



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 1

ATTORNEY-GENERAL ROBERT MCCLELLAND

19 JANUARY 2009

**INTERVIEW WITH SAMANTHA MAIDEN, ABC LOCAL
CANBERRA RADIO – 10.05AM**

SUBJECTS: GRANDPARENTS; SURROGACY; TORTURE.

SAMANTHA MAIDEN: Our guest this morning is Robert McClelland. Good morning, Robert. Now, tell us about why this is important. Break-ups can obviously be very messy, and sometimes grandparents have said in the past that they've been left out of a relationship with their grandchildren. Why have you felt the need to address this issue?

ROBERT MCCLELLAND: Yes, that can certainly happen; grandparents are often left out and obviously, that's distressing to the grandparents. But it also removes from the child a source of stability when otherwise, at least in the short term, the cards are falling down around them with their parents' separation.

So grandparents can play a very constructive role in giving stability to children in those circumstances.



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 2

SAMANTHA MAIDEN: Now, increasingly, we hear stories about grandparents actually taking on a parenting role. Are these reforms aimed so much at those sort of families, or just ensuring that when there is a break-up that grandparents can still have access and spend time with their grandchildren?

ROBERT MCCLELLAND: Initially, the lap of that is to ensure that grandparents maintain contact and have quality time with their grandchildren. But we're also asking the Institute of Family Studies to look at perhaps a more significant role that grandparents could play in appropriate circumstances; and that is to give specific powers to the court to direct that residence and access be given to grandparents, particularly in circumstances where the parents' relationship has become dysfunctional because of alcohol, substance abuse or inherent violence.

There's regrettably a number of circumstances where Family Court judges have said to me in some cases before them that they'd like a third alternative to either parent. And we are investigating the viability of the court having power to consider grandparents in that context.

SAMANTHA MAIDEN: So I suppose what you're saying is there be grandparenting orders, as well as parenting orders, in some places then?



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 3

ROBERT MCCLELLAND: This is something to explore. The fine balance is not introducing a third variable that actually complicates resolution of cases. On the other hand, we're naïve not to appreciate that regrettably many relationships are dysfunctional because of those broader social problems, alcohol abuse and substance abuse being the most common.

SAMANTHA MAIDEN: Is there a danger though that in some cases it could also complicate the situation - more lawyers involved, more parties to the action? I mean, how would you guard against that happening?

ROBERT MCCLELLAND: Yes, it could do; and that's something that we need to balance. These are the issues that the Institute of Family Studies is examining. It is a balance between giving the court an additional option in appropriate circumstances, as opposed to introducing what could be an additional complication and a headache for the court to resolve in cases where it wasn't necessary.

These are complex issues, but we're arranging for experts to think them through and give us a report on their views.

SAMANTHA MAIDEN: And you're also going to provide some extra resources in terms of DVDs and brochures. Do you think



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 4

grandparents aren't aware of their rights at the moment, as they exist?

ROBERT MCCLELLAND: It's partly that; partly grandparents aren't aware of their rights; partly, they don't have access to advice. It's often very difficult for them to obtain legal aid because they have their asset - namely, their family home - but very reduced income, being on a pension or part pension.

And what we're doing with this information network is, through the Family Relationship Centres in particular, providing DVDs, information brochures that can be given to the grandparents; and also, specifically asking the Family Relationship Centres to have regard for the interests of grandparents when they are coming up with a plan for the future upbringing of the child that necessarily is the subject of their deliberations.

SAMANTHA MAIDEN: Now, this isn't so much a legal issue, obviously, but I have read that some studies showing that children that are cared by - for by their grandchildren[sic] for at least part of the time, it's sort of good for their development as well. Is that something that you've noticed in your own life at all, or with your own grandparents' involvement?



ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

TRANSCRIPT

Page: 5

ROBERT MCCLELLAND: My grandparents, I suppose, were a little older, but unquestionably, they can have a very positive influence on you and their values, their histories. And I'm fortunate to see that my children have a very good relationship with their grandparents, and I think at the end of the day that gives a bit of depth.

And I suppose to an extent that, and as a result of my occupation, I'm away a fair bit; and I think my children having a relationship with their grandparents has been a very, very healthy thing and an alternative source of stability.

SAMANTHA MAIDEN: There have been criticisms of these changes or suggestions that you've announced over the weekend as well. Some people are saying that people don't need more studies; they need a bit of legal help, but the legal system is not accessible.

What are doing to help grandparents access and navigate the legal system as these - under these reforms?

ROBERT MCCLELLAND: Again, to a degree, those criticisms are appropriate. It is very difficult for grandparents often to obtain access to legal aid, as I've mentioned, because they've accumulated assets but have a reduced income.



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 6

And the fact that they have assets often disentitles them to legal aid.

So we've provided an additional \$400,000 to the legal aid commissions to try and expand the scope of advice that they can give, but I appreciate that far from addresses the situation entirely. And hence, we're trying to have it through the informal negotiation mechanisms through the Family Relationship Centres. We're trying to have the culture, if you like, altered or adjusted so that the interests of grandparents are considered more in the informal proliferations, as much as the formal court proceedings.

SAMANTHA MAIDEN: Mr McClelland, you're also looking at some national rules for surrogacy, obviously a controversial issue. Tell us about the changes that are being looked at, particularly in relation to the legal recognition as the child's parents down the track.

ROBERT MCCLELLAND: Yeah, this is a very complex and indeed controversial topic. But the reality is surrogacy does exist, and in fairness to him, Senator Steve Conroy, whose child was born a couple of years ago through surrogacy, has been an advocate for change.



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 7

And I think - certainly the federal and all the state attorneys-general, recognise there needs to be reforms, there needs to be uniformity around Australia so that children don't have different rights depending on where they were born, issues such as entitlement to a passport, entitlement to admission to a school. Just proof of parentage is different between the states and very complex.

What we've done at a federal level initially is to say that we will recognise for family law purposes the state systems, that is, if a state recognise a child born under surrogacy arrangements or otherwise, we will recognise that for the purpose of the family court dealing with the breakdown.

But we want to obviously have the framework in place that applies other than when a breakdown occurs.

SAMANTHA MAIDEN: In the case of Stephen Conroy that you mentioned, there is this issue, is there not - maybe we should just explain it - that even if the child - you basically have to apply to become this child's parents. It's quite tricky, isn't it?

Can you explain what sort of unusual situations are thrown up by surrogacy arrangements?



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 8

ROBERT MCCLELLAND: Yeah, you can often have the parents being required to adopt the child, and that can itself involve its own bureaucratic processes but also complications.

There are also very complex issues - the paper, and indeed all the state attorneys-general and the Federal Government recognise, and it will always be the case, that commercial surrogacy won't be legalised in Australia.

On the other hand, there are complex issues regarding compensating the surrogate mum who necessarily has to give up work, for her loss of income and sustenance during that period.

So, including all those issues into a legal framework is complex and certainly controversial, we recognise.

SAMANTHA MAIDEN: Am I correct in assuming that any payment to the surrogate at the moment is illegal? Are you basically suggesting that you might be able to make some payments to cover costs?

ROBERT MCCLELLAND: Often the law is silent, but certainly a commercial surrogacy arrangement is unenforceable. That is, if the mother, that is, the mother, the biological mother carrying the child, doesn't want to give up the



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 9

child for the purpose of the arrangement, it's unenforceable. And that will remain the case.

A commercial arrangement would be specifically defined as illegal and unenforceable, but as a matter of informal arrangements, as I understand it - and this is more by hearsay than actual knowledge - that there have been payments to sustain the mum during the period, and they have been accepted.

SAMANTHA MAIDEN: It's a pretty tricky area, though, isn't it? I mean, like, you're saying that some surrogates have been paid. Do you know how much they've been paid?

ROBERT MCCLELLAND: No, I don't. Again, I think it's more akin to assisting the mum who's had to give up work and for the income to sustain her during the pregnancy rather than a commercial payment. And again, we think it would be better to have that defined as to what is an appropriate amount for that to occur rather than for there to be a creep towards commercial surrogacy, which, as I say, all attorneys-general regard as being unacceptable.

SAMANTHA MAIDEN: You must be concerned that that's going on now and we just don't know about it, though?



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 10

ROBERT MCCLELLAND: If the regime remains unregulated and uniformity doesn't exist, there is a risk that these undesirable aspects of surrogacy - and we have to be realistic, as you say, surrogacy is occurring - all these things could be occurring, that's true.

SAMANTHA MAIDEN: Our guest is Robert McClelland, the Attorney-General.

Just before you go, there's obviously been a big debate in the United States in the last week over the issue of waterboarding and torture. There's been some very interesting hearings of Eric Holder, President-elect Barack Obama's nominee for Attorney-General, who's told a Senate confirmation hearing that waterboarding of terrorist suspects is torture.

Now, I know this is a subject that you've actually been doing a lot of speeches on and that you're interested in this subject. What did you make of Eric Holder's evidence to that Senate confirmation hearing?

ROBERT MCCLELLAND: I thought it was very refreshing. I've never met him, but it indicates a decent man of decent principles. And if the United States of America is entering now a period where they're adopting those principles, I think it will be a very, very good thing, not



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 11

only for the United States but internationally in terms of the standards that the United States necessarily sets around the world.

So I think we're entering a very encouraging period.

SAMANTHA MAIDEN: So what's your view on issues like waterboarding, and what's your definition of torture in terms of some of the things that have been going on in recent years?

ROBERT MCCLELLAND: Certainly I think unquestionably waterboarding is torture, and I've said so.

We're actually consulting with the state governments on a federal law that would outlaw torture, which would apply not only throughout Australia, but would also have extraterritorial operation, that is, it would apply to Australians operating overseas. So it would penalise or criminalise their involvement in torture, either directly or indirectly. And we're liaising with the states about that.

Defining torture is the hard part, I've got to be honest. For instance, some have argued that the use of tasers that the police use is torture. But commonsense tells me that having police armed with tasers is far more preferable than the police having to shoot and kill someone.



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 12

So these definitions in the context of what are appropriate law enforcement techniques are a matter for discussion between the Commonwealth and state governments. And I suppose at the end of the day, what we will have to come up with is a definition that is principled but also one that recognises commonsense.

SAMANTHA MAIDEN: So, I mean, would tasers be on the table of that discussion then, because a lot of the states...

ROBERT MCCLELLAND: No, I think the states and certainly the Commonwealth, they will - there's certainly a difference between using a taser for law enforcement purposes as opposed to repeatedly firing a taser into someone to elicit information.

Clearly, the use of the taser in the second instance may be regarded as - in that context. But the use of a taser for law enforcement purposes, I don't think anyone sensibly, although some - a couple of civil libertarian groups have suggested as much - but I don't think anyone sensibly, when they think through it, could regard it as inappropriate for law enforcement purposes.

SAMANTHA MAIDEN: All right. You've been generous with your time. Just one last question.



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 13

The other story that was interesting to emerge over the last little while was the British Foreign Secretary, David Miliband, suggesting that the war on terror was misleading and mistaken and may have done more harm than good.

What do you make of those remarks?

ROBERT MCCLELLAND: Great Britain is doing a lot of work in the language that is used, not only in government, but there's been a lot of cooperation with the media, where they've actually sat down and effectively rewritten their language so they're no longer talking about a war on terror and, if you like, glorifying what are the base criminal acts of terrorists. They are defining it in those base terms, that they're gross criminal violations of individual freedom, targeting in most cases, innocent civilians.

So they're talking about it in criminal terms rather than glorifying it in terms of a war.

And in fairness, the Victorian Government is also doing some work along those lines. So I think these are areas where, at a national level, we certainly could have a debate on. And interestingly, I think that debate will involve the media itself. So that will be an interesting debate, but I think it's a debate worth having.



**ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP**

TRANSCRIPT

Page: 14

SAMANTHA MAIDEN: All right. Well, thanks for talking to us this morning. Kevin Rudd's back at work, so there's no rest for any of you. Thank you very much for your time this morning.

ROBERT MCCLELLAND: That's my pleasure.

* * * ENDS * *