Identify several contemporary family issues and evaluate the effectiveness of legal and non-legal responses to these issues in achieving justice for family members.

Family Law is the body of law pertaining to marriage, matrimonial issues and the protection of each family member. Its aim is to protect family members through their recognition of rights in legislation and enforcing them in courts, in order to achieve justice for families. Through the evaluation of non-legal and legal responses to contemporary issues regarding family law we can determine the law’s effectiveness in achieving justice for all family members.

The Commonwealth Government uses its exclusive powers, outlined in Section 51(29) of the Commonwealth Constitution to sign international documents it agrees with and intends to uphold. Through utilising these powers Australia became a signatory of the International Covenant on Civil & Political Rights (1966) (ICCPR). Within this legislative agreement under Article 23 it outlines the nation-states responsibility to protect the family as it is a fundamental group unit of society and is entitled to protection. This principle was further ratified in domestic legislation by the Commonwealth Government through the establishment of the Family Law Act (1975)(Cth), specifically in Section 43(a). Outlining that each individual within a family unit has different rights that need to be protected by the state.

Due to the ever-developing world, shifts in societal values have occurred which resulted in the push for recognising family units that consist of marriages which are different e.g. same-sex marriage, from the original definition of marriage. Which was established in Hyde v Hyde & Woodmansee (1866) and ratified into the Marriage Act 1961 (Cth), outlining that marriage only existed if it were between a man and woman. Spot-lighting the discriminatory injustice manifested within the Australian legal system through their differing recognition of individuals based on the family unit that they belong to.

Same-sex marriage is a contemporary issue which has been undergoing reform over the last decade, challenging the original definition of marriage in order to recognise same-sex couples individually and provide legislative protection. The first developments of same-sex marriage equality and promotion of the rights of individuals in same sex de facto relationships came through The Property (Relationships) Legislation Amendment Act 1999 (NSW) and through the precedent set in the case re: Kevin (2001). Which legally recognised the new
sexual identity of a person after gender reassignment. Reforming the original precedent in
the case of Corbett v Corbett (1970). Furthermore, non-governmental organisations (NGO's)
played a major role throughout the campaign of achieving recognition for same-sex marriage.
For example, the Human Rights Committee, player a major role in the Toonen v Australia (1994)
case, through outlining Australia's violation of ICCPR as they were breaching rights to
privacy and freedom from discrimination.

Furthermore, the effectiveness of non-legal instruments is evident through the
response to the case Young v Australia (2003) where an individual wasn't granted a pension
as he was not recognised as a member of a couple due to his sexual orientation. Where by the
Australian Human Rights Commission released a report in 2008, titled “Same-sex: Same
entitlements”, which successfully pressured the parliamentary system into enacting the Same
Sex Relationships (Equal Treatment in Commonwealth Laws General Law Reform) Act 2008 (Cth)
and the Marriage Equality (Same Sex) Act 2013 (ACT), removing same sex discrimination in
Commonwealth Laws. Contributing to successful recognition of Same-sex marriage along
with the 2017 Plebiscite “Australian Marriage Law Postal Survey”, which for saw the
enactment of The Marriage amendment (Definition and Religious Freedoms) Act 2017 (Cth).
Changing the first definition on marriage by Lord Penzance’s which ensured the recognition
and protection of individuals', religious organisations and couples from discrimination.
Ultimately achieving greater justice for family members, through reflecting communal values.

Within the family unit the parents & guardians of the child as well as the Courts are
obligated to make decisions based on “the best interests of the child” in order to ensure their care
and protection of children. Due to Australia being a signatory of International Convention on the
Rights of the Child (1989)(CROC), which ensures the protection of the child in regards to
family violence, child abuse and child neglect and ratifying this key principle into domestic
legislation through Children and Young Person’s (Care and Protection) Act 1998 (NSW). This
legislation was later reformed into the Family Law Amendment (Shared Parental Responsibility)
Act 2006 (Cth), in order to specifically ensure all family court decisions are made with “the best
interests of the child,” as focus.

As the legislative documents outline the parent’s duty of care of the child, the
Children’s Court was established in order to effectively handle issues regarding the minors,
through hearing cases on merits not precedent for the best interests of the child. Although
the Children’s Court effectiveness is demonstrated by its jurisdictional power to pass
parenting and medical order’s, for example in the case R v BW & SW (2009), where a mother
and father were imprisoned for neglect of their autistic daughter. It lacks the independent power and resources to investigate allegations of abuse as outlined in the media articles “Child abuse has eluded family law reform” (2004) and “Ineffective and unsustainable: the system failing NSW children” (2018), highlighting the ineffectiveness of the Children’s Court in protecting children. This lack of action from legislative responses in order to rectify the issue is further emphasised through the time frame between the articles as 14 years later the issue continues to be publicised by the media without any reform to the Court’s Process amplifying its ineffectiveness in protecting children, and achieving justice.

Furthermore, the systems ineffectiveness is highlighted through institution of non-legal mechanisms in response to ineffective legal instruments. For example, Family and Community Services (FACS) provide effective once they are notified of a case as they can adapt responses on cases by case basis, but are inaccessible in terms of that they only recognize present issues rather than preventing. Thus, in an attempt to amend its ineffectiveness, the Child Wellbeing Unit was established to provide assistance in instances where FACS is unable to legally intervene, including assessment and advice. Additionally, the ineffectiveness of the child protection services is outlined within the Wood Enquiry (2008), a “Report of the Special Commission of Inquiry into Child Protection Services in NSW”. Law reforms have been witnessed in an extent by the strengthening legislation surrounding the care and protection of children, but has still not been a successful legal mechanism in achieving justice.

Moreover, as there has been a societal shift in values away from the assumption that parents have rights and recognition that they have responsibilities over their children; the law must adequately protect family member to a greater extent. Due to the Guardianship of Infants Act 1934 (NSW), and Family Law Act 1975 (Cth)/(FLA) not specifically recognizing the notions of the parental responsibility over parental rights, the Family Law Reform Act 1995 (Cth), was introduced as reform, accentuating the responsiveness from the legal system. Furthermore, The Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), introduced the concept of shared parental responsibility, even after divorce. These amendments were instituted in order to reflect the values and child orientated discourse CROC and its compliance with international and community standards.

Additionally, the establishment of this reform introduced the consideration of family violence in determining parental responsibility. As the Family Law Reform Act 1995 (Cth), outlines the increased sensitivity in regards to family violence, however further reform is required to the Family Law Reform Act 1995 (Cth), to better protect those at risk and underage. For example, in the reports, “Family Law does not put children first” (SMH 2010)
“Shared custody a mistake for the under-2s, say guidelines.” (SMH 2011) and in “National Family Court should be scrapped and powers given to state, according to review of the system” (SMH 2019) outline the need for legislative reform. Moreover, these amendments were initiated in an attempt to reduce the conflict between spouses in decisions about the child during divorce court proceedings as the Matrimonial Causes Act 1959 (Cth), failed in effectively recognizing the child.

Family court is a legal instrument which deals with matters of family law, through administering legally binding agreements. Family court is an enforcement agent of CROC, Family Law Reform Act 1995 (Cth) and the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) as in cases of divorce is determines the division of property and the responsibility for children through its parenting/financial Orders. Although the Child Support Scheme ensures that children are financially secure, figures show only half of payers completely meet their obligations. Which adds to the Courts ineffectiveness in protecting the child. This is further amplified through its inability to adequately tailor equal decisions to both parties whilst protecting the child, as outlined in the media article “Children the losers in Australia’s family courts, Law Reform Commission finds” (ABC 2019). Ultimately, spotlighting the inability the system in achieving justice for children, through the ineffectiveness of legislation regarding parental responsibility.

Advances in birth technologies have created multiple issues and challenges within family law, including paternity to rights of inheritance and the care and control over the child. Surrogacy is form of assisted reproductive technology (ART) that has raised a multitude of complex social, emotional and parenting issues, including the legal recognition of genetic parents as outlined in the media report “Surrogacy’s painful path to parenthood.” (SMH 2013). As under the Status of Children Act 1996 (NSW), “when a woman becomes pregnant by using donor sperm from someone other than her husband, then that man is presumed not to be the father of the child born”. In the case of B v J (1996), the father refused to pay maintenance, arguing the child wasn’t his but the responsibility of the sperm donor because the donor’s name appeared on the child’s birth certificate. This case illustrated the confusion and uncertainty that exists in the law in particular when dealing with birth technologies.

The laws relating to surrogacy differ slightly from state to state which has created a further deal of inconsistency, uncertainty and conflict between state Acts, due to conflicting beliefs and non-legal mechanisms pressuring for different solutions in separate states. For example, the Australian Health Ethics Committee (National Health and Medical Research
Council), is effective in responding to issue as it conduct surveys and advises legislatures on the ethical nature of reproductive technologies and appropriate law reform strategies. Whilst the Australian Christian Lobby, advocates against the legalisation of altruistic surrogacy.

However, as a result of the collective shift of social values toward “the best interests of the child”, caused the response of non-legal instruments to pressure for law reform. For example, in the case Re Mark (2003) a homosexual male couple was granted parental responsibility based on the best interests of the child. Furthermore, the “Final Report on the Legislation on Altruistic Surgery in NSW (2009)”, for saw the enactment of the Surrogacy Act 2010 (NSW), which removed discrepancies and difficulties in transferring parentage to new parents.

Additionally, ART utilizes advanced technology to allow for gender selection and cloning of embryos under the Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006 (Cth). The advanced technology has raised serval ethical issues regarding the cloning process outlined in the report “Breakthrough in cloned embryos poses ethical concerns.” (SMH 2013). On the whole however, the federal government lags behind in enacting laws relating to surrogacy and birth technology issues and the courts are constrained by existing legislation at this point of time making the legal system relatively ineffective at obtaining justice for family members, due to their failure to recognise individuals within the family unit.

Domestic violence is the violent, abusive or intimidating behavior in a relationship, and is notably an issue that circulates women’s safety as 62% of women experienced violence in the home, compared to 8% of men. Although domestic violence is protected under serval international statutes including: CROC, Convention on the Elimination of All Forms of Discrimination Women (1983), Declaration on the Elimination of Violence against Women (1993) which have been ratified into domestic legislation under the Crimes (Domestic and Personal Violence) Act 2007 (NSW), Crimes (Domestic and Personal Violence) Amendment Bill 2013 (NSW) and the FLA and Family Law Reform Act 1995. It remains a present force in society as a consequence of police reluctance to intervene, gender bias in the judiciary, a woman’s legal insignificance and the social conditioning of men that reinforces dominant and aggressive characteristics, that are often perceived as natural behavior by society.

As several domestic statutes outline the prohibition of domestic violence within the family. Enforcing agents have been established in order to recognize and enforce the issue
within courts. These agents include, Apprehended Domestic Violence Orders (ADVO’s), Magellan Program implemented by Family Courts, and Battered Women’s Syndrome.

Battered Women’s Syndrome (BWS) is a mental disorder that develops in victims of domestic violence as a result of serious, long term abuse, which in turn can cause acts of retaliation, such as murder. This disorder can be used as a defense as outlined in the Crimes (Homicide) Amendment Act (1981)(NSW), which allows for lesser penalties to be applied to women who kill their husband, as evident in the cases of, R v. Runjanjic and Kontinnen (1991), R v Singh (2012) and R v. Hickey (1992). In spite of the state governing body passing legislation and initiatives that include, the Crimes (Girl’s Protection) Act (1910)(NSW), Crimes (Domestic Violence) Amendment Act (1993)(NSW), Crimes (Sexual Assault) Amendment Act (1981)(NSW), Victim’s Support Line and Women’s Counselling Service, all aimed to reduce and eliminate domestic violence, it remains a pressing issue in society today, as exhibited by the case of Catherine Smith ("Women found not guilty of attempting to murder husband sues state for malicious prosecution", Sydney Morning Herald, 2014), "Kristi Abrahams jailed." (SMH 2013). Thus highlighting the legal systems inability to protect family members from violence within the family unit, resulting in the unjust outcomes for the individuals subjected to the domestic violence.

In conclusion the family law is relatively ineffective in achieving justice for family members and society. Although the legal system has successfully responded to the societal shift in values in regards to same-sex marriage. The law fails to effectively protect the family in other areas of the law exemplified within the contemporary issues of domestic violence, the care and protection of children, the parent’s responsibility, surrogacy and birth control and domestic violence. As supported by the increasing number of issues and reports regarding the rights and recognition of individual family members in regards to these contemporary issues. Which further accentuates the ineffectiveness of family law as it fails to promote and protect family units within society resulting in unjust decisions and outcomes occurring for family members.