

Constitutional roadblocks to Commonwealth coverage of ex-nuptial children

Under the Australian Constitution, state and territory parliaments have powers to make any laws they consider necessary for the 'peace, order and good government' except if such a law would be inconsistent with, a valid Commonwealth law. This power to make law in areas not already occupied by valid Commonwealth law is called the states' *residual legislative power.*

By contrast, the Constitution (at section 51) says that the Commonwealth Parliament may make laws in a listed set of areas only. These areas include marriage, divorce and pensions and benefits. They also include the custody and guardianship of children, but *only for those children whose parents are or have been married* and are involved in marital breakdown.

Because of these limits on the power of the Commonwealth under the Constitution, the original 1975 version of Commonwealth's *Family Law Act* could deal only with the property, financial and parenting arrangements of a married couple experiencing relationship breakdown. Parenting arrangements involving casual or de facto relationships were not covered. Post-separation financial and property disputes for people in de facto relationships, also, were not covered. Unmarried people with these issues needed to attend at a state court under state legislation rather than a federal court under the Commonwealth's family law legislation.

4. Harrison Moore, The Constitution of the Commonwealth of Australia, second edition, 1910.

DEVELOPMENTS IN FAMILY LAW SINCE 1975

1975

The *Family Law Act 1975* (Cth) established the Family Court of Australia and a uniform code for divorce and issues arising on marital breakdown such as property settlements and parenting disputes ('matrimonial causes').

1988 and 1990

By agreement among the states (except Western Australia), territories and the Federal Government, the *Family Law Act 1975* was amended to bring children of de facto relationships (ex-nuptial children) within the jurisdiction of the Family Court of Australia.

1995

The *Family Law Reform Act 1995* (Cth) attempted to re-focus attitudes away from the notion of the ownership of children towards greater emphasis on their best interests. The terms 'custody' and 'access' were changed to 'residence' and 'contact'. The concept of guardianship was replaced by 'parental responsibility'. It also introduced recognition of the potential impact of family violence on children within the legislation.

1999

Federal Magistrates Act 1999 (Cth) established a federal magistracy service as a lower level court below the Family Court of Australia and Federal Court of Australia, to deal with simple family law matters more speedily and at a lower cost. (The Court was subsequently renamed the Federal Circuit Court in 2012.)

2002

Family Law Legislation Amendment (Superannuation) Act 2001 came into operation, enabling superannuation, for the first time, to be treated as property and split between divorcing couples.

Western Australia gave the same rights to de facto and same sex couples as divorcing couples in property disputes under the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) and the *Family Court Amendment Act 2002 (WA).*

2003

The *Family Law Amendment Act 2003* empowered the Family Court to distribute the debts of parties in the same way as property, and to make orders, for example, that a creditor (like a bank) must substitute one party for another in relation to responsibility for a debt. It introduced a tougher regime for dealing with people who contravene parenting orders made by the court.

All states (except Western Australia) agreed to draw up legislation to refer power to the Commonwealth to make laws in respect of de facto property matters.

2004

The new *Family Law Rules 2004* created changes aimed at simplifying court procedures, instituting new requirements for parties to attempt to resolve their disputes before commencing a case in court (called pre-action procedures) and creating tougher penalties for parties and their lawyers who use delaying or other inflammatory tactics in a case.

2005

The *Bankruptcy and Family Law Legislation Amendment Act 2005* provided that the creditors of a bankrupt spouse (other people to whom the spouse owes money) would come to argue for their share in a property settlement in the Family Court alongside the spouse of the bankrupt person. Previously, the spouse had to argue for any share in the remaining property in the bankruptcy court, and often missed out as the bankruptcy court does not take child-rearing or homemaking contributions into account in assessing the fair division of available financial and property resources.

2006

The *Family Law (Shared Parental Responsibility) Act 2006* made the most significant changes to Australian family law since the original Act in 1975, featuring provisions for shared, co-operative parenting after separation.

The revised *Family Law Rules 2006* set out procedures for the new form of litigation known as 'child-related proceedings'.

2007

The *Family Law Regulations 2007* introduced the detail of the new system of compulsory family dispute resolution. The Regulations included a system for registration and accreditation of family dispute resolution practitioners.

2008

The *Family Law Amendment (De facto Financial Matters and other Measures) Act 2008* made provision, for the first time, for coverage of de facto couples under the Commonwealth's scheme under family law for property division and rationalisation of financial affairs at the end of a relationship.

2011

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* provided new and broader definitions of family violence and child abuse, strengthened court process around family violence and abuse and gave top priority to child safety in the list of considerations necessary for assessing a child's best interests.

A solution is found for parenting disputes

Between 1986 and 1990, all the states and territories except Western Australia passed laws to refer (hand over) to the Commonwealth the part of their residual powers that deals with parenting arrangements for children of unmarried partners.

The *Family Law Act 1975* (Cth) was amended in 1995 to reflect the states' referral of power. Although this solution was not as tidy nor as long-term as an amendment to the Constitution, it was a lot easier to achieve and meant that all children caught up in relationship breakdown could be dealt with under the one law, whether their parents were married or not.

Western Australia decided to keep its powers in relation to the children of unmarried partners, rather than referring them to the Commonwealth. It maintains a separate Family Court of Western Australia, which deals with both federal and state issues in relation to children, as well as all matters arising from relationship breakdown, *irrespective of the marital status* of the parties.

Dealing with the property issues of de facto partners

A significant amount of the *Family Law Act* deals with the division of property and finances after relationship breakdown. Similarly to the case with children's issues, the Constitution allows the Commonwealth to make laws and decisions about property only in relation to *marital* breakdown. So for many years, the property issues of de facto couples experiencing relationship breakdown were not covered under the Act.

This situation effectively discriminated against unmarried couples, who were required to take their property disputes to the state court instead. Not only are the costs of going to a state court much higher than the costs of a property case in the Commonwealth's Family Court, but the state legislation for property division on relationship breakdown uses different criteria. (Less wealthy, low-earning unmarried partners are likely to receive significantly less from a property distribution in a state court than they would under the Commonwealth law because the state legislation does not take into account likely future earnings of a high-earning spouse.) For more information see ***How the court decides property and financial issues*** page 20.

The unfairness and inconvenience of this situation had long been recognised and so progressively from 2003, the states and territories began passing laws referring their power over the property of de facto couples to the Commonwealth. Under the *Family Law Amendment (De facto Financial Matters and other Measures) Act 2008* de facto couples (including same-sex couples) can now access Commonwealth law and Commonwealth courts in relations to property distribution and other financial matters at the end of their relationships. For further details see ***Removing discrimination in Commonwealth law***, page 3.

LANDMARK CHANGES TO FAMILY LAW IN 2006

The *Family Law (Shared Parental Responsibility) Amendment Act 2006* introduced the most radical changes to Australia's family law since the original Act in 1975. The *Amendment Act* attempted a significant cultural change – to encourage more shared and co-operative parenting after separation, and to shift the focus, for post-separation dispute resolution, away from court action and towards private, mediated methods. It is arguable that the 2006 *Amendment Act* represents the most substantial step ever taken by the Commonwealth towards interventionism in family matters.

Features of the reforms

The 2006 amendments addressed only the parenting aspects of the *Family Law Act*, leaving the property settlement provisions virtually untouched. Features of the reforms included:

- *new language and terminology*: references to 'residence' and 'contact' have been changed to 'spending time' or 'communicating' with a parent;
- a new presumption of *equal shared parental responsibility*;
- significant changes to the court's method of *assessing the best interests of a child*;
- emphasis on private resolution of parenting issues including an expansive new system of *compulsory family dispute resolution*;
- change in focus from court-based services to *family services provided by community-based organisations* (eg for counselling, parenting training, and dispute resolution);
- a new role for *family consultants* in family law cases;
- re-defined role for *'independent children's lawyers'*;
- new importance for home-grown *'parenting plans'*;
- tougher penalties for *contravention* of orders; and
- an innovative new court process for *'child-related proceedings'*.

See the sections below for more detail in relation to each of these features.

Family dispute resolution for parenting issues

Many couples are able to agree on appropriate, workable arrangements for caring for their children in their new circumstances after separation. They do not need to approach a court or have anything to do with the *Family Law Act*. They are not required to write down their agreement or notify any government authority.

On the other hand, many separating couples do have difficulty in reaching agreement on post-separation parenting arrangements, or feel that they need a greater level of formality in the form of their agreement for the sake of certainty.

There are a variety of approaches that may be taken by a separating couple to assist them to achieve workable parenting agreements. These include:

- making a parenting plan – with or without the assistance of a lawyer or professional mediator (called a 'family dispute resolution practitioner');

- making a private agreement and then filing it at court (called 'consent orders'); or
- if the couple cannot agree, starting a case in court and asking a judge to decide.

Compulsory family dispute resolution

The changes to the *Family Law Act* in 2006 encouraged genuine effort by separating people to resolve their parenting issues privately, without starting a case in court. Society now recognises that the extended and bitter conflict involved in family law court cases often has a seriously detrimental effect on the people involved, and most particularly on children that become caught up in parental disputing. We now accept, also, that it is usually parents, rather than judges, who together can make the best decisions for their children.

Since 1 July 2007, a person cannot start a case on parenting issues in a family court unless they have a certificate issued by a registered family dispute resolution practitioner (called a 'Section 60I certificate'). This means that, unless an exemption applies, a person must find a registered family dispute resolution practitioner and then attempt a family dispute resolution process with the other party to try to resolve the dispute.

Depending on the circumstances, there a number of statements that might be made on the certificate issued, for example:

- that the person engaged in a family dispute resolution process and did make a genuine effort to resolve the issues;
- that the person did not make a genuine effort to resolve the issues;
- that family dispute resolution was inappropriate for the two people (often, because of family violence); or
- that one party refused to attend and so the family dispute resolution did not proceed.

WHAT IS FAMILY DISPUTE RESOLUTION?

Family dispute resolution is a process that involves a trained dispute resolution practitioner assisting the parties to come to agreement. It is usually undertaken in face-to-face discussion between the parties and the practitioner, but it can take place by telephone, videoconference or even on the internet. The successful results of family dispute resolution can be expressed in the form of a parenting plan or other agreement that may be signed by the parties.

There is a special form of family dispute resolution practice called 'shuttle mediation' in which the parties sit in separate rooms and the practitioner moves between them transmitting the parties' points of view and negotiating positions. This method is used if one party doesn't want contact with the other party – either because they are concerned for their safety, or they consider that they may not be able to negotiate effectively in a face-to-face situation with their former partner.

Most of the time people attend family dispute resolution without a lawyer, but lawyers or other support persons can be present if both parties agree.

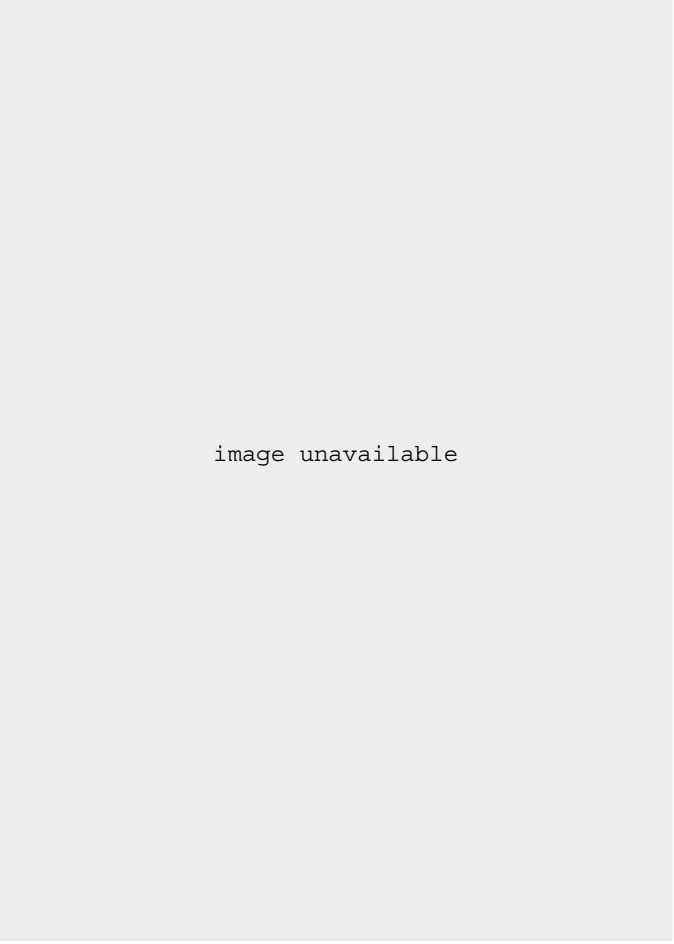
Family dispute resolution is provided by practitioners who either work privately or are employed by community agencies. Practitioners must be registered under the *Family Law Act* to provide a valid Section 60I certificate. To find a registered practitioner in your area, visit Family Relationships Online at www.familyrelationships.gov.au.

PARENTING PLANS

Parties coming to agreement at the end of private discussions, or with the assistance of lawyers or family dispute resolution practitioners, may decide to record the terms of their agreement in writing. If the written agreement about parenting issues is dated and signed by both parents of a child then it satisfies the requirements of a 'parenting plan'.

Typically a parenting plan deals with the same issues that a court might make orders about in a family law case, eg when the child is to spend time with each parent and how specific aspects of parental responsibility are to be shared. A parenting plan can usefully state also:

- how, when and why the parenting plan might change in the future;
- what type of contact and discussion the parents will have with each other about future issues to be decided about the child; and
- how the parents plan to go about resolving any future disagreements.



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A parenting plan has special power to override earlier court orders. This means that parents with court orders do not necessarily have to go back to court to have them adjusted as children mature and their needs and circumstances change.

Parenting plans are made and remain as private documents unless they are referred to in a future court case. They are flexible and useful documents for circumstances where the parents are usually able to resolve their own issues. But parenting plans have no legal effect beyond their capacity to override earlier court orders and influence the thinking of a judge in a later court case. A person cannot be forced to comply with a parenting plan.

CONSENT ORDERS

If separating parents have more conflict between them, or would like the strength or certainty of the authority of the court behind their agreement, they can file a copy of their parenting agreement at court by applying for 'consent orders'. There is usually no hearing in the court when an application for consent orders is made. The proposed agreement is reviewed in court offices and then issued back to the parties in the form of written orders. If a person breaches a consent order, the other party can apply to the court for assistance with enforcement in 'contravention proceedings'.

PARENTING ORDERS

If parties have tried and failed to resolve their parenting dispute privately, they may want to ask a judge to decide the issues for them. They commence this process by filing an application in a court that has the power to hear cases under the *Family Law Act*. This might be the Family Court of Australia, the Federal Circuit Court or, in NSW, a Local Court, depending on the circumstances of the case.

If a case proceeds from the initial application through to the end of a hearing, the court is likely to make parenting orders. Any person with an interest in the care, welfare and development of a child is entitled to apply for parenting orders – even if they are not a parent!

Parenting orders are about arranging aspects of parental responsibility for a child that the parents cannot agree about. Often this is about where or with whom a child will live and arrangements for being with each parent at different times. The court has a special process for deciding what orders to make. The paramount consideration for the court has to be 'the best interests of the child'. For more details see ***Presumption of equal shared parental responsibility*** and ***Best interests of a child***, following.

Parenting orders no longer refer to concepts like 'custody' or 'contact'. Although parenting orders can still refer to 'the person with whom a child resides', there are no longer labels such as 'residence parent' or 'contact parent'. Reflecting the new emphasis on shared, co-operative parenting, parenting orders strive for clear definition about patterns and 'types of time' that a child will spend with each parent (eg half of each school holiday with each parent).

Court orders can also deal with other specific aspects of parental responsibility such as where the child will go to school or what medical treatment the child will (or won't) have.

PRESUMPTION OF EQUAL SHARED PARENTAL RESPONSIBILITY

The introduction of a 'presumption of equal shared parental responsibility' was one of the more controversial – and misunderstood – changes introduced in the 2006 *Amendment Act*. The presumption means that if parents are asking the court to make a parenting order, and the conditions for application of the presumption are satisfied, the court must first consider whether it would be in the best interests of the child to make an order providing for the child to spend equal time with both parents, or alternatively, 'substantial and significant' time with both parents.

It is important to understand that the presumption of equal shared parental responsibility does not mean a presumption of equal time with both parents. The legal effect of the presumption is to direct the court to consider certain issues in making its decisions about orders. The child's best interests are still the paramount consideration in the final analysis (for more details see ***Best interests of a child***, below.)

Whether or not an 'equal time' order is eventually made, the court may make an order for 'shared parental responsibility' in any case. This order legally binds the parents (until the child turns 18) to consult with each other and to try to come to agreement with each other about decisions affecting the child's health, schooling, ability to see or communicate with either parent, or religion. The policy behind this change is to encourage co-operative, shared parenting between separated parents, and reduce the incidence of solo decision-making on major issues affecting the child by one parent without the knowledge or consent of the other.

The presumption of equal shared parental responsibility and the requirement to consult on major issues do not apply to all parents, only to parents applying to the court for an order. Co-operative parenting after separation is a generally considered to be a good idea for most families.

'BEST INTERESTS OF THE CHILD'

The central principle relating to children in family law is that any decision made by a court should be in the best interests of the child.

It has been a long-standing principle (in existence since the commencement of the *Family Law Act* in 1975), that a child's welfare is to be the paramount consideration in relation to any decisions affecting the child. The *Family Law Reform Act 1995* amended the *Family Law Act* to specifically include the term 'best interests'. The principles underlying the amendments are derived from the United Nations *Convention on the Rights of the Child (CROC)*. For more details about CROC see ***International obligations***, page 7.

The *Family Law Act* requires the best interests of the child to be the paramount consideration when making or altering parenting orders.

Legislation passed in some states and territories concerning children, such as laws relating to care and protection of children, and also to surrogacy arrangements, also incorporate the 'best interests' principle.

WHAT ARE THE BEST INTERESTS OF THE CHILD?

The child's best interests include long-term and short-term welfare concerns, consideration of physical and emotional wellbeing, financial interests, moral, cultural, educational and religious and health interests.

The *Family Law Act* provides a list of factors that family law courts must take into account when determining the best interests of the child. The list is not exhaustive, and other matters may be considered in particular cases. The 2006 Amendment Act divided the list into two tiers: 'primary considerations' and 'additional considerations'. The intended operation of the two-tier system is not explained in the Act but the courts have since stated that though the primary considerations will usually be given more weight, they will not necessarily determine the outcome, as against the additional considerations, in every case.[5]

'BEST INTERESTS FACTORS'

'Primary considerations'

- the need to protect the child from physical or psychological harm;
- the benefit to the child of having a meaningful relationship with both parents (Amendments in 2011 clarified that if there was conflict between the two primary considerations, the need to protect the child should be given top priority).

'Additional considerations' (a selection)

- the child's views;
- the nature of the child's relationship with each parent or other people important to them (such as siblings, step-parents, and grandparents);
- the effect of change on the child, including separation from parents or from other people important to them;
- the practical difficulty of the child having contact with a parent;
- child's personal characteristics (maturity, gender, background, culture etc.); and
- possible existence of family violence and family orders.

See the full list of factors at section 60CC of the *Family Law Act*.

VIEWS OF THE CHILD

Under the *Family Law Act*, any views expressed by a child must be taken into consideration to some extent, even if the child is very young. The weight that the child's views will have on the final decision will, however, be affected by the child's age, maturity and level of understanding, and the court may eventually conclude that that the child's views on an issue are not the same as the child's best interests when all the other factors are considered.

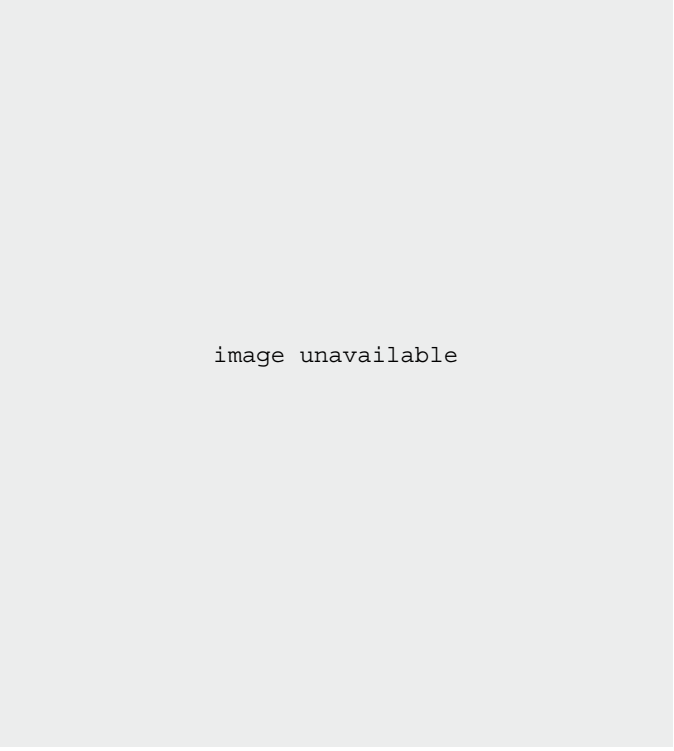
It is arguable that the child's views have less weight since the 2006 *Amendment Act* as against the 'primary considerations'. The child's views are listed under 'additional considerations'. If there was a conflict between a child's views and a factor listed as a 'primary consideration' (for example, the benefit of the child keeping a relationship with both parents) then it is likely that the primary consideration will be given more weight in the final assessment of what is in the child's best interests.

See also ***Child-related proceedings***, below.

CHILD-RELATED PROCEEDINGS

Traditional form of litigation

Prior to the 2006 amendments, a parenting case in a family law court proceeded in the same way as any other civil law case. There were usually lawyers for each party who gathered whatever evidence they could find to convince the court that their party's version of the facts was the correct one, and then to make the orders that they wanted. Even when the parties did not have lawyers and represented themselves in court, the process was inevitably 'adversarial' being, in practice, as much about trying to destroy the case of the other party as to convince the court of your own.



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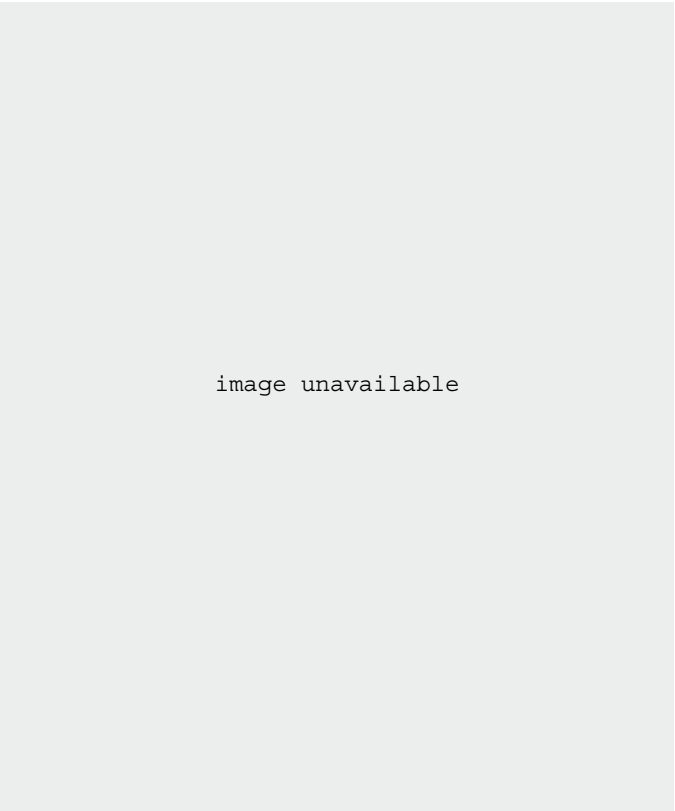
5. See *Mulvany v Lane* [2009] FamCAFC 76; (2009) 41 Fam LR 418; available at http://www.austlii.edu.au/au/cases/cth/FamCAFC/2009/76.html

This often led to the public airing of unpleasant, personal, irrelevant or untrue facts about people and increased the level of hostility between the parties. Children, particularly, suffered considerably by exposure to the high-levels of stress and conflict involved in a long-running family court case run in the traditional mode.

A new, less adversarial process from 2006

The 2006 amendments introduced a new style of litigation called 'child-related proceedings' that draws on European rather than English civil law tradition. As in Europe, now in Australia in a child-related family law case, the judge has a great deal of influence on the way the case proceeds. Lawyers have less influence. In a child-related case, the judge questions and discusses issues with the parties directly. He or she often attempts some dispute resolution to give the parties a final opportunity to compromise and resolve the issues themselves. Instead of listening passively to the witnesses and evidence chosen to be brought to court by the parties' lawyers, the judge will say what witnesses he or she will hear and on what topics. The judge can make orders, deciding individual issues in dispute, at any point in the case.

Child-related proceedings result in shorter cases and often more positive outcomes for parenting cases. Parties, and particularly self-represented parties, report feeling less frustrated and confused by legal technicalities and have more opportunity to speak and explain themselves freely. Judges use new powers to shut down or exclude evidence designed only to criticise or upset the other party.



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EVIDENCE OF CHILDREN

Before the 2006 amendments, the evidence of a child could usually only be put to the court through the evidence of an adult witness, usually one of the parents, who would report what the child allegedly said. Not surprisingly, parties often brought conflicting reports of the child's viewpoint to the hearing. Now, however, the judge is able to receive more independent evidence of a child's views. Although the judge does have the power to interview a child, more usually a 'family consultant' will be engaged to speak to the child and will then report back directly to the court.

See also ***Views of a child***, page 17.

INDEPENDENT CHILDREN'S LAWYER

At an early stage in child-related proceedings, if it appears that the parties have very different ideas about the best interests of the child, the court will appoint an independent children's lawyer to represent the child in a parenting case. Independent children's lawyers are almost always paid for entirely by Legal Aid.

An independent children's lawyer is appointed by the court to ensure that the best interests of the child are independently represented during the case. Although the lawyer is the child's legal representative, the relationship between the child and the lawyer is different from the usual relationship between an adult and a lawyer (where the lawyer takes instructions from the client and argues in accordance with the client's wishes). The independent children's lawyer has to make such enquiries as are necessary to form a view on what would be in the child's best interests – including obtaining an understanding of the views of the child. He or she must then argue in court, and work privately with the other parties, for a course of action that would support the lawyer's view of the child's best interests. The child's best interests, as assessed by the independent children's lawyer, will not necessarily be the same as the child's wishes. The lawyer must also work to minimise the trauma suffered by the child due to the case and continue to work with the other parties to try to reach agreement. This type of representation is called 'best interests advocacy'.

The child cannot dismiss the lawyer even if the child is unhappy with their performance or the conclusions reached by the lawyer. The lawyer is bound however to ensure that any relevant views expressed by the child (such as the disagreement of the child with the lawyer's views) are brought to the attention of the court.

See also ***Views of a child***, page 17.

Property and money matters

Couples usually organise their property and finances so as to provide the best outcomes for the couple together or for the family as a whole. This might mean that property or income is held in joint names, or it might be formally named as an asset of one partner only but used for the benefit of both, or for the whole family. Often, property arrangements are complex and intertwined, particularly after a long relationship.

ISSUE OF PROPERTY AFTER SEPARATION

When a relationship ends, the former partners need to divide their property and resources between them to be able to go forward with their separate lives. It may be necessary to sell property and get the cash value to make the division possible. Agreeing on what is a fair division of property and financial resources may not be an easy task for a separating couple.

There is no law that says people have to divide up their property in any particular way. People can choose to divide it 50/50 or 90/10 or even give it all to a man down the road if they wish. If they can't come to an agreement about what should happen privately, or with the help of lawyers or a dispute resolution practitioner, they may need to approach a court to make the decision for them. If the couple comes to the family law system, the courts will use the method set out in the *Family Law Act* to work out who should get what. See ***How the court decides property and financial issues***, page 20.

DE FACTO COUPLES AND PROPERTY

Since 2008, separating de facto couples (including same-sex couples) who satisfy the eligibility criteria in the *Family Law Act* have access to almost identical provisions about property distribution and financial matters as do married couples.

The basic definition of a de facto relationship under the Act is simple: it is a relationship where the parties are not legally married, and not related, but have a couple relationship and live together on a 'genuine domestic basis'. To determine whether this 'genuine domestic basis' exists, the court will consider:

- the length of the relationship;
- the nature and extent of the joint life;
- whether there was a sexual relationship;
- financial and property arrangements;
- mutual commitment to a shared life;
- whether the relationship is 'registered';
- the care and support of children; and
- public aspects of the relationship.

(See sub-section 4AA(2) of the Act.)

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HOW THE COURT DECIDES PROPERTY AND FINANCIAL ISSUES

For cases under the *Family Law Act*, the court applies a 'four-step process' to deciding cases on post-separation property and finance:

Step 1: Identifying and valuing the property pool

The court asks the parties to provide evidence about the value of all of their assets (including superannuation), liabilities (debts), income and other financial responsibilities (e.g. to support another person). Often the parties disagree about the value of items. The court makes a decision about what should be included in the final pool for distribution between the parties, the value of each item and the total value of all the items together in the 'property pool'.

Step 2: Assessing the contributions of the parties

The court makes an initial assessment of an appropriate split of the property pool based on how much each party contributed to the relationship. The split is often referred to in percentage terms (for example, 55% of the property pool value to Party X). The assessment process involves looking at the parties' evidence of their financial contributions (such as wage-earning and gifts or inheritances from family) and their non-financial contributions (such as homemaking and parenting). In the case of longer-term relationships particularly, the court often decides that the parties' contributions have been roughly equal. This is because society regards such relationships as representing co-operative, multi-functional partnerships with common purpose.

Step 3: Assessing the future needs and resources of the parties

The court will adjust the initial percentage split of the property pool made in Step 2 by an additional amount to take into account the future financial needs and resources of the parties. The percentage adjustment is usually in the region of 0-20%. So, for example, a couple with a 50/50 assessment after Step 2 might end up with a percentage split of 70/30 after Step 3, with the larger share awarded to the partner who is the primary carer for (say) the couple's three young children. In assessing future needs and resources, the court will consider such factors as the age, health, financial resources, child-caring responsibilities and the earning capacity of the parties.

Step 4: Making the final distribution and checking for overall fairness

After the percentage split of the property pool is assessed, the court must then decide how the value to each party's share will be made up. This can be difficult as large assets such as superannuation are not easily divided, and contractual arrangements with third parties such as banks and business partners can complicate things – although amendments to the *Family Law Act* have given the court more power in this area (see ***Developments in family law since 1975***, page 13). Sometimes the court decides it is necessary for an item in the property pool to be sold so that the value can be split to make up the necessary percentage of the total pool assessed for each party. When organising the practical split of the items in the pool (including valuable assets and debts) the court will look at the overall fairness of the situation being created by the distribution. If it doesn't appear possible to put the Stage 1 to 3 assessment into action in such a way that sets the parties' into their new futures in a fair way, then it is possible, although rare, that the shares will be adjusted in this final Stage 4 check.

The four-step process is process devised by the courts and based on the law to guide them in making appropriate property orders. There is no part of the law however that requires people to use the process outside court. On the other hand, the four-step process can be a very useful tool for a separating couple who wish to make their arrangements privately but 'in the shadow of the law' (that is, with a sense of what the law and the courts would consider fair in the circumstances).

For the same reason, it is advisable that each member of a separating couple should get at least a sense of their entitlements at law, in the course of a consultation with a legal practitioner before concluding their private property settlement negotiations. The stakes for the future in this area can be very high. Misjudgement is easy to make and difficult to unmake – particularly in the early months after separation.

The rest of the eligibility criteria for de facto partners applying for property orders under the *Family Law Act* may be summarised as follows:

Geographical – An applicant needs to be able to prove one of a set of particular current, or past, connections to a state or territory of Australia (other than Western Australia).

Timing – Unless hardship circumstances exist, de facto parties usually need to make their application under the *Family Law Act* within two years of their separation.

Other 'gateway' factors – At least one of the following must apply:
- the relationship has lasted at least two years; OR
- the parties had a child; OR
- the party applying made 'substantial contributions' to the relationship; OR
- 'a serious injustice' would result if the court did not allow the application; OR
- the relationship is registered under State or Territory law.

If a couple does not meet the eligibility requirements for coverage under the de facto provision of the Commonwealth's *Family Law Act*, they may still be eligible to apply for property distribution orders under the broader 'domestic relationships' schemes that apply in each state or territory. In NSW, this is set out in the *Property (Relationships) Act 1984* (NSW).

FORMALISING AND ENFORCING A PRIVATE AGREEMENT

It is a good idea for a separating couple to record any private agreement reached between them about property division in writing. Even then, the written agreement will probably not be enforceable legally unless the parties take the additional step of submitting it to a court and applying for it to be returned to them in the form of 'consent orders'. Applying for consent orders is an administrative process and does not require any court appearance. For more details see ***Consent orders***, page 15.

WHAT ORDERS CAN THE COURT MAKE?

A member of a separating couple unable to resolve their own disputes about property and finances can apply to the Family Court or Federal Circuit Court for orders relating to:
- the re-organisation and sharing-out of the property and debts of the parties ('property settlement'); and
- provision of financial support from one party to another ('maintenance').

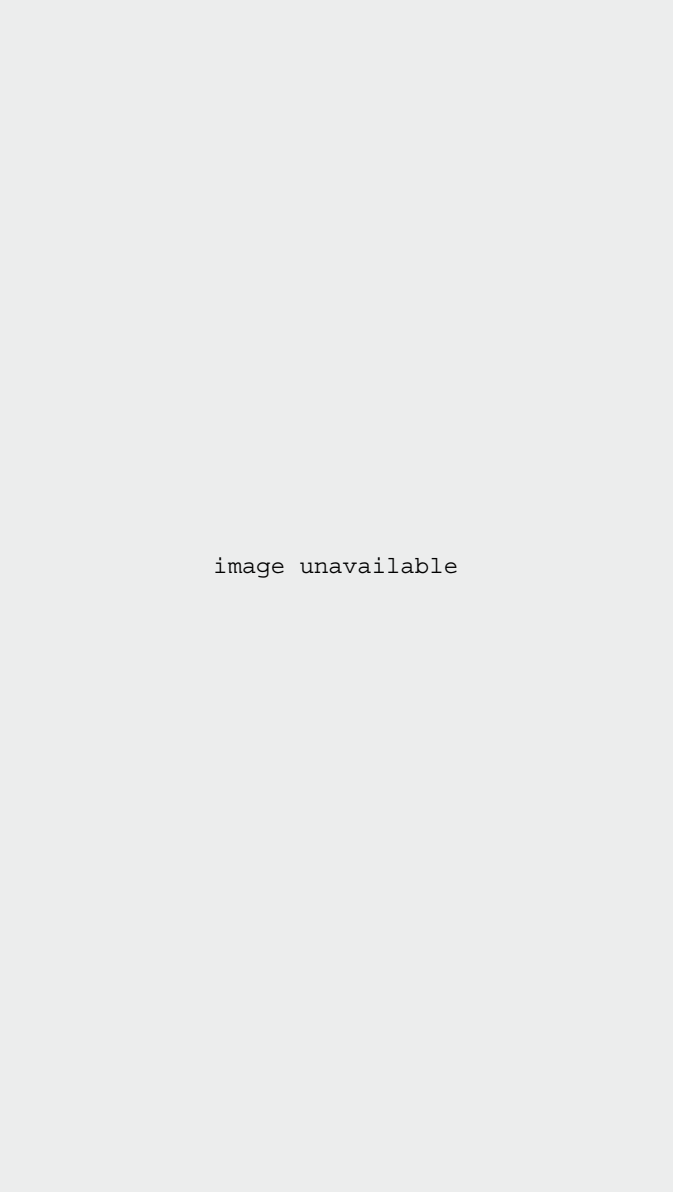
It is important to remember that an application to the court for property or maintenance orders *may* be made at anytime between separation and divorce, but *must* (ordinarily) be made within 12 months of the divorce.

MAINTENANCE

A person can apply to the court for an order that their spouse, or former de facto partner, must pay him(or her) a regular amount to assist with living expenses after separation. This is called a maintenance order. The court will make a maintenance order when, because of such factors as age, health, financial resources, child-raising responsibilities or earning capacity, the financial situations of each party after the separation and/or divorce (and even after the property settlement) appear to be significantly different.

Maintenance orders are rarer these days, when often both parties are income earners and any differences in their likely future circumstances can be adequately provided for in the four-step property settlement process.

In most cases, but depending on the circumstances, spouse maintenance is ordered for a short-term period only (say, up to three years). The time-frame chosen may depend on the age of children, or the time necessary for one party to complete educational qualifications, or re-train for employment.



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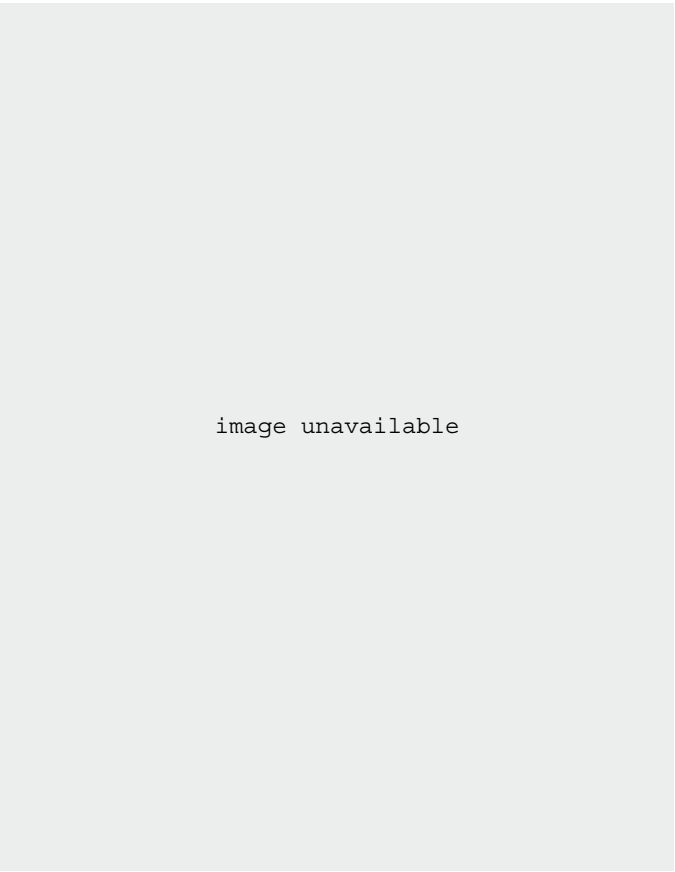
Child support

When parents separate, they are required to make financial arrangements for the care, welfare and development of their children until they reach the age of 18. This is referred to as 'child support'. Parents can agree to their own arrangements – in terms of both the amounts to be paid and how the payment will be made – or they can apply to the Child Support Agency for assistance. However, it is advisable that any private agreement for child support is recorded in writing, dated and signed by both parents.

WHO PAYS CHILD SUPPORT?

Both biological parents of a child have a duty to provide financial support for the care, welfare and development of the child. This is so even if the parents were never in a relationship. It is the parent who has the smaller role in daily care of the children of the relationship that is required to pay child support. The amount of child support that is paid can change depending on the number of nights the child/children spend with either parent and their financial means. There is a formula that the Child Support Agency uses to calculate the amount. The payment is made either directly or through the Child Support Agency.



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The Child Support Agency assesses the amount that a parent has to pay as child support in accordance with the *Child Support (Assessment) Act 1989*. Assistance in collection and payment of child support is provided by the Agency under the terms of the *Child Support (Registration and Collection) Act 1988*.

Even if the amount and form of the payments is agreed privately between the parties, the arrangement can still be registered with the Child Support Agency for assistance with enforcement and collection, although there is no requirement that it must be.

COLLECTION OF CHILD SUPPORT

Collection of child support can be arranged privately or through the Child Support Agency. If payment is arranged through the Child Support Agency, the Agency will collect the amount payable from the payer parent and forward it to the payee parent.

If a valid private agreement is registered with the Agency, the Agency will collect child support in accordance with the terms of the agreement rather than its own assessment.

The Child Support Agency has powerful methods for extracting payments from payer parents who are failing to meet their child support obligations, including by applying to a court for an order for wage garnishment (mandatory deduction from wages), or for seizure and sale of property. Unpaid child support collects as a legal debt owed to the payee parent by the payer parent (provided there is a registered child support arrangement in force).

ASSESSING THE AMOUNT OF CHILD SUPPORT

A parent can apply to the Child Support Agency for an assessment of the parties' circumstances and to determine the amount that the parent with the smaller role in child-caring must contribute to the care of the child.

The Agency makes its assessment based on a legislative formula. The formula takes into consideration each parent's income, the number of children, living expenses of the parents, the living arrangements of the children, and any other children in the liable parent's care.

Parties with a child support assessment should let the Child Support Agency know if their financial or domestic circumstances, or the circumstances of the other parent, change. The changes could affect the amount of child support payable.

SOCIAL SECURITY BENEFITS AND PROGRAMS FOR FAMILIES

The Commonwealth Government provides a range of **benefits** and implements social policy through various **programs** to assist and support family life in Australia. These Government-funded programs and benefits are part of what is sometimes referred to as the 'social safety net'. It is generally agreed in Australia that families need assistance from time to time to meet their care responsibilities, that some families need more help than others, and that it is a fair and proper use of taxpayer's money to for the government to provide such assistance. The exact nature and extent of the programs and benefits provided under the social safety net at any point in time varies with the politics of the government of the day, and their perception of the needs of different groups.

Government-funded programs for the support of families are provided in a wide range of areas including health, education and early childhood. Many programs are managed by Commonwealth Government departments, such as the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), and by state government departments, such as NSW Department of Family and Community Services (FaCS), but actually carried out by community-based organisations, such as Centacare and Relationships Australia, that receive government funding. A current example is FaHCSIA's 'Family Support Program' (FSP) which provides services to vulnerable families to improve family functioning, safety and child wellbeing. The FSP provided both broad-based early intervention and prevention services, as well more intensive assistance in targeted locations where there are multiple indicators of disadvantage. The FSP also provides Family Law Services which funds programs for family dispute resolution, Family Relationship Centres and other important community services that support separating families and particularly, the children involved. The FSP in its various forms has been funded by successive governments since the 1960s.

'Benefits' are payments made by government to families that have specific financial needs. They are sometime referred to as 'social security' or 'Centrelink' benefits. Centrelink is the Commonwealth government agency that administers the payment system. Commonwealth benefits available from Centrelink at the time of writing to assist eligible parents to raise their children include:[6]

Benefit name	***Purpose and payees***
Family Tax Benefit Part A	for parents or carers to help with the cost of raising children
Family Tax Benefit Part B	for single income families or sole parents
Parenting Payment	for more needy parents or carers to help with the cost of raising children
Child Care Benefit	for families to help with the cost of child care
Baby Bonus	for help with extra costs after the birth of a new baby
Double Orphan Pension	for people who are raising children who have lost both parents
Carer Allowance (Child)	for people who care for a child with a disability at home
Dad and Partner Pay	to support dads or partners caring for a newborn or recently adopted child
Schoolkids Bonus	an automatic payment each January to help eligible families with education costs
Fares Allowance	to help eligible students who have to live away from home in order to study

Centrelink payments are authorised legally under a range of social security and family assistance laws, featuring the *Social Security Act 1991* (Cth) and *A New Tax System (Family Assistance) Act 1999* (Cth) specifically.

6. Source: Centrelink website http://myaccount.centrelink.gov.au/wps/portal/pay_3_to_help_raise_children?initURL=true

Family violence and child abuse

The primary responsibility and power to make laws and decisions about child welfare, care and protection falls to the states and territories as part of their residual jurisdiction under the Australian Constitution. To help them carry out their responsibilities in these areas, each state and territory has a child protection service made up of various government and non-government agencies concerned with the safety and wellbeing of children.

S. Oskar, Corbis.

COMMONWEALTH SPECIAL WELFARE JURISDICTION

The High Court of Australia has confirmed, however, that the Commonwealth and its federal courts have their own special powers to make laws and decisions about the care and protection of children of married parents where a particular right, duty or responsibility (such as parental responsibility) is involved, or if the child's issue also involves other Commonwealth heads of power listed in the Constitution.[7] This is referred to as the Commonwealth's 'special welfare jurisdiction'.[8]

The welfare jurisdiction of the Commonwealth is a version of the ancient legal doctrine of *parens patriae*. *Parens patriae* means 'parent of his country'. It involves the head of state having special responsibility for people unable to care for themselves. It is often exercised when a 'special medical procedure' (one that is major, invasive and irreversible) is proposed for a child. The courts have held that authorisation for a special medical procedure is outside the bounds of parental responsibility (which means that parents cannot provide the necessary consent) and so requires a court order.[9]

OVERLAPPING JURISDICTION

Even without the complication of the Commonwealth's special welfare jurisdiction, there is much overlap between the Commonwealth's role in organising parenting and other family issues in circumstances of relationship breakdown and state and territory responsibilities for the welfare of children. This is particularly the case where relationship breakdown and family violence or child abuse are all involved in complex family situations.

The jurisdictional situation can result in difficulty for the courts, the parties and the children concerned. For example, a matter may be commenced in the Family Court and then stopped when Children's Court proceedings for care and protection orders are commenced (because the Family Court is prevented from making parenting orders if there is a state care order outstanding). Also, state court family violence orders can be made invalid to the extent they conflict with Commonwealth family court orders. Other difficult outcomes resulting from the split and overlapping jurisdictions in family matters include delays (possibly involving increased risk of violence or abuse), inconvenience, higher costs, and emotional trauma.

7. *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20
8. More information on the Commonwealth's special welfare jurisdiction is available in *Hot Topics 81: Child care and protection*, pp 1-2; see www.legalanswers.sl.nsw.gov.au/hot_topics.
9. *Re Angela (Special Medical Procedure)* [2010] FamCA 98; available at http://www.austlii.edu.au/au/cases/cth/FamCA/2010/98.html

CHANGES TO LAW ON FAMILY VIOLENCE AND CHILD ABUSE IN 2011

The Commonwealth decided that amendments to the *Family Law Act* were necessary after research suggested that the co-operative parenting changes made in 2006 may have contributed to increasing rates of reports of family violence and child abuse around relationship breakdown. The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* came into effect in July 2012. The main changes to the *Family Law Act* were as follows:

New definition of family violence

The definition of family violence in the Act was changed to remove the requirement that a person 'reasonably' fear for their safety, and to include controlling or coercive behaviour. The new definition, at section 4AB, provides that family violence is violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.

For clarity, a new sub-section 4AB(2) provides an open list of the types of circumstances that may be family violence under the Act.

New definition of child abuse

The definition of child abuse has been extended to include two new categories of behaviour. The new definition, at sub-section 4(1) provides that child abuse is:

- assault;
- if the children is used as a sexual object and there are unequal power relations between the child and the perpetrator;
- action causing a child 'serious psychological harm' and expressly including *subjection or exposure to family violence* (new); and
- serious neglect (new).

Exposure to family violence is explained further by example at sub-sections 4AB(3) and (4).

Protection of a child must have top priority

The 2011 amendments to the Act confirm that, in the event of any conflict between two primary 'best interests' considerations, the 'need to protect a child from harm' should carry more weight than the 'relationship with parents' consideration.

Removal of the 'friendly parent' provision.

The 2006 amendments to the Act had included a provision that a decision about the best interests of a child should include consideration about the extent to which each parent had tried to encourage a good relationship between the child and the *other* parent. This difficult – and apparently sometimes dangerous – measure was removed in the 2011 family violence amendments.

Firmer rules about dealing with family violence and child abuse at court

The 2011 amendments strengthen considerably the rules about how courts, parties to cases, and others must deal with any allegations about family violence or child abuse. These include new provisions requiring the court, in every child-related case, to expressly ask the parties about whether they have any 'concerns' about family violence or child abuse.

WHAT IS FAMILY VIOLENCE?

There has been a growing awareness of the many different forms of domestic violence that occur in Australian lives and a greater recognition of the negative effects it can have on child victims, including children who see it happening in their family life. Evidence suggests that children who witness violence are adversely affected as children and adults, often exhibiting physical and behavioural problems and even signs of delayed development.

Family violence and the Family Law Act

The definition of 'family violence' under the *Family Law Act* was changed in 2011. See ***Changes to law on family violence and child abuse in 2011*** on page 25.

Family violence is often alleged in the course of cases before family law courts. Under the Commonwealth's *Family Law Act*, the courts have powers to grant 'protection orders'. They are also able to take a history of family violence into account in deciding what parenting orders should be made in the best interests of the child/children. Family violence can also have an impact as a 'negative contribution' to family life and be factored in the court's reckoning about the proper distribution of property at the end of a relationship.[10]

A court exercising authority under the *Family Law Act* may grant an order for the personal protection of a child and their parent or carer, and also for a married person, with or without children[11]. The order may prevent another named person from entering or remaining in the place of residence, education or employment of the protected person. The order is enforceable by the police. A person who breaches a personal protection order may be arrested and incur penalties, which may include a fine or a term of imprisonment.

All court officers, counsellors and family dispute resolution practitioners working with people involved in family disputes are required to notify the Family Court of any suspicions of child abuse, as well as suspicions of bad treatment, neglect or psychological harm. Changes to the *Family Law Act* in 2011 also require that parties to family law cases declare any allegations of child abuse. Any other person with reasonable grounds can also make a notification of child abuse to the Family Court.

If a family law court is advised of child abuse allegations, it must consider making immediate temporary orders to protect the child and/or change living or care arrangements, advise the necessary state protection authorities (in NSW, the Department of Family and Community Services), and generally, act as quickly as possible to resolve the case. The court will appoint an 'independent children's lawyer' and the case may be moved to a special program of cases called the Magellan Program. Magellan cases involve serious allegations of physical and sexual child abuse. They receive special case management, early attention to protection for the child, and the expert attentions of a specialised team of judges, registrars and family consultants.

The Family Court cannot make any parenting orders for a child once state or territory agencies have made a care and protection order for the child.

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10. *Re Kennon and Kennon* [1997] FamCA 27; available at http://www.austlii.edu.au/au/cases/cth/FamCA/1997/27.html
11. Section 68B and section 114, *Family Law Act* 1975.

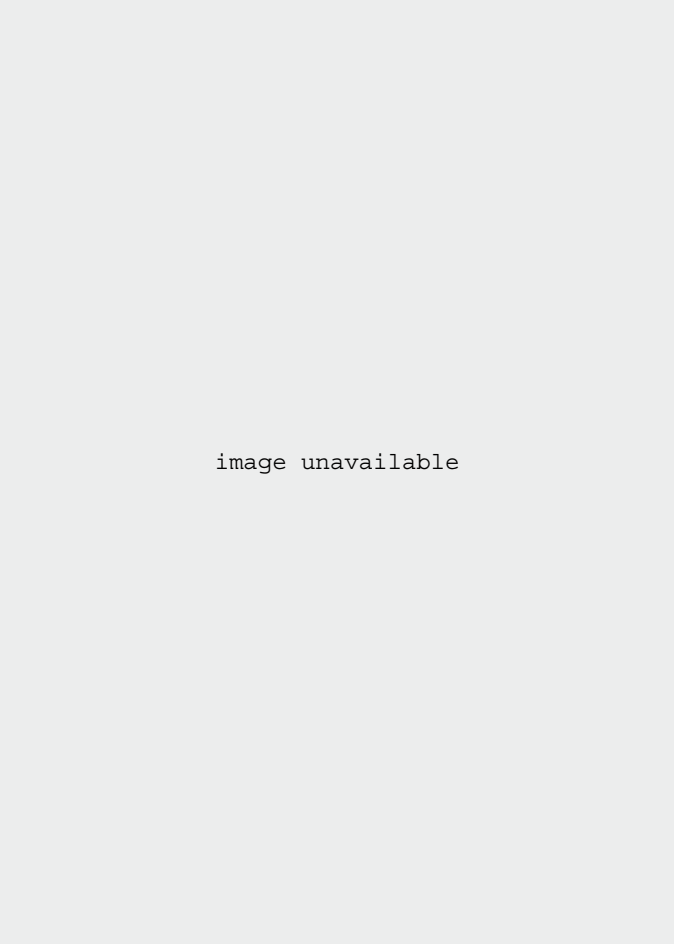
Family violence under NSW law

Under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) a 'domestic violence offence' is a personal violence offence committed by a person:

- who is or has been a spouse or de facto partner of the victim;
- who has had an intimate personal relationship (sexual or otherwise) with the victim;
- who is living or has lived in the same household or residential facility as the victim;
- who has or has had a relationship of dependence with the victim;
- who is or has been a relative of the victim; or
- who is or has been part of the extended family or kin of the victim other person according to the Indigenous kinship.

A personal violence offence includes a range of offences such as murder, manslaughter, malicious wounding or damage, assault, and sexual assault, and also the breach of an apprehended domestic violence order.

Under NSW law, a 'mandatory reporter' is any person who delivers health care, welfare, education, children's services, residential services or law enforcement to children aged under 16 as part of their work. A mandatory reporter with concerns that a child aged under 16 is at 'risk of significant harm' is legally obliged to make a report to the NSW Department of Family and Community Services (FaCS).



A. Hampton, © DWSPL.

Under section 16 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), the court can make an Apprehended Domestic Violence Order (ADVO). An ADVO can be very detailed, containing provisions banning a person from making contact with certain people, being in certain places and doing certain other things. An ADVO is designed to protect a person from violence, abuse, threats, harassment, stalking or contact with another person. An ADVO may be issued if the court is satisfied that a person 'has reasonable grounds to fear and in fact fears' a personal violence offence, or intimidation, or stalking (though the fear requirement is not necessary if the person is a child or of below-average intelligence.) See section 19 of the Act.

Breach of an ADVO is a criminal offence. Offenders are liable for a range of penalties including community service orders, fines and imprisonment.

FACTS ABOUT DOMESTIC VIOLENCE

- Many incidents of domestic violence are never reported.
- Both men and women are victims of domestic violence.
- Most victims are between the ages of 20 and 39
- Though most domestic assault incidents reported to the police involved a female victim (71%), almost one-third involved a male victim.
- The peak time for domestic violence is between 6 pm to 9pm at night.
- More than one-third of the domestic assault incidents recorded in NSW in 2004 were alcohol-related.

Source: *Domestic Violence in NSW – Briefing Paper 07/07*, T Drabsch, NSW Parliamentary Library Research Service, June 2007, page 1.

ROLE OF STATE AND TERRITORY AGENCIES

In each Australian state and territory there are various government and non-government agencies concerned with the safety, welfare and wellbeing of children that provide child protection services for children experiencing or at risk of abuse or neglect. In NSW, the principal government agency is the NSW Department of Family and Community Services (FaCS).

In NSW, FaCS conducts investigations into child abuse allegations, including those made in the course of Family Court proceedings. After receiving a notification that a child is at risk of harm, either from the Family Court, a mandatory reporter or a member of the public, FaCS may:

- report back to the Family Court and/or provide counselling;
- intervene in the Family Court proceedings; or
- commence separate care and protection proceedings in NSW.

Further information

The **Legal information Access Centre (LIAC)** in the State Library offers a free service to help you find information about the law, including cases and legislation. See the back cover for details. Specialist resources in this area include: *Australian family law and practice,* CCH Australia (online and loose-leaf) and *Australian Family Law,* LexisNexis.

Visit LIAC's ***Find Legal Answers*** website: **www.legalanswers.sl.nsw.gov.au**

You will find the ***Legal Studies Research*** guide under the 'HSC Legal Studies' tab.

Use our ***HSC Legal Studies News Watch*** blog to find the latest information: **http://blog.sl.nsw.gov.au/hsc_legal_studies/**

LawAccess

www.lawaccess.nsw.gov.au

Family Law Courts

www.familylawcourts.gov.au

Children's Court

www.childrenscourt.lawlink.nsw.gov.au

National Children's and Youth Law Centre (NCYLC)

www.ncylc.org.au

A community legal centre providing advocacy, information and education focused on human rights issues for children and young people. Includes **What's up Croc?** a section on implementation of children's human rights in Australia.

Families NSW

www.families.nsw.gov.au

Child Support Agency

www.csa.gov.au

Department of Family and Community Services (FaCS)

http://www.community.nsw.gov.au

Family Relationships online

www.familyrelationships.gov.au

Australian Institute of Family Studies

www.aifs.org.au

A government research and information agency established in 1980 to promote the identification and understanding of factors affecting marital and family stability in Australia. It provides access to discussion papers and publications such as **Family Matters** and **Family Relationships Quarterly** that have many articles on aspects of families and relationships available in full text.

Department of Family, Housing, Community Services, and Indigenous Affairs

www.fahcsia.gov.au

Responsible for a broad range of social policy issues such as income support, housing policy, community support, disability services, child care services and family issues, including family payments, child support and family relationships.

Australian Domestic and Family Violence Clearing House

www.austdvclearinghouse.unsw.edu.au

See publications, which include Thematic review, for articles such as 'Intersection of family law and family and domestic violence', Karen Wilcox in Thematic review 2, 2012.

The family law handbook, Maree Livermore. 3rd ed. Thomson Reuters, 2012. A Tool Kit title available in all NSW public libraries. Also available online at: www.legalanswers.sl.nsw.gov.au in 2013.

The law handbook, 12th ed, 2012, Thomson Reuters. See Chapter 8: Children and young people, Chapter 26: Family law and Chapter 37: Same-sex couples and their families A Legal Tool Kit title, available in all NSW public libraries. Also available online at www.legalanswers.sl.nsw.gov.au

Australian family law in context: commentary and materials, Patrick Parkinson, 5th ed., Thomson Reuters, 2012. Available in the State Library of NSW.

Australian master family law guide, Renata Alexander, 5th ed, CCH 2012. Available in the State Library of NSW.

Family law, Eithne Mills, Marlene Ebejer, 5th ed., LexisNexis Butterworths, 2012. Available in the State Library of NSW.

Family law in Australia, Lisa Young, 8th ed., LexisNexis Butterworths, 2012. Available in the State Library of NSW.

Current trends in the regulation of same-sex relationships, Paula Gerber and Adiva Sifris (eds), Federation Press, 2010. Available in the State Library of NSW.

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82 Families
The family role is to care and support for one another and to share resources, with parents protecting and guiding the development of their children. However, not all families are able to fulfil these roles. Some families are vulnerable and require extra support, while some have to adjust to changes brought by separation, divorce, and re-partnering. This issue looks at the different concepts relating to family issues, as well as property and money after separation, child support payments, adoption and courts that deal with family issues.

81 Child care and protection
Responsibility for decisions about a child's health, schooling and cultural upbringing in Australia generally lies with parents; but when families cannot provide adequate care and protection for their children, the State may intervene in various ways. This issue discusses Australia's obligations to implement and report under the UN Convention on the Rights of the Child, as well as parental responsibility, children in out-of home care and initiatives to improve protection for children.

80 International humanitarian law
IHL is the branch of international law that deals with armed conflict. It seeks to place limitation on the damaging effects of armed conflict especially on the vulnerable and to impose restrictions on the means and methods of warfare that are permissible.

79 Australian legal system
An overview of the elements of our system and how it developed, covering how law is made, what the law deals with and the roles of the legislature, judiciary and executive. Information on the Australian legal system is rarely to be found in a single publication and in a reader-friendly accessible format.

78 You and your lawyer
Having a legal problem can be intimidating. This issue will help you to understand the role of lawyers, and the help provided by other organisations in the legal services sector. It includes practical information about how to work with a lawyer, lawyers, duties, ethics, costs and complaints.

OTHER ISSUES

77 Refugees, 76 Employment and the law, 75 Discrimination, 74 Animal law, 73 Young people and crime, 72 Consumer credit, 71 Courts, 70 Cyberlaw, 69 International law, 68 Indigenous peoples, 67 Prisoners, 66 Domestic violence, 65 Human rights, 64 Health and the law, 63 Climate change, 58 Terrorism, 57 Shelter, 56 Sexual assault, 55 Sentencing, 54 Bill of rights, 53 Same-sex families, 52 Copyright, 51 Personal injury, 48 Native title, 45 Privacy, 39 Intellectual disability and criminal law, 36 Human genetic information.

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