Removing Legal Discrimination Against Children Born Outside Marriage

by

Rebecca J. Bailey

Rebecca Bailey B.A., B.C.L. (Oxon) is Lecturer in Law, University of Adelaide.

The First Principle of the United Nations Declaration of the Rights of the Child (1959) states that "The child shall enjoy all the rights set forth in this Declaration. All children, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of . . . birth or other status, whether of himself or of his family". Such a general expression of the desirability of equal rights for all children can be of little practical significance in the absence of positive laws to give substance to its spirit. The Declaration itself recognizes this in its Preamble, which calls upon ". . . national Governments to recognize these rights and strive for their observance by legislation and other measures". This paper will discuss recent legislative attempts in Australia to remove discrimination on grounds of birth by equating the legal position of children born outside marriage with that of children born within marriage. In 1977 the Royal Commission on Human Relationships said: "Children born outside marriage have in the past been subject to both social and legal discrimination. This discrimination has been mitigated to a great extent by legislation".[1] This decade has seen the appearance in the various Australian States of legislation whose declared purpose is to make all children of equal status. Much has been achieved, particularly in the area of succession rights, but the process of equalisation is not yet completed even at State level. More fundamentally, a serious obstacle to the removal of discrimination on grounds of birth stems from the division of powers between the Commonwealth and the States contained in the Constitution, which makes inevitable a sharp distinction between children born within marriage and those born outside it. Future reform at the highest level is necessary if the ideal expressed by the Royal Commission is to be fully realised: "We consider that uniformity is desirable in regard to the status and rights of all Australian children".[2]

Approximately ten per cent of children born in Australia today are born outside marriage. Figures[3] for live births in Australia in recent years reveal the following pattern:

https://doi.org/10.1017/S1035077200902037 Published online by Cambridge University Press

LIVE BIRTHS AND EX-NUPTIAL BIRTHS, AUSTRALIA, 1970-1976

	Nuptial	Ex-nuptial	Total	Annual % ex-nuptial
1970	236 149	21 367	257 516	8.30
1971	250 733	25 629	276 362	9.27
1972	239 310	25 659	264 969	9.68
1973	223 472	24 198	247 670	9.77
1974	221 769	23 408	245 177	9.55
1975	209 307	23 705	233 012	10.17
1976	204 746	23 064	227 810	10.12

Hence the number of children potentially affected by persisting discrimination against those born outside marriage is substantial. Some children born outside marriage are born into stable *de facto* relationships. Others are born to mothers who live without partners. Around five thousand children born outside marriage each year in Australia are adopted, and so become part of new families.

The Constitution of the Commonwealth of Australia (1901) presents the most serious obstacle to equal treatment of all children in Australia. The laws affecting children are divided between the Commonwealth and the States. The Commonwealth Parliament does not have the power to make laws covering the whole area of family relationships and childrens' rights. In this context, it can make laws only with respect to:

"s.51 (xxi) Marriage

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants."

Children born outside marriage thus by definition fall outside Commonwealth legislative competence, and outside the current Family Law Act, 1975-1979 (Cth.) as administered by the Family Court of Australia. That Act contains a definition of "child of the marriage", which, in addition to the ordinary meaning of the term, extends to —

(a) a child adopted since the marriage by the husband and wife; and

(b) a child of the husband and wife born before the marriage.[4]

All other children fall under State Law. Hence disputes over the custody or maintenance of children born within marriage take place in courts exercising Federal jurisdiction, whereas such disputes concerning children born outside marriage take place in State courts. If a household contains both children of the marriage and children born outside marriage (e.g. an ex-nuptial child of husband or wife by a previous partner born before the marriage, but brought up accepted as part of the present household), disputes between the husband and wife over custody and maintenance of these different "classes" of child must be litigated in separate courts. The undesirability of such a division of jurisdiction is obvious. Until this basic Constitutional obstacle is removed, true equality of status and treatment for all children in Australia is impossible to achieve. Moves are currently afoot to remedy the situation by referral of power[5] by the States to the Commonwealth in the areas of custody and maintenance of children born outside marriage. Following a meeting in April 1978 of the Standing Committee of Federal and State Attorneys-General, the Commonwealth Attorney-General released the following statement:

> "The meeting considered the form of a Bill to refer certain family law matters to the Commonwealth. Enactment of legislation would be subject to the approval of the Governments of all States and the Commonwealth Government. The legislation would enable the Commonwealth to amend the Family Law Act to cover *(inter alia)* the custody, guardianship and maintenance of ex-nuptial children and children of previous marriages."

The Attorneys-General of four States supported the referral: New South Wales, South Australia, Tasmania and Victoria. At the time of writing, no further steps have been taken to implement this proposal. The proposed Bill would need

to be passed by a majority in the Parliament of each State concerned. The ideal would be for all States to refer such powers. However, even if the problem of a divided jurisdiction in custody and maintenance proceedings is solved in this way, other problems remain. Other significant areas affecting childrens' rights — registration of births, succession, testator's family maintenance and adoption — fall outside Commonwealth power and are the subject of the laws of each State. The potential for lack of uniformity in Australia is thus great.

Given that the rights of children born outside marriage are governed by the laws of the various States, it is fortunate that the last decade has seen the appearance in each State of fairly uniform legislation designed to remove the legal disabilities of such children. These "Status of Children Acts"[6] followed the New Zealand model of 1969[7]. The philosophy of each Act is found in the Preamble. Thus the Victorian Act declares itself to be "An Act to remove the Legal Disabilities of Children Born out of Wedlock", and the South Australian Act "An Act to abolish the legal consequences of illegitimacy under the Law of this State." All the Acts eliminate the term "illegitimate child" from the law, and replace it with some less stigmatizing term such as "exnuptial child" (New South Wales), "child born outside marriage" (South Australia) and "a child whose parents were not married to each other at the time of its birth" (Victoria). Each Act contains a basic provision the principle of which is stated in the marginal note: "All children to be of equal status". Typical is s.3(1) of the Victorian Status of Children Act 1974:

> "For all the purposes of the law (of this State), the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other and all other relationships shall be determined accordingly."[8]

Essential to the operation of such a principle is the establishment of the paternity of a child born outside marriage. Each Act states the circumstances in which paternity will be recognized;[9] these range from acknowledgment by the father on the birth certificate to the making of a declaration by the Supreme Court upon application by the mother alleging that a particular man is the father of her child.

Section 3 (1) of the Victorian Act (and its equivalent in other States[10]) states that its principle applies "for *all* purposes" of the law of the State. This might at first sight appear to suggest that, without more, the rights of children born outside marriage have been equated with those of children born within marriage in every area governed by State law. But this is somewhat misleading, for the Status of Children Acts themselves deal primarily with matters of property i.e. inheritance (whether under a will or upon intestacy), entitlement under trust deeds, and *inter vuios* dispositions of property. Before such legislation was enacted, a child born outside marriage could succeed if his parents died intestate (i.e. without making a will). Such a child could inherit if he was specifically named in a will, but was excluded where the will merely referred to the testator's "children". Nor could a child born outside marriage claim under the Testator's Family Maintenance Legislation if inadequately provided for in the will of his parent. The Status of Children Acts have removed this discrimination. A child born outside marriage now has the same rights and claims in the abovementioned areas as a child born within marriage, provided that paternity is recognized in accordance with the law of the State. Consequential amendments have been made to the legislation dealing specifically with matters of property, succession and trust; in most States a list of such consequential amendments is included in the Schedule to the Status of Children Act.

It is not yet accurate to say that "for *all* purposes" of the law of each State the rights of children born outside marriage are equal to those born within marriage. That supposedly general principle expressed in the Status of Children Acts has not yet been fully implemented in areas outside succession and entitlement to property. For example, in the area of adoption (a matter governed by State Law), a disparity remains in all States except South Australia between children born within marriage and those born outside it. If the parents of a child are married, the consent of both is required to the child's adoption. If they are unmarried, the consent of the mother alone is required in all States except South Australia, where the father's consent is also required if his paternity is recognized under the law of the State.[11] Further legislative reform is required if such anomalies are to be removed.

Irrespective of what is claimed in their Preambles, the Status of Children Acts can never eradicate the distinction between children born within marriage and those born outside it. These Acts can ameliorate the legal position of children born outside marriage in those areas which are governed by State law. But the basic Constitutional problem of division of powers remain and no Status of Children Act passed by a State Parliament can make an exnuptial child a "child of the marriage" for the purposes of the Family Law Act, 1975-1979 (Cth.). The division of jurisdiction is acutely felt in the areas of custody and maintenance, where disputes concerning children born within marriage must be litigated in courts exercising Federal jurisdiction, and those concerning

children born outside marriage in courts exercising State jurisdiction. Different legislation will apply to the two classes of children. This division is particularly unfortunate in relation to custody disputes, a notoriously difficult and delicate area of litigation. The Family Law Act, 1975-1979 (Cth.) established the Family Court of Australia. The creation of this Court has been seen by many as the greatest innovation of that Act. The Court is envisaged as a "helping court", specially designed to deal with family problems in a more humane manner than is possible under the traditional procedures followed in State courts of general jurisdiction. A Judge of the Court must be "by reason of training, experience and personality . . . a suitable person to deal with matters of family law."[12] The Court sits as a closed Court; neither judge nor counsel robe. In the custody jurisdiction in particular there are significant modifications of the traditional adversarial process of litigation; these are designed to ensure that the best decision is reached concerning the child's welfare.[14]The Court may order separate representation of the child; this is funded by government assistance. Extensive use is made of reports on the child compiled by a welfare officer. Above all, each Registry of the Family Court has attached to it a counselling service,[15] staffed by trained counsellors with a professional background in social work and psychology. Conferences with counsellors are held in an attempt to conciliate the disputing parties, encourage them to come to an agreement about custody and access and thus avoid hostile proceedings before the Court. In addition, the Court may order supervision by a welfare officer after it has made a custody order. It is unfortunate that at present only children born within marriage can benefit from this specialized jurisdiction. Custody disputes concerning children born outside marriage are litigated in State Courts. These courts apply the same principles as the Family Court of Australia, namely that the welfare of the child is the paramount consideration, but they are less well equipped to realize that principle. They are courts of general, not specialized, jurisdiction. They follow traditional adversarial procedures and above all have no court counselling services attached.

The spirit of the Status of Children Acts passed by the various Australian States is to be applauded, and those Acts undoubtedly represent a significant step towards equalization of the rights of all children in Australia irrespective of their birth. But true equalization cannot be achieved while the division of power between the States and the Commonwealth remains. The constitution as it stands at present makes inevitable a fundamental distinction between children born within marriage and those born outside it. This can be remedied by the proposed referral of power by the States to the Commonwealth. The success or failure of this current proposal will no doubt depend on political considerations. It is to be hoped that in a matter so vital as childrens' rights political obstacles will not impede a just solution. If referral of power takes place, Australia may be said to have fulfilled its obligation to give concrete effect to the First Principle of the United Nations Declaration of the Rights of the Child.

References

1. Royal Commission on Human Relationships, Final Report, Vol. 4, Chapter 5, para. 91.
2. **Id.**, para. 107.
3. Cited in Finlay, "Family Law in Australia" (Butterworths, 2nd. ed., 1979). 302.
4. Family Law Act, 1975-1979 (Cth.), s. 5(1).
5. Under s.51 (xxxvii) of the Australian Constitution.
6. Children (Equality of Status) Act 1976 (N.S.W.); Status of Children Act 1978 (Qld.); Family Relationships Act 1975 (S.A.); Status of Children Act 1974 (Tas.); Status of Children Act 1974 (Vic.). See also Status of Children Act 1978 (N.T.). In Western Australia no equivalent statute exists, but a similar effect has been achieved by amendments to individual statutes dealing with specific areas such as succession.
7. Status of Children Act 1969 (N.Z.)
8. See also Children (Equality of Status) Act 1976 (N.S.W) s.6; Status of Children Act 1978 (Qld.) s.3; Family Relationships Act (S.A.) s.6; Status of Children Act 1974 (Tas.) s.3.
9. Children (Equality of Status) Act 1976 (N.S.W.) ss.11, 12, 13; Status of Children Act 1978 (Qld.) s.6; Family Relationships Act 1975 (S.A.) s.7; Status of Children Act 1974 (Tas.) s.7; Status of Children Act 1974 (Vic.) s.7.
10. **Supra.**, n.8.
11. Adoption of Children Act 1964 (N.S.W.) s.26; 1964 (Qld.) s.19; 1967-78 (S.A.) s.21; 1968 (Tas.) s.21; 1964 (Vic.) s.23; 1896-1976 (W.A.) s.4A.
12. Family Law Act, 1975-1979 (Cth.) s.22.
13. **Id.**, s.97.
14. **Id.**, Part VII generally.
15. **Id.**, s.37 (8).