Chapter 1  The nature of family law

The nature of family law

The concept of family law

- The Federal and State laws in respect of marriage and family
- The changing nature of the family and family relationships over time
- The evolution of family law over time

Legal requirements of marriage

- The nature of the requirements as detailed under the Marriage Act 1961 (Cth)
- Former common-law requirements: Hyde vs Hyde and Woodmansee 1866
- Age, gender, notice, witnesses, registered celebrant, prohibited relationships
- Absence of duress, fraud, etc.

Alternative family relationships

- Non-married relationships: de facto including:
  - Same-sex
  - Polygamous
  - Indigenous Australian customary law marriages
- Single parent (sole parent) families
- Blended families
- Step families

Adoption

- Domestic and offshore adoption
- Issues with the complexity and cost of adoption
- The need to carefully screen prospective parents
- Concerns about the low rates of adoption

Legal rights and obligations of parents and children

- Parental rights:
  - To name their child and raise them in the culture/religion of their preference
  - Right to discipline their child
  - To a meaningful relationship including taking part in the major decisions affecting the child (eg medical, educational)

- Parental responsibilities:
  - Care and control
  - To protect their child from avoidable harm

- Children's rights:
  - To be safe and free from harm
  - Emotional security
  - To obtain an education, appropriate medical care, to be socialised, to increased autonomy over time

- Children's responsibilities:
  - To listen to their parents
  - To undertake their duties

Figure 1  A summary of the nature of family law
1.1 The concept of family law

Throughout history there have been various notions of family, though the basic value of the family has remained constant. Over time the perception of the 'family' has changed. Traditionally, a family unit has referred to the nuclear family (that is, parents and children living together with a shared goal of mutual support). However, the definition of 'family' is beginning to change in order to reflect changing societal trends, which include alternative family arrangements.

The different functions of a family as dealt with by the law

There are many different types of family and their respective functions are many and varied.Whilst many people agree that the family is the base unit of society, there is no general consensus on the internal structure. Therefore a definition of the family cannot, by nature, be a narrow one. Nor can a narrow definition of the family be imposed on society, as society influences law as much as it is bound by it. That is, alternative family arrangements would still exist even if the definition of a family were contained to traditional conceptions. Hence, any definition of 'family' must recognise its inherent capacity for diversity.

The leading article of family legislation within Australia, the Family Law Act 1975 (Cth) recognises the family, in Section 43, as:

"the natural and fundamental group unit of society; particularly while it is responsible for the care and education of dependent children"


The law recognises that the family serves specific functions in society. Some of these functions are specifically detailed in law, although many of them are not.

The functions of the family include caring for family members at an individual level, carrying out certain functions between family members and ultimately providing a social unit that mediates between the individual and the state. These functions can either be carried out by individuals within the family (usually the parents) or by the family as a collective whole.

These functions of a family thus include:

- Provision of housing, food and clothing
- Care and protection of children, the elderly, the ill and the less-abled
- Emotional and psychological support for family members
- Stability and security (both personal and actual)
- Economic support of family members
- Socialisation of children
- Encouragement and development of family members to their full potential
The role of family law

It is appropriate to ask why the state needs to be involved in the regulation of family, in defining the ‘family’ and in imposing requirements over marriage and divorce. A response to this could include:

- We need to regulate families in order to protect children
- We need to protect the financial interests of the parties when they separate
- We need a sense of order and regulation over relationships

These are noble aspirations – after all, the law should protect children and vulnerable persons – vulnerable mothers and fathers.

However, does the law need to regulate marriages and divorces in order to achieve this aim? It is possible to ensure that parents are responsible with respect to their children through having laws particularly targeting parental responsibilities. Similarly, it is also possible to have laws protecting the financial interests of the parties to a relationship without imposing legal rules in regards to marriage as a ceremony. Thus the role of the government and the law with respect to marriages and divorces specifically is an important consideration.

Note that giving notice is an important facet of marriage law in Australia because of the legal consequences arising from marriage. Also note that there is an important nexus between migration law and marriage law in that it is illegal for a person to try and get around the immigration laws through posing with a sham marriage. This is explored in Family Matters 1 below.

**Family Matters 1  Getting in to avoid getting out**

There is a small minority of people who seek to get around the migration laws by arranging to marry a citizen. In these arrangements a person is offered up to $20,000 to act as a bride or bridegroom. The Migration Act outlaws this behaviour as follows:

**MIGRATION ACT 1958 - SECT 240 - Offence to arrange marriage to obtain permanent residence**

(1) A person must not arrange a marriage between other persons with the intention of assisting one of those other persons to get a stay visa by satisfying a criterion for the visa because of the marriage.

(2) Subsection (1) applies whether or not the intention is achieved.

(3) It is a defence to an offence against subsection (1) if the defendant proves that, although one purpose of the marriage was to assist a person to get a stay visa, the defendant believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship.

Penalty: $100,000 or imprisonment for 10 years, or both.

Note: A defendant bears a legal burden in relation to the matter in subsection (3) (see s13.4 of the Criminal Code).


The penalties are very serious for a breach of s240 as can be seen above. A fine of $100,000 and/or 10 years imprisonment is a significant deterrent. Note also how the onus of proof shifts to the defendant if the defendant claims that they thought the marriage would be ‘for life’ or in the words of the Act; ‘genuine and continuing’.

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HSC Legal Studies Family 9
Review Activities – The concept of family law

1. Briefly outline what a family is.

2. Detail why the definition of family has been altered over time.

3. Identify the main law that regulates family law in Australia.

4. Explain why the family has been called ‘the natural and fundamental group unit of society’, as stated in the Family Law Act 1975 (Cth).

5. List SIX (6) functions of a family.

   a. What is the purpose of s240 of the Migration Act?
   b. What are the penalties for a breach of s240 of the Migration Act?
   c. Outline the meaning of the term ‘onus of proof’ and its relevance for those defending a charge under s240 of the Migration Act.

7. What is the purpose of family law?

Thinking Activity

What role should the government have with respect to family?

Think about the purpose and role of family. Reflect on how family has particular roles with respect to each family member. Use your insight and experience to discuss the role that government should have with respect to family.
1.2 The legal requirements of marriage

Marriage (traditionally the lifelong union of a man and wife) has historically been held
within the jurisdiction of the Church. However, marriage has not always been a union
of love, but rather that of a property agreement. For example, early Church agreements
viewed marriage as the transferral of a woman's property to that of the man. Marrying
for 'love' has only been a relatively recent phenomenon.

Legal definition of marriage

The legal definition of a marriage is most clearly articulated in the common law case
of Hyde v. Hyde and Woodmansee (1866), which remains a strong part of family law in
Australia today.

Family Matters 2 Hyde v Hyde and Woodmansee (1866) LR 1 P & D 130

This was an English case in the 19th Century that has had a lasting effect on the definition
of legal marriage. Mr Hyde (an Englishman) married an American Woman (within American
jurisdiction), who then became known as Mrs Hyde. Both were part of the Mormon religion at
the time. However, some time after their marriage Mr Hyde decided against Mormonism and
actively began preaching against it. Thus, he was banished from the Mormon Church. Following
his excommunication Mrs Hyde remarried Mr Woodmansee, without having divorced Mr Hyde.
Polygamy (having more than one spouse) was allowable in the Mormon religion. Mr Hyde, having
renounced his faith, appealed for a divorce as he believed that his wife had committed adultery.
However, this was not the case under English Law. The Judge presiding over the case stated that
English courts could not rule over potentially polygamous marriages and thus dismissed Mr Hyde's
request. Most importantly however, was the statement by the Judge, which declared that the law
recognised a legal marriage as

'a voluntary union for life of one man and one woman, to the exclusion of all others.'

This case stated that four elements must be present in order for a marriage to be valid.
These elements included:

- Voluntary Union
- For life
- Between a man and a woman
- To the exclusion of all others (monogamous union)

If any of these four elements is missing the marriage is considered null and void.
Voluntary Union

In a contemporary context, this means that entering into marriage must be voluntary; no person can be forced to marry under duress. If this is the case, the marriage is considered void. However, there must be a distinction between forced and arranged marriages; these concepts are not one and the same.

MARRIAGE ACT 1961 – SECT 23  Grounds on which marriages are void

(1)(d)(i) the consent of either of the parties was not a real consent because it was obtained by duress or fraud


The capacity for a person to be induced into a marriage through fraud extends to misrepresentation. A case where misrepresentation was alleged is outlined below.

Family Matters 3  Misrepresentation or in the course of living together...?

A Pre-Nuptial or Binding Financial Agreement (BFA) entered into prior to marriage promising the wife $3.25 million if the relationship broke down, has been upheld by the Family Court of Australia. The husband tried to have the agreement set aside on the basis that there was fraud and/or unconscionable conduct on the wife’s behalf. The couple met in a strip club where the wife was working as an erotic dancer and the husband a very successful businessman.

The husband based his claim on the fact that his wife told him that she loved him, wanted to have children with him and wanted to live with him for the rest of her life, but that none of this occurred after they married and so, he argued, it was a misrepresentation inducing him to enter the agreement, as well as fraud. The husband also relied on the fact that intimate relations between him and his wife had deteriorated after their marriage.

The court did not accept the husband’s position and upheld the BFA. The court held the husband gave his wife the impression that if she did not sign it, he would not marry her. Additionally, it was the husband who instructed his solicitor to craft the agreement because he had experienced a separation from a former wife, and was aware of the implications if he had no such agreement. The Judge also pointed out that the husband was a successful businessman who had examined the agreement in detail, and carried out negotiations, a skill which he was proficient at. This rebutted the argument that he was coerced into the agreement.

The Judge found that the representation made by the wife about love, children and living together forever, were not made in the context of fraud or unconscionable conduct, but were simply discussions that people in long relationships have from time to time, and that she was bona fide in aspiring to a life with the husband. Additionally, it was found that “any change in the nature of intimacy between parties when they married was not an indication of fraud, coercion or unconscionable conduct”.

The husband was unsuccessful in having the Pre-Nuptial Agreement overturned and was forced to pay the wife what she was entitled to under the Agreement, however, costs of the proceedings were deducted.

For life
The 1866 requirement of "for life" no longer applies in Australia following the implementation of the Family Law Act 1975 (Cth) which allows divorce on the grounds of an "irretrievable breakdown of marriage" (Part VI, ss48-50). Therefore, people within Australia are able to file for divorce.

Between a man and a woman
At present under Australian law, the Marriage Act requires that marriage be between a man and a woman. Whilst the terms 'man' and 'woman' seem obvious this may not be the case in some scenarios. Consider for example the situation for transgender persons. If a person born a female has gender reassignment surgery as an adult, and identifies as a man, which gender is the person? The gender on the birth certificate or the gender the person has become? These are issues for the law.

MARRIAGE ACT 1961 – SECT 5 Interpretation
In this Act, unless the contrary intention appears:

"marriage" means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.


Homosexual unions are not currently legally recognised as marriage, but are granted de facto status. There is however much international law reform for same-sex couples and there have been many recent reforms in Australia improving the legal rights of same-sex couples.

Family Matters 4 Transsexual marriage
In the facts of Re Kevin, Kevin was born a woman and had female chromosomes and genitals at birth. However, Kevin identified himself as a male for most of his life and was accepted as such by the people around him. Subsequently, Kevin underwent gender reassignment surgery and was a post-operative transsexual. Upon completion of the surgery, he made an application to the Registrar of Births, Deaths and Marriages to be identified as a male and a new birth certificate was issued showing that Kevin was indeed now a male.

Eventually, Kevin met and married his wife to be who was also aware that he was a transsexual and the couple sought to have their marriage considered as valid. The trial judge, Chisholm J, stated that the identity of the person is to be ascertained at the time of marriage, rather than at birth, therefore, declaring Kevin's marriage as valid. His Honour stated:

"The weight of medical opinion generally agrees that in the instance of a transsexual person, that individual is born with a brain that recognises him or herself as a member opposite to that whose physiological indicia he or she bears."

To the exclusion of all others

Monogamy is the basis of marriage in Australia. That is, an individual may only have one spouse. Therefore, polygamy (more than one wife) and polyandry (more than one husband) are both against Australian law. If however a person is validly married outside of Australia in a polygamous marriage then it is recognised as valid in Australia. A person who is married is allowed to have de facto partners. These partners may even be concurrent. The married person is not however allowed to marry more than one person simultaneously under Australian law.

**MARRIAGE ACT 1961 – SECT 94  Bigamy**

A person who is married shall not go through a form or ceremony of marriage with any person.

Penalty: Imprisonment for 5 years.


**Requirements of a valid marriage**

There are many legal requirements that must be fulfilled before a valid marriage can take place. These requirements are detailed in the *Marriage Act 1961* (Cth). The requirements of a valid marriage include:

i) Marriageable age (s11)

ii) Authorisation of marriage if under 18-years-old (s12)

iii) Parental consent (s13) or consent of a guardian (s14)

iv) Prohibited degrees of relationship (consanguinity) – s23(B)(2) and s23(B)(3)

v) Notice of marriage (s42)

vi) Requirements for a valid marriage ceremony (solemnisation of marriage) ss44–47

vii) Marriage licence

**Marriageable age**

Marriageable age in Australia under the *Marriage Act 1961* (Cth) is 18 years for both males and females. However, there are certain exceptions to this as can be seen from s12 of the Act outlined below.
**MARRIAGE ACT 1961 – SECT 11  Marriageable age**

Subject to section 12, a person is of marriageable age if the person has attained the age of 18 years.

**MARRIAGE ACT 1961 – SECT 12  Authorisation of marriage of person under age of 18 years in exceptional circumstances**

(1) A person who has attained the age of 16 years but has not attained the age of 18 years may apply to a Judge or magistrate in a State or Territory for an order authorising him or her to marry a particular person of marriageable age despite the fact that the applicant has not attained the age of 18 years.

(2) The Judge or magistrate shall hold an inquiry into the relevant facts and circumstances and, if satisfied that:
   a. the applicant has attained the age of 16 years; and
   b. the circumstances of the case are so exceptional and unusual as to justify the making of the order the Judge or magistrate may, in his or her discretion, make the order sought, but otherwise the Judge or magistrate shall refuse the application.


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Authorisation of marriage if under 18-years old and Parental Consent

Parental consent only applies to persons between the ages of 16 and 18 years. Persons over the age of 18 years do not require parental consent for marriage. Persons aged 16 years and above are entitled to apply for a grant of marriage to a magistrate or judge under special circumstances. The partner must be over 18 years old and "the circumstances of the case are so exceptional and unusual as to justify the making of the order", as per section 12(2) of the Marriage Act 1961 (Cth).

Generally parental/guardian consent is also required, however judges can dismiss under-18 marriage proposals even where parental consent has been given. Due to recent Court cases, it remains unclear as to whether pregnancy is considered an "exceptional circumstance".

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**Family Matters 5  Ex parte Willis (1997) (WA)**

In this case, the couple had known each other for several years and been in a relationship for a year. The female was 17 and nine months old, and her partner was 22. They had already engaged and had been saving for a house when they discovered that the female was pregnant. The couple wanted to marry prior to the birth of their child. They had the support and consent of their parents. The couple had stable jobs, savings, had booked their wedding and even invited the guests. However despite this, the Magistrate of the Family Court at first instance (first hearing) ruled that the couple could not marry.

The Magistrate held that notwithstanding the circumstances, the matter was not "so" exceptional and unusual as to justify accepting the application.

The couple appealed and the judge who heard the appeal held that the word "so" should be interpreted as "sufficiently" rather than "extremely" or "very". Thus the judge ordered a re-hearing.
Prohibited degrees of relationship

**MARRIAGE ACT 1961 – SECT 23B  Grounds on which marriages are void**

(2) Marriages of parties within a prohibited relationship are marriages:
   (a) between a person and an ancestor or descendant of the person; or
   (b) between a brother and a sister (whether of the whole blood or the half-blood).

(3) Any relationship specified in subsection (2) includes a relationship traced through, or to, a person who is or was an adopted child, and, for that purpose, the relationship between an adopted child and the adoptive parent, or each of the adoptive parents, of the child shall be deemed to be or to have been the natural relationship of child and parent.


Prohibited relationships refer to the degree of biological closeness of the individuals. That is, how closely they are related. Consanguinity means relationship by blood or by a common ancestor. Under Australian law no one can marry a close family member. As can be seen above, under the Marriage Act 1961 (Cth) a marriage is void where it is between:

- A person and his (or her) descendants (e.g. children) or ancestors (e.g. parents), or
- Brother and sister (either related wholly or in part by blood)

Therefore, a woman cannot marry her father, grandfather, brother, son or grandson. Similarly, a man cannot marry his mother, grandmother, sister, daughter or granddaughter.

First cousins however may marry in Australia.

Legally adopted children are considered natural children and hence cannot marry either their biological or legal parents.

**Notice of Marriage**

**MARRIAGE ACT 1961 – SECT 42  Notice to be given and declaration made**

(1) Subject to this section, a marriage shall not be solemnised unless:

- a notice in writing of the intended marriage has been given in accordance with this section and has been received by the authorised celebrant solemnising the marriage not earlier than 18 months before the date of the marriage and not later than 1 month before the date of the marriage.


Notice of marriage must be given no later then 30 days (approximately one month) and no earlier than 6 months to the authorised marriage celebrant. This may be either a religious or a civil (non-religious) celebrant who conducts the marriage.
Requirements for a valid marriage ceremony (solemnisation)

The marriage must take place in the presence of an authorised celebrant (religious or civil). However, in the case of a civil celebrant there is a prescribed set of words which must be included within the wedding vows.

The ceremony may be conducted on any day, at any time and at any place (Marriage Act 1961 (Cth), section 43). However the following always apply:

- There must be two adult witnesses (that is, both over the age of 18), who are required to sign the marriage certificate toward the conclusion of the ceremony.
- The couple must have legitimate copies of their birth certificates.
- Also, if either (or both) of the partners have been married before, then proof is required of the dissolution of all previous marriages or the death of previous spouses.
- A declaration by each party is made as to their single status and their belief that there are no legal impediments to the marriage proceeding.

Marriage licences

Immediately following the solemnisation of the marriage, the celebrant, the married couple and two witnesses (over 18 years) must sign the marriage certificate.

Three identical copies of the certificate are signed. One copy to be given to the couple and the other two are kept for official purposes. One copy is sent to the Registry of Births, Deaths and Marriages (BDMs) which registers the marriage, and the other is retained by the celebrant for filing. The celebrant’s copy must be kept for a minimum of six years. This entire process makes up the marriage licence.

The marriage certificate is proof that that the ceremony was conducted as per legal requirements.

Consequences and responsibilities of marriage

There are many consequences and subsequent responsibilities once an individual has entered into marriage. These include mutual duties of husband and wife, maintenance, property rights, agency, wills and family provision legislation.

Mutual duties of husband and wife

These mutual duties (known as consortium vitae) include the expectations that society has of spouses. These include duties and responsibilities such as:

- Sharing of household duties
- Having a sexual relationship
- Responsibility for the care and maintenance of children
Sharing of household duties

At the basic level this includes sharing of duties such as washing, cooking, cleaning and general household maintenance. Despite traditional views, these duties are expected to be divided equally between the couple. That is, both the male and the female are expected to carry out such basic household duties, which have often been left within the female domain.

**Domestic Deliberations 1  How should the management of the family be divided?**

Traditionally, domestic duties have resided within the realm of female responsibility. Males would generally work full time and household duties fell to the female. However, much has changed in the past two decades and many families now consist of two full-time working parents. If both parents now work, how is the household labour to be divided? Whilst some men do help considerably with household chores, much anecdotal evidence would suggest that most women still bear the ‘burden’ of such duties. Indeed, such responsibilities even restrict many women from engaging in full-time labour, decreasing their ability to earn equivalent male wages.

If the family is the base unit of society (as stated earlier), and the maintenance of the family allows for the less-restricted adult (males) to enter the workforce, and further, if families rear future participants of the labour force, surely this ‘home’ work should be rewarded? This is the suggestion of many academicians, both male and female, who feel the work of women is unduly recognised in Australian society.

What about the emotional management of the family? In your experience, which parent gives more emotional support in managing the family? In your observation of romantic relationships, which partner is more empathetic to the feelings of the other?

It seems that much of the family work traditionally associated with women is difficult to quantify. This is vital consideration for all deep and meaningful relationships, regardless of the genders of the parties involved, where the responsibilities of a family are to be divided equitably.

*What do you think??*

Having a sexual relationship

Generally, it is expected of a married couple that they share a sexual relationship (‘consortium’) as one of the ‘mutual duties’ of husband and wife.

In fact, the *Matrimonial Causes Act 1959* (Cth) stated that unless a marriage was consummated (that is, to complete the rite of marriage with the first act of sexual intercourse after the ceremony), the marriage would be deemed void.

Before this, there was a (now outdated) legal principle known as ‘*unita caro*, meaning “one flesh”. One of the consequences of the application of this principle, was that a man had free access to his wife’s body, regardless of her wishes. Technically this meant that the male could both rape and beat his wife (legally) within the confines of marriage.

However, the current legal framework governing rape in marriage is now covered by the *Crimes (Sexual Assault) Amendment Act 1981* (NSW) which prohibits rape in marriage. Therefore, non-consensual sex within marriage is now regarded as a violent sexual crime and is treated under the law as such.
Review Activities – The legal requirements of marriage

1. State the FOUR (4) elements that must be present for a valid marriage as expressed in the Hyde v. Hyde and Woodmansee judgement.

2. Explain how marriage must be a voluntary union and what this means.

3. Can arranged marriages be classified as ‘voluntary’? Justify your response.

4. Define the following terms:
   - Monogamous
   - Polygamy
   - Polyandry
   - Consanguinity
   - Transsexual
   - Solemnisation
   - Authorisation
   - Notice period
   - Celebrant

5. How are ‘man’ and ‘woman’ to be understood in the context of the common law?

6. Is a person allowed more than one partner concurrently under Australian law? Explain your response.

7. Identify FIVE (5) requirements for a valid marriage.

8. Explain the circumstances under which those under the age of 18 can get married.

9. Describe the term ‘consanguinity’ and detail how it applies in the Australian context.

10. Outline the period of notice required for people to marry in Australia.

11. List TWO (2) requirements for a valid marriage ceremony.

12. Detail how a marriage licence is a process.

13. Identify THREE (3) mutual duties of married persons (husbands and wives).

14. Explain whether household duties between married people have always been equal.

15. With reference to TWO (2) sources of law, discuss the change in law with respect to the view that having a sexual relationship is expected in marriage.
1.3 Alternative family relationships

'Alternative' family arrangements refer to all family relationships that do not fit into the 'nuclear' model of a family (that is, two parents who live together with one or more children). In an age where 'nuclear' families constitute less than half of the known family arrangements in Australia, it is entirely appropriate to question the legitimacy of the term 'alternative' in the context of family arrangements. With 1 in every 3 children now living in single parent households at some stage during their childhood years and more marriages remaining childless, it would seem as though the experience of the 'nuclear' family is becoming increasingly less common. Thus, when studying family law it is imperative that students concern themselves with the wide array of family structures present within Australia and do not only concentrate on the traditional 'nuclear' family.

Aboriginal and Torres Strait Islander people's customary law marriages

Most Australian Indigenous customary law marriages are not recognised under Australian law as certain aspects of customary marriages fail to fulfill the Australian statute or common-law criteria. In order to understand why certain Indigenous marriages are not recognised under Australian law, you must understand the requirements that constitute a 'valid marriage'. Note that in this context 'validity' is based on mainstream British-Australian law.

As discussed earlier, a marriage is considered lawful under mainstream Australian law when it is a:

- Voluntary Union
- For life
- Between a man and a woman
- To the exclusion of all others (monogamous union)

These requirements are specified in the case \textit{Hyde v. Hyde and Woodmansee (1866)} LR 1 P & D130. A second set of requirements must also be fulfilled as specified under the \textit{Marriage Act 1961} (Cth) and detailed earlier:

- Marriageable age (18 or 16 with consent and/or exceptional circumstances)
- Authorisation of marriage if under 18-years-old (s12)
- Parental consent (where applicable)
- Prohibited degrees of relationship (consanguinity)
- Notice of marriage
- Requirements for a valid marriage ceremony (solemnisation)
- Marriage license
Indigenous customary law marriages may exhibit the following characteristics which prevent them from being recognised under Australian statutory law and common law:

- Marriages can occur between Indigenous People who are already closely related by ancestry (consanguinity). Hence, this would be considered a 'prohibited relationship'.
- Marriages may include more than two people (that is, the marriage is not monogamous)
- Girls younger than the age of 18 may marry
- Marriage may not be satisfactorily voluntary
- The marriage may not be authorised by a (legally) recognised celebrant
- As Indigenous Customary Law is an oral tradition, no written records (such as marriage certificates) are kept.

Therefore, there are many aspects of Indigenous Australian customary law that have the potential to exclude Indigenous Australian customary law marriages from being recognised under mainstream Australian law.

Although Indigenous Australian customary law marriages are not recognised as 'legitimate marriages', mainstream Australian law does recognise Indigenous marriages in certain circumstances for legal purposes. This was due to the Australian Law Reform Commission (ALRC) releasing a report in 1986 (*Recognition of Aboriginal Customary Laws*) which addressed the issue of non-recognition of Indigenous Australian customary law marriages. The report suggested that whilst mainstream Australian law could not legally recognise Indigenous Australian customary law marriages, it could give these marriages temporary *de facto* status (despite not fulfilling *de facto* legal requirements) when remedying issues to do with children and taxation schemes so as to provide a workable compromise between the two.

*A de facto* relationship occurs when two unmarried people live together, sharing domestic circumstances as if they were married and who also share sexual relations. Detailed information of *de facto* relationships is covered later.
Single or ‘Lone’ Parent Families

Single parent families are also called ‘lone’ parent families. These are families where one parent cares for one or more children on their own. A single parent can either be male or female, however in the majority of cases (about 84%) the female takes on the role of the full-time single parent. Single parent families can result from:

- Divorce or separation (where the parents have ended their relationship)
- Death (where one parent has died and the other parent, or subsequent care giver assumes full parental responsibility)
- One parent (generally female) deciding before birth to be a single parent

Family Facts 1 Increase in single or ‘lone’ parents

Data from the 2001 Household, Income and Labour Dynamics in Australia (HILDA) survey, indicated that more children are experiencing parental separation and living in single-parent families than ever before. The report indicated that the number of children born to married couples fell from 98% in 1946 to 72% in 2001. It also showed that the number of children born to cohabiting unmarried parents jumped from zero to 16%. The report demonstrated that children experiencing parental separation by the age of 15 more than trebled from 7% in 1946 and 1955 to 23.5% since 1985 (considerably higher than the ABS divorce figures which indicated that 18% of children by the age of 18 are affected by separation).

Lone parent families

In June 2011, there were 950 thousand lone parent families, making up 15% of all families. About two-thirds of these lone parents were living with their dependants. There were 780 thousand single mother families in June 2011, making up the vast majority of lone parent families (83%).

Lone parent families with dependants

In June 2011, there were 630 thousand lone parent families with dependants, and most (84%) were single mother families. In a little over half (54%) of lone parent families with dependants, the age of the youngest child was between 0 and 9 years old. The parent was employed in 59% of lone parent families with dependants in June 2011. In these families, 70% of single fathers were employed compared with 57% of single mothers. Employment among single parents generally increased as the age of the youngest dependant increased, with 73% of single parent families whose youngest dependant was 15–24 years old having an employed parent, compared with 35% whose youngest dependant was under 5. Nationally, 19.0% of children under 15 years lived in a lone parent family in 2011. Among the states and territories, Tasmania had the largest proportion, (24.5%) while the ACT had the smallest (13.2%).

Sources: Louise Belamy, 23.05.04, Sun Herald and http://www.abs.gov.au/ausstats/ausstats/abs@.nsf/Products/6224.0.55.001~Jun%202011~Chapter~Lone%20Parent%20Families
Blended Families

Blended families are families where a couple lives together (either married or de facto) with children from previous relationships. However, these couples may also produce subsequent children who are fully related to both parents within the relationship.

**Intact Family** A couple with at least one child (natural or foster) of their own and NO child who is a step-child of either member of the couple.

### Family Facts 2  Blended...but not always splendid

A blended family is one in which there is a couple with two or more children, of whom one is the natural child of the couple and at least one is the step child of either member of the couple.

Source: Australian Institute of Family Studies (AIFS)

![Diagram of blended family structure]

In 2001, 4.4% of all couple families with children under the age of 18 were blended families. 5.5% were step-families. Children living in step or blended families are at higher risk of abuse, neglect and depressive disorders than children in intact families. For example, 6.6% of male children and 5.1% of female children living in step or blended families experience a depressive disorder, compared with 3.2% of female children and 2% of male children in intact families. Similarly, substantiated abuse is twice as high in step and blended families than substantiated abuse in intact families. However, this does NOT mean that step or blended families are the cause.

Source: State of The Family, p11, Anglicare Australia, 2005

In 2006-07: 72% of all families with a child under the age of 18 years were intact families, 17% were families headed by lone mothers, 4% were step-families, 3% were blended families and 3% were lone-parent families headed by fathers. There has been little change in the relative proportions of such families over the decade from 1997 to 2006-07.

Same-sex relationships

In the context of an alternative family arrangement, same-sex or homosexual relationships are relationships where two people of the same sex (either both male, or both female) form a committed partnership, share a bona fide (in good faith or genuine) domestic basis and a sexual relationship. These couples may or may not have children.

Same-sex couples cannot (under Australian law) be legally married. Indeed, up until relatively recently it was illegal to participate in a homosexual relationship. In more recent times Australian laws have been changed in order to reflect society's changing values.

Over the past 20 years same-sex relationships have gained substantially greater legal recognition. Whilst homosexual relationships are yet to gain equal status with married heterosexual couples, they are now entitled to de facto status. However, even the progression to de facto status was a long and arduous journey.

In 1995 a gay male couple took the health insurer NIB Health Fund Ltd. to the Equal Opportunity Tribunal stating that they had been discriminated against as they had been refused the option of family health cover (to potentially cover both partners and the son of one of the men) Hope and Brown v. NIB Health Fund Ltd 1995. By that stage, NIB was one of the last major health insurers to recognise same sex families. The Tribunal ruled that the men had been discriminated against on the grounds of their sexual orientation.

Further cases have paved the way for recognition of homosexual entitlements in areas of taxation (such as social security benefits), leave benefits from work (such as parental and carer's leave). By 2003 New South Wales, Queensland, Victoria, Western Australia, Tasmania and the ACT all legally recognise same-sex couples in matters of superannuation, hospital and coronal rights, property settlements, taxation, compensation payments, wills and estates (Greig, 2003 quoted in ABS Cat 3101), however there was still a high degree of inequality between same-sex couples and heterosexual couples.

There have been very significant recent reforms that have had the effect of improving equality for same-sex couples. Such laws include:

Commonwealth law reforms

*Family Law Amendment (De facto Financial Matters and other Measures) Act 2008 (Cth)*

This law gave equality for same-sex couples under family law by allowing access to Federal court for property settlement. A new section 39, Division 2 was inserted into the *Family Law Act* which gives the Family Court jurisdiction in de facto financial causes.

*Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Amendment Regulations 2008 (Cth)*

This law amended 84 federal laws to give inclusion and equality to same-sex couples and their children.
NSW state law reforms

*Miscellaneous Acts Amendment (Same Sex Relationships) Act 2003*

This legal amendment changed the law to extend parenting rights to both female parents allowing that both could be registered on the birth certificate.

*Adoption Act 2000 (NSW)*

The amendment to the *Adoption Act* in late 2010 allowed same-sex couples to adopt by making the definition of *de facto* more inclusive.

Whilst these law reforms were much needed and arguably well overdue, same-sex couples still have trouble gaining legal equality under Australian family law. This is especially the case in the areas of marriage and surrogacy. The *Marriage Act* at present expressly states that only a ‘man and a woman’ can marry. Prior to 2004, this common law requirement was not in the Act, however the Howard-led Liberal-National coalition went against international trends and made this amendment in order to stop the possibility of same-sex marriage.

**Family Facts 3  How many same-sex couples...?**

In the 1996 Census about 10,000 couples identified themselves as same-sex (about 6,000 male couples and 4,000 female couples) in the 2001 Census, 10,802 male couples (20,711 males) and 8,792 female couples (17,063 females) classified themselves as same-sex couples (a doubling in 5 years).

- These figures equate to 0.26% of all couples identifying themselves as gay
- These figures equate to 0.21% of all couples identifying themselves as lesbian

*Source: ABS, 2001 Census of Population and Housing: Marriages and Divorces, 2002 (Cat 3310.)*

However, according to the Australian Study of Health and Relationships the real figures are 4 to 5 times the reported rates – 1.3% of all couples are male same sex couples and 0.9% of all couples are female same sex couples.

*Source: State of The Family, Anglicare Australia, 2005*

**The latest figures**

Same-sex couples account for a very small proportion of all couple families. They comprised 0.7% in 2011, up from 0.6% in 2006, and more than twice the proportion in 1996 (0.3%). The most recent available data from Censuses of Canada and New Zealand is from 2006, with same-sex couples accounting for 0.6% and 0.7% of couples respectively, similar to the Australian rate. In 2011, as in previous censuses, more male than female same-sex couples were reported: 17,584 compared with 16,131 or 109 male couples for every 100 female couples. However, the gap between the number of male and female same-sex couples has narrowed since 1996, when there were 137 male couples for every 100 female couples.

*Source: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852012-2013*
Polygamous Marriages

Polygamy is the act of having more than one spouse at a time. Just as monogamy means being married to one person at a time, polygamy means being married to more than one person at a time. Polygamy refers to males who have more than one wife at a time whereas polyandry refers to a woman who has more than one husband at a time (this instance is significantly rarer).

As previously stated, under Australian law a marriage is deemed to be valid only where the union is voluntary, is between a man and a woman, is for life and is to the exclusion of all others. This means that polygamy is not permitted under Australian law. Bigamy is a crime as a second marriage has been entered into whilst a first marriage is still valid. Under Australian law, this immediately nullifies (makes void) the second marriage (or multiple marriages) following the first legal marriage. This is stated in the Marriage Act 1961 (Cth).

Issues can arise when polygamous marriages have occurred overseas and where the spouses of these marriages have since migrated to Australia. In this case, Australia recognises the first marriage as legally valid and treats all subsequent marriages as de facto relationships under the Family Law Act 1975 (Cth).
Polyandry refers to the marriage of a woman to two or more men at the same time; the term derives from the Greek polys, “many,” and anêr, andros, “man.” When the husbands in a polyandrous marriage are brothers or are said to be brothers, the institution is called adelphic, or fraternal, polygyny. Polygyny is the marriage of a man and two or more women at the same time. Polyandrous cultures have devised several methods through which to designate the ancestry of the children of such marriages. In fraternal polyandry, the children are often said to be descended from the eldest brother alone, while in other cases fatherhood is established through a ceremony or the children are said to have descended from all the husbands equally. A related form of marital union, sometimes called secondary marriage, results when a married woman cohabits with a man other than her husband without having terminated the marriage by annulment or divorce. True polyandry is a rare phenomenon that is generally considered to be a response to peculiar recognized conditions.

Source: http://www.britannica.com/Ebchecked/topic/468282/polyandry

Magistrate Ian Matterson sentenced Richard Eames to 9 months jail for bigamy. Eames pleaded guilty after he was found to have married Ms. Matuschka from Hobart even though he already had a wife, Fiona McFadden. Eames’ sentence was the first case of bigamy in Tasmania since 1981 and, according to Tasmanian Supreme Court records, only one of 14 bigamy charges since 1952.

Source: SMH 28.04.05

A Tasmanian man has pleaded guilty to the rare charge of bigamy after forging divorce papers to marry another woman. In what has been described by Tasmania Police as an “extremely rare and unusual” case, 43-year-old Nicholas Trikilis appeared in the Hobart Magistrates Court charged with bigamy.

Trikilis did not hide the fact he was a bigamist. After filing fake divorce documents to marry his new bride, Katrina May Phillips, in April 2008, Trikilis sent his wedding pictures to the newspaper to celebrate the special occasion. The picture showed the couple, family and friends in the Royal Tasmanian Botanical Gardens.

Trikilis admitted forgery, using a forged document, giving defective notice of his divorce and giving false information which were offences all relating to the bigamy charge. He admitted falsely trying to end his marriage to Ms Statton by signing a document stating he was already divorced. Trikilis then attended the Family Court in Hobart and presented the false document to Commonwealth public servant Elizabeth Gray. He then married in a civil ceremony. Two days later, Trikilis filed the false divorce papers along with his marriage papers. After being separated for almost a decade, Ms Statton learned of her separated husband’s new wife in late 2008. Magistrate Michael Daly asked police prosecutors for their help in previous sentences for bigamy, having not come across the charge before.

The last bigamy case in Hobart, in 2005, involved disgraced former British policeman Richard Eames who, after leaving his wife of 26 years in Britain, married a Tasmanian woman so he could stay in the country. Before sentencing Eames to 21 months’ jail with a 12-month non-parole period, magistrate Ian Matterson said the problem with bigamy was that “you end up with two mothers-in-law”.

Source: D Brown, “Tasmanian man found guilty of ‘rare case’ of bigamy”
**De facto relationships**

A *de facto* relationship is one where two people (either heterosexual or homosexual) live together (that is, share a permanent domestic basis) and also share a sexual relationship. The term *de facto* status contrasts with *de jure* status (which signals the presence of all necessary legal requirements). Therefore, *de facto* status can be viewed as a 'marriage' situation outside of legal marriage. The existence of *de facto* relationships has increased dramatically in Australia over the past 30 years. These increases have prompted the introduction of legislation and (later) reform in order to provide legal certainty to individuals within *de facto* relationships and also in order to reflect society's changing moral and ethical standards.

*De facto* status was first recognised in NSW by the *De Facto Relationships Act 1984 (NSW)* which stated that a *de facto* relationship was one "between a man and a woman who although not legally married to one another live as husband and wife on a bona fide domestic basis". This definition was broadened in 1999 to include homosexual couples under the *Property (Relationships) Act 1999 (NSW)* which defines a *de facto* relationship as

"(a) a *de facto* relationship, or (b) a close personal relationship (other than a *de facto* relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care"

Section 5(1)

Note that payment for personal care or domestic duties nullifies the domestic basis intended by the legislation.

<table>
<thead>
<tr>
<th><strong>De Facto Relationships Act 1984 (NSW)</strong></th>
<th><strong>RENAME AND UPDATED</strong></th>
<th><strong>Property (Relationships) Act 1999 (NSW)</strong></th>
</tr>
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<tr>
<td>Considered very progressive at the time in terms of its recognition of the social phenomenon of relationships between committed, non-married persons of different genders.</td>
<td></td>
<td>Replaced the De facto Relationship Act 1984 (NSW). This Act was more progressive in that it recognised same gender committed partnerships (gay and lesbian relationships).</td>
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Whilst determining *de facto* status may seem fairly straightforward, complex issues can arise when defining such a relationship. Such issues have been tested through cases where *de facto* status had to be legally determined, as was in the case of *Roy v Sturgeon* (1986) 11 Fam LR 271 at 274, where Justice Powell took into consideration the following factors:

- Duration (length) of the relationship
- Nature and extent of common residence
- Existence of a sexual relationship
- Mutual interdependence (especially extent of financial support)
- Property ownership and use
- Procreation of children
- Care and support of children
- Performance of household duties
- Degree of mutual commitment and mutual support
- Reputation and 'public' aspects of the relationship

The factors or aspects of a relationship considered in this common law decision have now become a part of legislation. This can be seen with respect to s4AA of the *Family Law Act*. Note that the law gives discretion to the court as to how much weight they accord to the various factors. Thus, it is not prescriptive as to how much each factor should be weighted or emphasised.

Whilst all *de facto* circumstances vary slightly (due to the particulars of all personal relationships varying), the *minimum* duration of a *de facto* relationship is usually between 2-3 years in ALL Australian jurisdictions. *De facto* status is used to determine property distribution following the end of a *de facto* relationship.

Note: Normal divorce proceedings (that is, formal divorce following a legal marriage) and property settlements following separation are two different areas of family law. Just because a couple (with or without children) have not been legally married, they are not exempt from property settlements following separation from their partner if they have been involved in a *de facto* relationship. Indeed, recent developments have made it possible for *de facto* couples (including same-sex couples) to access the Family Court for property settlements.

**Relationships and *de facto* status**

If a couple is together, but not married, then the partners may well be in a *de facto* relationship. *De facto* status covers a wide range of relationships including:

- Heterosexual couples living together on a *bona fide domestic* relationship for 2+ years
- Homosexual couples living together on a *bona fide domestic* relationship for 2+ years
- Polygamous relationships: one marriage, others are *de facto* in status
- Indigenous Australian customary law marriages
- Muslim Australian marriages which do not follow the *Marriage Act* requirements
- Christian Australian marriages which do not follow the *Marriage Act* requirements.
FAMILY LAW ACT 1975 – SECT 4AA  De facto relationships

Meaning of de facto relationship:

(1) A person is in a de facto relationship with another person if:
   (a) the persons are not legally married to each other; and
   (b) the persons are not related by family; and
   (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Working out if persons have a relationship as a couple:

(2) Those circumstances may include any or all of the following:
   (a) the duration of the relationship;
   (b) the nature and extent of their common residence;
   (c) whether a sexual relationship exists;
   (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
   (e) the ownership, use and acquisition of their property;
   (f) the degree of mutual commitment to a shared life;
   (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
   (h) the care and support of children;
   (i) the reputation and public aspects of the relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.

(4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(5) For the purposes of this Act:
   (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
   (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

Family Facts 4  The Facts on De factos....

- 1991  585,905 couples in de facto relationships
- 1996  744,100 couples in de facto relationships (up 27% on 1991)
- 2001  951,500 couples in de facto relationships (up 28% on 1996)
- Between 2001 and 2006, the census count of people aged 15 years and over in de facto relationships rose by 25% from 951,500 to 1,193,400. 77% of people getting married live together prior to marriage
- 2010  1,900,000 couples in de facto relationships

De facto partnering has arisen as an alternative living arrangement prior to, or instead of marriage and following separation, divorce or widowhood. Some couple relationships, such as that between a boyfriend and girlfriend who live together but do not consider their relationship marriage-like, are classified as de facto.

Source: Australian Demographic Statistics (3101.0); Marriages and Divorces, Australia (3310.0)
Accessed from http://www.abs.gov.au/ausstats/abs@.nsf on 03.08.05

Living together

In 2009-10, 11% (1.9 million) of Australians aged 18 years and over were living in a de facto relationship, while 53% were in a registered marriage. De facto relationships were most common amongst younger people, with one fifth (22%) of people aged 20-29 years living in these relationships, compared with nearly one tenth (9.4%) of people aged 40-49 years. The proportion of people aged 20-29 years living in a de facto relationship has doubled since 1992, where one tenth (10%) were living in one of these relationships. The rate for people aged 40-49 years has also nearly doubled (up from 4.7%) during this time.

Review Activities – Alternative Family Relationships

1. Define the term ‘alternative family relationships’.
2. Explain why Indigenous Australian customary law marriages are not recognised under mainstream Australian law.
3. Explain what is meant by the term ‘de facto’.
4. Explain what is meant by the term ‘single parent’ or ‘lone parent’ family.
5. Explain how single parent families might arise.
6. Discuss the trend in lone parent families.
7. Explain how blended families are created.
8. Propose THREE (3) reasons as to why children in blended families are at higher risk of depressive disorders and abuse than those in intact families.
9. Outline what is meant by the term ‘same-sex’ relationship.
10. Examine some problems faced by same-sex couples historically.
11. Identify TWO (2) recent commonwealth law reforms that have beneficially impacted on the status of same-sex couples.
12. Outline the effect of TWO (2) recent amendments to NSW laws that have had a beneficial impact on the status of same-sex couples.
13. What proportion of couples are same-sex couples?
14. Define the term polygamy, contrasting it with monogamy.
15. Distinguish between polyandry and polygamy.
16. Explain the status of polygamous marriages with respect to Australian law.
17. Outline what is meant by the term ‘de facto relationships’.
18. List FIVE (5) factors that a judge will consider when determining whether a de facto relationship exists.
19. Explain why the 1984 NSW De facto Relationships Act was broadened in 1999.
20. How many couples are classified as de facto in Australia?
1.4 Legal rights and obligations of parents and children

The legal relationship within Australia between parents and their children has changed significantly throughout the latter decades of the 20th Century. Instead of parents having 'rights', they now have 'responsibilities' for the adequate care and protection of their children. These changes were made in order to reflect international recognition of children's rights, as articulated in the Convention on the Rights of the Child and ratified by Australia in 1990.

This conceptual shift from 'rights' to 'responsibilities' is enshrined in the Family Law Reform Act 1995 (Cth). Specifically, the sections pertaining to parental responsibilities include:

- **Article 3(1)** the interests of the child are paramount
- **Article 7** a child has the right to know his or her parents and be cared for by them where possible
- **Article 9(3)** all children have the right to be in regular contact with both of their parents following separation unless there is a Court order to the contrary
- **Articles 18-19** both parents share the responsibility for the appropriate socialisation and development of their child(ren) and must take all necessary steps to protect their children from violence and/or abuse

Parental responsibilities reside in the areas of parental care, child socialisation and medical and financial provision for children and include:

- Care and control
- Education
- Discipline
- Medical treatment
- Autonomy of children
- Inheritance
Underpinning the approach to children under the law is the UN Convention on the Rights of the Child.

**Family Matters 7  Understanding the Convention on the Rights of the Child**

The Convention on the Rights of the Child brings together the children's human rights articulated in other international instruments. This Convention articulates the rights more completely and provides a set of guiding principles that fundamentally shapes the way in which we view children. The articles of the Convention, in addition to laying the foundational principles from which all rights must be achieved, call for the provision of specific resources, skills and contributions necessary to ensure the survival and development of children to their maximum capability. The articles also require the creation of means to protect children from neglect, exploitation and abuse.

All children have the same rights. All rights are interconnected and of equal importance. The Convention stresses these principles and refers to the responsibility of children to respect the rights of others, especially their parents. By the same token, children's understanding of the issues raised in the Convention will vary depending on the age of the child. Helping children to understand their rights does not mean parents should push them to make choices with consequences they are too young to handle.

The Convention expressly recognises that parents have the most important role in bringing up children. The text encourages parents to deal with rights issues with their children "in a manner consistent with the evolving capacities of the child" (Article 5). Parents, who are intuitively aware of their child's level of development, will do this naturally. The issues they discuss, the way in which they answer questions, or the discipline methods they use will differ depending on whether the child is 3, 9 or 16 years of age.

Adapted from: [http://www.unicef.org/crc/index_30177.html](http://www.unicef.org/crc/index_30177.html)

**Care and Control**

Parents have a responsibility to both care for their children and also to ensure that their children do not harm others. Caring for children includes, but is not limited to, the adequate provision of housing, clothing, food, medical care, financial and emotional security.

It must be noted that ‘caring for children’ is legally defined to include the time before that child is born. For example, a mother (or father) cannot behave recklessly where there is foreseeable danger posed to the unborn child. However, this also has other moral implications, as many would argue that playing a sport (eg netball) or smoking whilst pregnant damages the health of an unborn child. A more extreme example is where an abortion ends the ‘life’ of an unborn child. Whilst this obviously affects the ‘care’ of the child, many women would strongly defend their right to have an abortion. Thus, the term ‘care’ when applied to children can often be fraught.

Parents have a responsibility to prescribe the same level of care and control for biological children, ex-nuptial children and adopted children.

Controlling children includes the development of appropriate social skills and the monitoring of social behaviour – both general (manners and the like) and specific (keeping a watch over the children). Parents must control their children in a way that prohibits them from harming others.
In fact, the Children (Protection and Parental Responsibility) Act 1997 (NSW) states that parents are responsible for the behaviour (and any damage caused) by their children. This is true until the child/ren are of 18 years of age. If two parents are living separately, and damage is caused by one or more of their children, then the parent with whom the children are staying with at the time is held responsible.

If parents are found to have failed in their duty to care for and control their child/ren and there is evidence of abuse (physiological and/or physical) or neglect (emotional or physical) under the Children and Young Persons (Care and Protection) Act 1998 (NSW), then the Children’s Court has the power to remove the child from their family and relocate them to a more suitable environment. This is a step of great significance and does not occur without all options having been explored fully.

**Education**

Parents have a responsibility to send their children to school between the ages of six and seventeen under the Education Act 1990 (NSW). Alternatively, a child may be schooled at home where an exemption from the NSW Board of Studies (BOS) has been granted. In this case, the child must be taught in accordance with the BOS syllabuses.

Whilst children are only legally bound to attend school until the age of 17 (approximately end of Year 11) a child who wishes to continue their education until completion of the HSC (both Years 11 and 12) must be supported by their parents under the law.

Whilst parents have a right to choose at what school their child is to be educated, the BOS determines the content of educational syllabuses. Thus, parents have only a limited role in directly determining what their child learns at school. Parents are expected to encourage their child’s participation in school and support them in both academic and co-curricular activities as part of the basic responsibility of caring for their children.

If parents want to have some measure of control over how the syllabuses are taught, they can do so by enrolling their child(ren) in particular types of schools – religious, independent, private and so forth.

Whilst the child is present within the school premises, within school hours, the school assumes the role of ’in loco parentis’ which means the school temporarily stands in the place of the parent or guardian. Effectively, this means that the school becomes the child’s caregiver and is responsible for the safety and well being of the child.

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**Domestic Deliberations 2  Home’s Cool**

There is growing evidence, particularly in early childhood learning, that parents are spending more time and money on educating their children at home. This may take the form of purchasing puzzle books, educational software, or, as a child gets older, tutoring. Should there be less emphasis on formal schooling and a greater emphasis on home-based and after-hours learning?

What do you think??

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Discipline

Throughout childhood, children require appropriate levels of discipline in order for them to grow into socially mature, considerate and independent adults. The level and forms of such 'discipline' requires considerable thought and flexibility on behalf of parents over a child's lifetime. For example, disciplining a young child may include instructing them on what time to go to bed, how to behave around other children and ways in which they can become more independent in order for them to begin to manage and care for themselves. Similarly, older children may require discipline regarding study habits, appropriate social behaviour and guidance when making important decisions.

However, discipline in a legal sense generally refers to physical discipline or corporal punishment (punishment of a physical nature).

The law does not go so far as to define exactly the appropriate responses to child misbehaviour but it does make the line clear between acceptable (yet not always appropriate) physical discipline and abuse. Discipline refers to reasonable force (verbal or physical) applied in order to control behaviour to a particular ideal or norm. Abuse is where these acceptable boundaries have been breached and where the force used is damaging to the child.

A legal determination between discipline and abuse takes into account:

- The age, size and health of the child
- The misdemeanor the child has committed; was it serious or not serious?
- The injuries/blows the child received from the punishment
- The item used to deliver the punishment (hands/cane/weapon)

All of these requirements must be taken into consideration when determining whether the physical force applied falls into the category of discipline or abuse.
Domestic Deliberations 3  Discipline or Damage?

In the past, there has been division as to whether corporal punishment (physical punishment) is appropriate in schools when disciplining children. Whilst the use of the cane had been banned in NSW schools since 1995, there are still parents and schools within NSW who are in favour of using the cane and other forms of corporal punishment to discipline children. Parents and schools feel that it is their right as caregivers to decide how their child is to be schooled and 'appropriately' disciplined.

Is it appropriate or morally correct for schools to physically punish children for their actions?

Some points to consider:

- Does it make a difference what type of punishment is administered (e.g. cane, whip)?
- Should it depend on the age and/or size of the child?
- Is physical punishment warranted by any student misdemeanour?
- Physical punishment is not administered to adult criminals as part of their punishment, so why should it be administered to our children?
- Does it teach our children that physical violence is an appropriate response to child misbehaviour?
- Does it have the potential to be classified as abuse? Or to lead to abuse?
- Should any parent be allowed to give permission to a school to physically punish their children? Does this violate the child’s rights? Does this meet the requirements of parental responsibility?
- What lasting effects, psychological and physical, does this kind of punishment have on children?
- Would you trust someone you do not know well (i.e. a teacher) to judge when physical punishment is appropriate for your child?

What do you think??

The Crimes Amendment (Child Protection – Physical Mistreatment) Act 2001, which came into force in December 2002, has made it illegal for any parent or caregiver to administer physical punishment to a child above the neck of the child (i.e. to the head) and it must also not cause long term injury or pain.
Family Matters 8  Three smacks...and you’re out

A mother became a convicted criminal yesterday for smacking her three-year-old son at a supermarket. She lost control after her son threw a tantrum in the middle of Coles, Dee Why.

The mother, from Narraween, said that she had never hurt her son. Her son had a history of behavioural problems (including head banging and tantrums) and would express “extreme frustration”.

The Court heard that the boy was taking items off the shelves that the parents did not want to buy, and would not let go of a pair of tongs.

Wade Harman, the Produce Manager at the Coles, told the Court that he saw the woman yelling at the boy, then pick him up and smack him across the head three times. “The lady’s hand was extended to take a good, hard swing”, he said.

The Magistrate, Carmel Forbes accepted the evidence of the Crown witnesses and in finding the mother guilty said, “I am satisfied that (the mother) was very angry. On this day she lost control of her emotions...I do not accept that the force used was reasonable. I accept she...assaulted (the child) on this occasion and I find the offence proven”. Ms Forbes also said that the defence of “lawful correction”, available to parents disciplining their children, could not apply.

Should parents be allowed to smack?

Source: www.brisbane.indymedia.org.au/front.php3?article_id=9511&group=webcast;
Accessed on 6.6.05

Lawful correction of a child

NSW law allows that a parent, or a person acting for the parent, can use force to correct a child if the force used is lawful. Thus, under the Crimes Act a defence can be brought against a charge of using physical force against a child. This is detailed below in the excerpt from s61AA.

CRIMES ACT 1900 – SECT 61AA  Defence of lawful correction

(1) In criminal proceedings brought against a person arising out of the application of physical force to a child, it is a defence that the force was applied for the purpose of the punishment of the child, but only if:

(a) the physical force was applied by the parent of the child or by a person acting for a parent of the child, and

(b) the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances.

(2) The application of physical force, unless that force could reasonably be considered trivial or negligible in all the circumstances, is not reasonable if the force is applied:

(a) to any part of the head or neck of the child, or

(b) to any other part of the body of the child in such a way as to be likely to cause harm to the child that lasts for more than a short period.

Medical treatment

Parents are wholly responsible for their children’s medical needs until they are 14 years of age. Up until this age parents must supply their children with appropriate medical supervision for the child when required. Parents must also always act in the best interests of the child. For example, a parent cannot refuse a child an operation which is in their best interests, nor can they force their child to undergo procedures where the outcome is not in his/her best interests (such as sterilisation procedures).

Beyond the age of 14, children gain greater autonomy in relation to medical treatment. For example, a girl over the age of 14 may legally seek contraception (or even an abortion) without the knowledge/consent of her parents. Whilst the doctor/nurse may encourage the girl to notify or involve her parents in regards to her medical treatment, the medical practitioner cannot release this information to the child’s parents without her consent. This aspect of law has enraged many parents and caregivers especially as the legal age of consent (allowable age for sexual intercourse) is 16 years old. However, the law realises that a child’s autonomy increases as they get older and this is reflected by the regulations in regards to a child’s medical treatment.

Family Matters 9  Important children’s rights cases

Re Marion (‘Marion’s case’) (1992)
Marion had a severe disability and her parents were concerned that puberty would make her life even more difficult. They thus sought to have Marion sterilised but the medical authorities refused. The court hearing the matter decided that parents do not have the right to order the sterilisation of their daughter on the grounds that her rights were being breached. The principle applied was ‘the best interest of the child’. Thus the parents were not allowed to have their daughter sterilised.

Gillick v West Norfolk and Wisbech Area Health Authority and Anor (1985)
Mrs Gillick was the parent of four daughters. She was outraged when the local Area Health Authority issued leaflets to children and schools stating that 16-year-olds could get medical advice and care without the patient’s permission. Mrs Gillick was very alarmed and thus sought a court order to stop the Wisbech Area Health Authority from giving such advice. This case concerned whether medical practitioners could give medical advice contrary to parents express wishes. The Court held that practitioners could give such advice if it was consistent with the duty to what is in the ‘best interests of the child’. The details of the case are as follows:

In 1982 Mrs Victoria Gillick took her local health authority (West Norfolk and Wisbech Area Health Authority) and the Department of Health and Social Security to court in an attempt to stop doctors from giving contraceptive advice or treatment to under 16-year-olds without parental consent. The case went to the High Court where Mr Justice Woolf dismissed Mrs Gillick’s claims. The Court of Appeal reversed this decision, but in 1985 it went to the House of Lords and the Law Lords (Lord Scarman, Lord Fraser and Lord Bridge) ruled in favour of the original judgement delivered by Mr Justice Woolf:

“...whether or not a child is capable of giving the necessary consent will depend on the child’s maturity and understanding and the nature of the consent required. The child must be capable of making a reasonable assessment of the advantages and disadvantages of the treatment proposed, so the consent, if given, can be properly and fairly described as true consent.”

Source: http://www.nspcc.org.uk/inform/research/questions/gillick_wda61289.html
Autonomy of children

As mentioned earlier, children gain greater autonomy (self governance) as they get older. Whilst children gain greater general autonomy (non-legal independence) as they mature from their parents, there are also legal milestones where a child gains autonomy in his or her decision making. These areas include:

- Age 14 grants children autonomy to seek medical treatment/advice.
- Beyond Year 11 (that is, the age of 17) children can decide whether to continue their secondary schooling. Normally it is expected that a child at this age either find full-time work, vocational studies or a mix of part-time work and study.
- Age 16 grants the opportunity to children to leave home only where the child can prove that they can adequately provide for themselves away from home. In most instances, this coincides with family situations where the child is actually safer away from the home (i.e. due to neglect or domestic violence). If a child is safer away from home, yet cannot support him or herself and/or is under the age of 16 then that child will be made a ward of the state (or placed in the ‘care of the state’) and cared for by the government.

Family Matters 10  Increasing autonomy

As children grow they become more independent and autonomous. The stages of increasing autonomy allow that at 4 a child can attend pre-school and at 5 attend primary school (Kindergarten). A child cannot be guilty of a criminal offence until they reach the age of 10 years as the principle of dolii incapax applies. The presumption here is that they are incapable of forming the requisite mens rea. This presumption is rebuttable between 10 and 14-years of age. At 14-years a child is criminally responsible for their actions and can also seek medical care on their own. At age 16 a person can learn to drive and can have sex. At 17 a person can leave school and at 18 a minor becomes a legal adult and therefore can vote, enter into contracts, drink alcohol, smoke and gamble. There is no minimum working age in Australia. Most people find this surprising but governments get around it by having a requirement that children attend school full time – thus restricting the hours they can work. Note however that many businesses do not employ children who are under the age of 14 years and 9 months old. At all ages children can give evidence in a court.

Tattoos

In NSW the legal age to get a tattoo without a parent’s permission is 18. If under 18, a parent’s permission that states the type of tattoo and the position on the body where the tattoo will be done is required. Permission can be in person or in writing. Without permission it is a criminal offence for someone to tattoo a minor or make a permanent mark or design on a minor’s skin.

Scarification, Branding and Beading

A person must also be 18 to have any other mark made on their skin such as branding, scarification or beading unless they have parental permission. The permission must include the type of marking to be done and its location on the body.

Body Piercing – Non-intimate

A non-intimate body piercing is a piercing of any part of your body that is not genitals or nipples. If under 16 the permission of a parent is required to have a non-intimate piercing. The parent can give their permission and must say what part of the body is to be pierced. If over 16 a person can get a non-intimate body piercing without parental permission.

Intimate body piercing

An intimate body piercing is a piercing of the nipples or genitals. If under 16 a body piercer is not allowed to give an intimate body piercing even if the person and their parent give permission for it.

Some information adapted from source: http://www.lawstuff.org.au/nsw_law/topics/tattoos-and-piercing
In NSW under the *Minors (Property and Contracts) Act 1970 (NSW)*, children can enter contracts where he or she is benefited. However, there are a few contracts which require sole consent from minors; most contracts require the signature of the legal parent or guardian who acts on behalf of the child. Furthermore, any contract signed by a child or entered into on behalf of the child (i.e. trustee consent) will only be legally valid where the contact does not unfairly disadvantage the child in any way.

All these measures attempt to grant greater autonomy to children as they get older in order for them to exert increased control over their bodies, education and well being.

**Inheritance and succession**

Inheritance refers to money and/or assets received following the death of a family member. Only in certain circumstances do parents have to provide for children in their Will. The *Succession Act 2006 (NSW)* states that parents have a moral duty to provide for their spouse and children (or dependent others) who were dependent on them at the time of their death. This also includes de facto partners.

Individuals who feel they have not been provided for in a will may challenge the will in legal proceedings. If these individuals are successful they will be awarded with a sum of money or assets for their adequate provision. Money inherited by minors (those children under the age of 18) will be placed in trust until these children reach adult status.

<table>
<thead>
<tr>
<th>Succession Act 2006 (NSW)</th>
<th>Order of inheritance</th>
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</thead>
<tbody>
<tr>
<td>According to the <em>Succession Act</em> there is an order in which the estate of a deceased person will be distributed. The order is as follows:</td>
<td></td>
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<tr>
<td>▪ Spouse or domestic partner immediately before death s104; multiple spouses s125</td>
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<tr>
<td>▪ Children s27</td>
<td></td>
</tr>
<tr>
<td>▪ Parents s128</td>
<td></td>
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<tr>
<td>▪ Brothers and sisters s129</td>
<td></td>
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<tr>
<td>▪ Grandparents s130</td>
<td></td>
</tr>
<tr>
<td>▪ Aunts and uncles</td>
<td></td>
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</tbody>
</table>


**Children – Care and abuse issues**

An aspect of responsibility is that parents bear the onus to care for and protect their children. This should be quite obvious but in some families children are not safe due to the lack of responsibility displayed by their parents. Some children do not grow up in safe homes. Parents may be caught up in personal problems such as unemployment, drug and/or alcohol abuse or be dealing with depression, isolation or trauma. Some parents may be addicted to narcotics. In many households where parents have deep-seated problems, children may suffer neglect. Moreover, in many households parents may not be able to cope with having children and may resort to abuse and harm. Distressingly, in a significant number of households children are at risk of psychological harm, physical harm, sexual abuse or other forms of harm resulting from a lack of adequate care.

When parents cannot adequately care for and control their children then organisations such as the Department of Family and Community Services (FaCS) may be able to assist. This government department incorporate the community services which is focused on the care, protection and welfare of children at risk of neglect, harm or abuse.
Family Facts 5  About Community Services

Community Services (formerly DoCS) is the leading NSW Government agency responsible for community services. We work to promote the safety and wellbeing of children and young people and to build stronger families and communities. In particular, we help those who are vulnerable and most in need. We work to protect children and young people from risk of harm and to provide care for children and young people who are not able to live with their families.

The majority of these services are provided through our community partners such as non-government organisations and other government agencies. Our core activities are to:

- help protect and care for children and young people and support their families
- provide and fund accommodation and support services for children and young people who need to live away from their families (foster care)
- regulate child care by licensing and monitoring compliance
- fund and regulate adoption services
- fund support services to assist people who are homeless or at risk of homelessness
- help people separated from their families to trace their records

Source: http://www.community.nsw.gov.au/docs_menu/about_us/about_the_community_.services.html

If a child is subject to neglect or serious abuse then Community Services can remove the child and then apply to the Children's Court for the child to be placed under state care. If the court agrees then the child may be removed. The aim is to protect the child by finding a stable home environment which may come about from foster care.

As a general rule, the authorities do not like to separate parents from their children. Thus, the foster care option is often temporary while parents learn to sort themselves out and take their responsibilities towards their children seriously.

Family Facts 6  What does the NSW Children’s Guardian do?

Under the Children and Young Persons (Care and Protection) Act 1998, the Children's Guardian functions to:

- promote the best interests of all children and young persons in out-of-home care,
- ensure the rights of all children and young persons in out-of-home care are safeguarded and promoted,
- accredit designated agencies and to monitor their responsibilities under the Act and the regulations.

The Children's Guardian is also responsible for regulating the employment in NSW of children who are under 15 years of age for entertainment, exhibition, still photography and door-to-door sales, and children who are under 16 years of age for any type of modelling. This is done by:

- promoting the welfare of children and consulting with employers if specific safety and welfare issues are identified.
- investigating complaints and alleged breaches of the statutory provisions.
- helping to educate parents and people in the industry about the Code of Practice.

Foster care and Guardianship Fostering

"Fostering" is different from adoption. Fostering is generally only temporary in nature (where the biological parents do not renounce their legal rights as parents), whereas adoption is a permanent arrangement (where the biological parents do renounce their legal rights as parents).

Note: 'Temporary' fostering can be for a period of weeks or even years. In this situation, even though the biological parents have declined giving up their legal rights as parents, the fostered child can still live with their foster parents as a permanent arrangement.

Family Matters 11  Fostering Inclusion

A NSW government department says there are plenty of opportunities for same-sex couples to foster children, despite a recent ruling allowing religious charities to ban gays from becoming foster parents. A gay couple began a legal battle seven years ago with Wesley Mission Australia, which refused to allow them to become foster parents. However, the NSW Administrative Decisions Tribunal (ADT) found in favour of the Wesley Mission. The tribunal found that the Mission was exempt from the NSW Anti Discrimination Act on religious grounds.

But a statement from the Department of Community Services (DoCS) should give the gay couple hope, as it makes clear that the department accepts gay couples as foster parents.

"Community Service foster carers can be single, married, in a de facto or same-sex relationship," the statement read. DoCS puts its emphasis on the need for foster carers to provide "a safe, nurturing and secure family environment" and states that anyone in good physical and emotional health can apply to become a foster carer.

The case involving the Wesley Mission dates to 2002 when the two gay men lodged a complaint under the Anti Discrimination Act after an agency operated by the mission refused to allow them to foster a child. The Administrative Decisions Tribunal (ADT) initially found in favour of the men in 2007 and awarded them $5,000 each. The Wesley Mission appealed and a review panel overturned the decision, ruling that the tribunal had erred in deciding the Mission did not have a right to discriminate on religious grounds. The panel sent the case back to the tribunal, which decided earlier this month in favour of the Wesley Mission, and dismissed the complaint of discrimination.

An affidavit supplied to the tribunal by the Wesley Mission, which follows the Methodist doctrines of the 18th-century preacher John Wesley, says:

"The Methodist doctrine is based on the belief that God's pattern for family relationships includes a union between a man and a woman. For Wesley Mission to appoint homosexual couples as foster carers would be fundamentally unacceptable to the Methodist doctrine and would be viewed as an abdication of its responsibility to uphold the word of God as understood by Methodism."

The Wesley Mission is a parish of the Uniting Church, but the church allows its parishes to make their own decisions on matters involving homosexuality.

Children in trouble – Children and violence

Sometimes children are the perpetrators of violence – not the victims. A relevant question to ask is whose responsibility is it when crimes are committed by minors. The answer to this is quite complex on account of the issue of autonomy.

Up until the age of 10-years a child cannot be convicted of a criminal offence as the legal presumption is one of ‘doli incapax’ – they are deemed in capable of forming the requisite mens rea. Between 10 and 14 years of age this presumption can be rebutted. From 14-years onwards a child takes full responsibility.

Parents, however also have a role to play. They are financially responsible for the child until the child is 18-years-old. Thus, if a child causes damage the parents must pay for it. Additionally, the court can order parents to take responsibility for care and control of their child.

Emerging national laws called ‘third party responsible’ laws are placing the onus of responsibility for the aberrant behaviour of other on third parties. Parents have largely had this responsibility historically until the child turns eighteen. However if the national trends continue then parents may have responsibility in particular areas of law for their children even when they are adults – especially if damage or harm is caused whilst under the supervision and in the home of parents.

There are several laws which relate directly to children and their parents, placing responsibility on both for trouble caused by youth and adolescents. These laws are:

- Children (Protection and Parental Responsibility) Act 1997 (NSW)
- Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW)
- Young Offenders Act (YOA) 1997 (NSW)
- Children (Criminal Proceedings) Act 1987
- Graffiti Control Act 2008 (NSW)

The first of these laws, the Children (Protection and Parental Responsibility) Act 1997 (NSW) places responsibility on parents and goes so far as to allow a court to order family counseling, that parents attend court and it allows authorities to remove children from a public place and return them to their home.

**CHILDREN (PROTECTION AND PARENTAL RESPONSIBILITY) ACT 1997 – SECT 10**

**Family counselling**

A court may require a child that it finds guilty of an offence and the child’s parent or parents to undergo such specified counseling as the court considers would be beneficial in assisting the progress of the child.

Family Facts 7  Young People and the Law in NSW

The Young Offenders Act 1997 (NSW)
This piece of legislation gives the police four options with respect to young offenders:
- To issue a warning (as in the case of minor summary offences – nothing recorded)
- To issue a caution (for more serious matters like property damage and theft)
- To order a Conference (this decision is made by the DPP, a Court or the NSW Police Specialist Youth Officers). The young person must admit to the offence and the offender and the victim must agree to the outcome plan – including an apology and reparation
- Taking the young person to Court (for serious crimes like murder, sexual offences and motor vehicle offences where the person is old enough to have a license)

The Children (Protection and Parental Responsibility) Act 1997 (NSW)
This Act enables the police to remove young people at risk from a public place and return them to their parents. A young person is deemed at risk if:
- The person is in danger of being physically harmed or injured
- The person is in danger of abuse
- The person is about to commit an offence

This particular Act has attracted criticism for unfairly targeting Indigenous Australians.

The Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW)
This Act amended the Summary Offences Act 1988 (NSW) to make carrying a knife in a public place or school an offence. It also allows the police to search young people and seize any knives. This aspect of the Act particularly targets young people as they have been found to be more likely than any other group in society to carry knives.

The Children (Criminal Proceedings) Act 1987
This details the rules that apply when children are subject to criminal law processes. The rules include that children’s names must not be revealed (s15A), lists the age of criminal responsibility as 10-years (s5), states that the Children’s Court is a closed court (s10) and details the penalties available under the Act (s33). These penalties can only be imposed by the Children’s Court and do not refer to proceedings for indictable offences in higher courts.

The Graffiti Control Act 2008 (NSW)
This law prohibits the sale of spray cans to person under 18-years (from s7: penalty $1,100) and also details the penalties and processes when a person is found to have been engaged in graffiti. This law was drafted with minors considered particularly.

NSW Children's Court and Legal Aid

The Children's Court

The NSW Children’s Court was established in 1905. There are many actual Court sites. Some of those situated in Sydney include one in Parramatta, another in Bidura, one in Campsie and another in Lidcombe. The court is currently regulated by the Children’s Court Act 1987 (NSW).

This Court is a ‘closed Court’ (meaning the public is not able to witness the proceedings) and the media cannot release the names of children who are having matters heard before the Court to be released to the public. The court is an informal court and the Magistrates are trained in child psychology. Moreover, it is the duty of the court to ensure that the child before the court understands the proceedings.

The Children’s Court has jurisdiction for two main areas:

- Decisions about the need for State care – that is, when a child is removed from the care of the parent or guardian and made a ward of the State
- Criminal proceedings against minors (children under the age of 18 years)

1. **State care decisions** – decisions made about whether a child should be cared for by the State are not taken lightly. The standard of proof is that it is ‘very highly probable’ that a child is in need of State care.

2. **Criminal proceedings** – will be heard against those under 18-years of age, or who were under 18 years of age when the alleged offences were committed (and the person is under the age of 21 when the Court appearance is listed). Very serious indictable offences, such as murder and manslaughter will still be heard in the District or Supreme Courts, following a committal in the Children’s Court.

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**Family Facts 8  The Youth Drug Court abolished**

The NSW government abolished the Youth Drug Court in mid-2012 on the grounds that it was too expensive. About 120 young people would attend the court annually and of them about 20 of them made it through the program, at a cost of $4 million. Critics have said the alternative is more expensive – long-term imprisonment and untreated drug addiction.


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**Legal Aid**

Legal Aid is available to all children, regardless of the wealth of their parents. Thus children who are required to attend a Court will be offered Legal Aid in the form of a Solicitor to represent them or advice from a solicitor. Legal Aid is also provided for those in need of State care.
Review Activities – Legal obligations on the rights of parents and children

1. Distinguish between the term 'rights' and the term 'responsibilities'.
2. Identify the aspects of the Family Law Act, as reformed in 1995, that pertain to parental responsibilities.
3. List SIX (6) areas of parental responsibility.
4. What is the relevance of the Convention on the Rights of the Child to Australian law?
5. Explain how parents can show that they care for their children.
8. Which law articulates the requirement that children must have an education between the ages of 5 to 17 years?
9. Discuss the role of the school with respect to child safety and control.
10. Define the term 'discipline' with respect to parental responsibility.
11. Detail the limits placed on the capacity for parents to impose certain forms of discipline upon their children.
13. Detail the rules around children seeking medical help on their own.
14. Outline the significance of Marion's Case in establishing medical rights for minors.
15. Explain how the decision in Gillick v West Norfolk and Wisbech Area Health Authority and Anor 1985 established particular rights for children.
16. Define the term 'autonomy'.
17. Discuss how autonomy for children increases as they age.
18. Define the term 'succession'.
19. Explain the order of inheritance as articulated under the Succession Act 2006.
Family

**Review Activities – Children – Care and abuse issues**

1. Detail the importance of the Department of Family and Community Services to children at risk of harm, abuse or neglect.

2. Outline the importance of the NSW Children’s Guardian.

3. Distinguish between fostering and adoption.

4. Identify SIX (6) laws that are aimed at stopping children from engaging in violence or protecting them from trouble.

5. Summarise the main features of the *Young Offenders Act 1997 (NSW)*.

6. Detail the importance of the *Children (Protection and Parental Responsibility) Act 1997*.

7. Detail the effect of the *Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW)*.

8. Detail the importance and relevance of the *Children (Criminal Proceedings) Act 1997*.

9. Detail the effect of the *Graffiti Control Act 2008*.

10. Identify the court that deals specifically with children and young people.

11. Detail the two broad roles of the Children’s Court with reference to the Court’s jurisdiction.

12. Describe what is meant by the term ‘closed Court’.

13. State for which children Legal Aid is made available and why.
1.5 Adoption

Adoption is the legal process which permanently transfers all the legal rights and responsibilities of being a parent from the child’s birth parents to the adoptive parents.

Adoption occurs when a couple (or individual) legally takes another couple’s child as their own. For this to occur, the biological parents of the child must legally renounce their rights as the ‘legal’ parent of the child and give consent for the child to be adopted by another couple. The non-biological couple would then become the legal parents of the child and subsequently take on all responsibilities associated with caring for the child.

The state legislation governing adoption in NSW is the Adoption Act 2000 (NSW).

As adoption is within state jurisdiction, people who wish to adopt in NSW must apply through the Department of Family and Community Services (DFS) or through an approved private adoption agency (ONLY applicable where the person applying for adoption is also a relative – aunt, uncle or grandparent). Final adoption orders are made by a Court (in NSW this is the Supreme Court).

Pending final orders from a Court, people who can apply for adoption, under s26 of the Adoption Act, include:

- married couples (including Aboriginal couples married under Aboriginal and Torres Strait Islander people’s customary law)
- de facto couples (includes gay and lesbian couples) in a relationship for a period of longer than three years AND where the child has been in their care for at least two years
- single applicants

Under section 27 of the Adoption Act 2000 (NSW), adoptive parent applicants must be over the age of 21 years, and must not be less than 18 years older than the child (for male adoptive parents) or less than 16 years of age (for female adoptive parents). In some circumstances, these requirements may be waived.

Consent from parents and guardians must be given in all jurisdictions. Rights also exist for all adopted people to contact their birth parents, once they turn 18-years of age. This right exists in NSW, under section 133C of the Adoption Act 2000 (NSW).
ADOPTION ACT 2000 – SECT 8

What principles are to be applied by persons making decisions about the adoption of a child?

(1) In making a decision about the adoption of a child, a decision maker is to have regard to the following principles:

(a) the best interests of the child, both in childhood and in later life, must be the paramount consideration,
(b) adoption is to be regarded as a service for the child,
(c) no adult has a right to adopt the child,
(d) if the child is able to form his or her own views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child and the circumstances,
(e) the child’s given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved,
(f) undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child’s welfare,
(g) if the child is Aboriginal—the Aboriginal child placement principles are to be applied,
(h) if the child is a Torres Strait Islander—the Torres Strait Islander child placement principles are to be applied.

(2) In determining the best interests of the child, the decision maker is to have regard to the following:

(a) any wishes expressed by the child,
(b) the child’s age, maturity, level of understanding, gender, background and family relationships and any other characteristics of the child that the decision maker thinks are relevant,
(c) the child’s physical, emotional and educational needs, including the child’s sense of personal, family and cultural identity,
(d) any disability that the child has,
(e) any wishes expressed by either or both of the parents of the child,
(f) the relationship that the child has with his or her parents and siblings (if any) and any significant other people (including relatives) in relation to whom the decision maker considers the question to be relevant,
(g) the attitude of each proposed adoptive parent to the child and to the responsibilities of parenthood,
(h) the nature of the relationship of the child with each proposed adoptive parent,
(i) the suitability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child,
(j) the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour.

Types of adoption

- In 2009/10, there were 13 local adoptions and 78 inter-country adoptions across all of NSW.
- Domestic
- Intercountry

Intercountry adoption occurs between Australia and those countries with whom the Australian government has a bilateral agreement about intercountry adoption or which are a member of the Hague Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption. This Convention establishes safeguards to ensure that intercountry adoption takes place in the best interests of the child and to prevent the abduction, sale or trafficking of children.


<table>
<thead>
<tr>
<th>Family Matters 12</th>
<th>Adoption processes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stage 1:</td>
<td>Read 'Thinking about Adoption'. Ask: Do you meet the criteria?</td>
</tr>
<tr>
<td>Stage 2:</td>
<td>Order an Adoption Information Package</td>
</tr>
<tr>
<td>Stage 3:</td>
<td>Submit the Expression of Interest (EOI) in the Adoption Information Package if you think you may be eligible to adopt.</td>
</tr>
<tr>
<td>Stage 4:</td>
<td>In the Local Program, attendance at a seminar is by invitation, depending on the needs of the Program. Your EOI remains valid for 12 months.</td>
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<tr>
<td>Stage 5:</td>
<td>In the Intercountry Program, you will be asked to ring Adoption and Permanent Care Services to book into the next available seminar.</td>
</tr>
<tr>
<td>Stage 6:</td>
<td>Attend a two-day Preparation Seminar. (Adoption application kit provided at end of Preparation Seminar)</td>
</tr>
<tr>
<td>Stage 7:</td>
<td>Lodge a formal application to adopt. Undergo Adoption Assessment, which includes health, police and referee checks as well as interviews with a contracted adoption assessor. Approval decision is made at the Adoption and Permanent Care Services.</td>
</tr>
<tr>
<td>Stage 8:</td>
<td>In the Local Program, you enter the pool and prepare a profile for consideration by birthparents. Placement occurs if you are chosen as the family best able to meet a child’s needs. There is no ‘waiting list’ or date priority system. In the Intercountry Program, your adoption application is sent to an overseas country to await allocation of a child. (Some countries impose a quota of applications – so an application may not be able to be sent immediately.) The decision to place a child for adoption with a family rests with the overseas adoption authorities. If placement has not occurred within two years, an update is done for local adoption and within three years for intercountry adoption.</td>
</tr>
<tr>
<td>Stage 9:</td>
<td>In the Local Program – placement of child if chosen in the Intercountry Program, allocation and travel to overseas country to meet child.</td>
</tr>
<tr>
<td>Stage 10:</td>
<td>Post Placement supervision by contracted adoption assessor.</td>
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<tr>
<td>Stage 11:</td>
<td>Order of Adoption in the NSW Supreme Court, (if required).</td>
</tr>
</tbody>
</table>
Family Facts 9  Adoption Costs

Fees are set by the Regulation and the approximate costs for each of the programs are as follows:

Local Adoption: Departmental fees of $2,782 plus legal fees of $834

Intercountry Adoption: Departmental fees of $9,700 (first adoption) and $6,900 (second and subsequent application).

Additional fees for intercountry adoption include any NSW and overseas legal fees (including notarisation, legalisation and authentication of documents), immigration sponsorship application fees, travel expenses, translation fees and charges imposed by the overseas country/agency. These additional costs are in the range of at least $10,000 - $25,000.

Other costs
In addition to the above costs applicants should plan their budget so that the family can afford to have one parent at home as a full time carer for a minimum of six months after placement of a child. This time allows the child (who has already experienced a change of caregiver at least the opportunity to settle in and attach to their adoptive parents and new family members, without the confusion of multiple carers or attendance at childcare centres.


Each State and Territory is responsible for adoption and the relevant laws are listed in Table 1 below.

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Act(s)</th>
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<tbody>
<tr>
<td>NSW</td>
<td>Adoption Act 2000</td>
<td>SA</td>
<td>Adoption Act 1988</td>
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<td>NT</td>
<td>Adoption of Children Act 1994</td>
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<td>Adoption Act 2009 and Adoption of Children Act 1964</td>
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<td>ACT</td>
<td>Adoption Act 1993</td>
<td>WA</td>
<td>Adoption Act 1984</td>
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Table 1  An overview of the legislation regulating adoption by State and Territory; Source: www.austlili.edu.au
Review Activities – Adoption

1. Define the term ‘adoption’.
2. What is the law that details the legal rules and requirements in respect of adoption?
3. Who can apply to adopt?
4. How old must a person be before they can legally adopt in NSW?
5. Can adopted children contact their birth parents?
6. Detail the main principles to be applied by persons who are making decisions about the adoption of a child.
7. In NSW, which government department administers the law in regards to adoption?
8. Outline the main processes that must be followed for a person to be able to adopt.
9. Detail the costs of adoption.
10. Examine issues that can arise when State and Territory laws in regards to adoption differ.
Chapter Summary – The Nature of Family Law

- The concept of family under the law is changing. Traditional notions of family as being characterised as a married parents (mother and father) with their children does not reflect contemporary society. Contemporary society features single parents, unmarried de facto couples, with or without children, same-sex couples and a wide variety of other ‘alternative’ family relationships.

- ‘Family’ is called the fundamental building block of society particularly whilst in the care of children. However, the nature of family has changed and thus a clear definition of family is not easy. Nevertheless, it can be taken that a family involves a parent or parents and at least one child or children.

- Family law falls under the joint or shared jurisdiction of the Commonwealth and the States and Territories. The Commonwealth is responsible under the Constitution for marriages, divorces and marital causes; s51 (xxi) marriage; and s51 (xxii) divorce and marital causes; and in relation thereto, parental rights, and the custody and guardianship of infants’. The States and Territories are responsible for everything else: children, de facto relationships, adoption, protecting against violence, foster care, guardianship, IVF and ABTs, surrogacy, succession.

- The law imposes particular legal requirements of marriage on marriage. These requirements are detailed in the Marriage Act 1961 (Cth). The requirements include notice, that the parties be of marriageable age, that the common law provisions as articulated in Hyde v Hyde and Woodward 1866 be followed (that marriage be a ‘voluntary union, for life, between a man and a woman, to the exclusion of others’), that there be an authorised celebrant who conducts the ceremony according to the legal rules (including saying particular words and having two adult witnesses present), that the parties not be in a prohibited relationship.

- International law imposes a requirement that parents uphold the rights of children. In this regard parents have legal obligations. Children’s rights are articulated in the Convention on the Rights of the Child and in a range of Commonwealth and State laws. A central maxim or legal principle running through these laws is that the ‘best interests’ of the child always be placed central to decisions made about the child. This should be the case under all laws including those affecting foster care and guardianship, a child brought before criminal justice authorities, when children/young people seek or are given medical care, receive and education and gain increasing autonomy. Parents are obliged to care for and protect their children, ensure they are educated, receive appropriate health care, social development protection from harmful risks and the like.

- Adoption is a legal process whereby parents legally give up their rights and responsibilities to another adult or adults. Adoption may be domestic or intercountry and is complex, slow and expensive as the best interests of the child are foremost and prospective parents are thoroughly assessed.
Chapter Review Activities – The Nature of Family Law

1. How does the Australian Constitution affect family law in Australia?
2. How has the traditional notion of the family changed over time?
3. Define the term 'marriage'.
4. Detail the FOUR (4) legal requirements of marriage.
5. State the law that regulates the requirements of marriage in Australia.
6. How old must the parties be in order to marry in Australia?
7. Describe what 'prohibited' relationships are.
8. Outline the notice period that must be given for a marriage.
9. Recount the requirements for a valid marriage ceremony.
10. Identify THREE (3) consequences and responsibilities of marriage.