Option 3: Family Law

1. THE NATURE OF FAMILY LAW

- The concept of family law includes the laws and institutions that govern:
  ● Marriage
  ● Alternative family relationships (e.g. de facto relationships)
  ● Legal rights and obligations of parents and children
  ● Divorce
  ● Legal ways of dealing with domestic violence
  ● Same sex relationships
  ● Surrogacy and birth technology

Discuss the difficulty of defining family and the changing concepts of family

Legal definition of marriage:
This definition originally came from the case Hyde v. Hyde (1866).
The Howard Government passed the *Marriage Amendment Act 2004 (Cth)* to make sure that the definition of marriage did not include same-sex couples. Now it’s written in the *Marriage Act 1961* and the *Family Law Act 1975*.

The definition of family is beginning to change in order to reflect changing social trends, which include alternative family arrangements.

Why it’s increasingly difficult to define family:
1. In 2011, 22% of families were headed by a lone parent
   □ 18% lone mothers, 4% lone fathers
2. In 2008, 34.4% of all babies were born outside of marriage
3. The ABS found in 2011 that there were almost as many families living without children as there were couples living with children

But despite these trends away from traditional family make-ups, the authors of the report argued that families remain the basic unit of society and that most children are raised within a family.
Distinguish between state and federal jurisdiction in family law

<table>
<thead>
<tr>
<th>State Jurisdiction</th>
<th>Federal Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Same-sex couples (other than de facto relationships</td>
<td>- De factor relationship breakdowns since 2008 when most</td>
</tr>
<tr>
<td>- E.g. registration of same-sex marriage, civil union</td>
<td>states referred their powers to the federal government</td>
</tr>
<tr>
<td>relationships</td>
<td></td>
</tr>
<tr>
<td>- Alternative family arrangements</td>
<td>- Marriage</td>
</tr>
<tr>
<td>- Adoption</td>
<td>- Divorce</td>
</tr>
<tr>
<td>- Child welfare</td>
<td>- Guardianship, custody and maintenance of children</td>
</tr>
<tr>
<td>- The Children’s Court</td>
<td></td>
</tr>
<tr>
<td>- Surrogacy and IVF</td>
<td></td>
</tr>
<tr>
<td>- Criminal law (e.g. domestic violence)</td>
<td></td>
</tr>
</tbody>
</table>

Our system is fragmented. This split between state and federal jurisdiction causes serious problems. Neither state nor federal courts have the authority to deal with all of the legal issues that happen within families. This has been a major problem, especially when it comes to dealing with domestic violence. The Australian Law Reform Commission Family Violence Inquiry (2010) made recommendations about how to fix this system. Some of the recommendations have been followed up by the government, but the system is still flawed.

Outline the legal requirements of a valid marriage

1. Voluntary Union:
   - No person can be forced to marry under duress (e.g. “if you don’t marry me, I will kill you”) DiMento v. Vissalli 1973
   - It also means that arranged marriages aren’t allowed in Australia (Kreet v. Sampir, 2011)
   - In fact, it’s now a crime to coerce someone into getting married (Crimes Legislation Amendment Slavery, Slavery-like conditions and people trafficking Act, 2013)

2. For life:
   - ‘For life’ doesn’t apply in Australia anymore as the Family Law Act 1975 only allows for divorce on the grounds of irretrievable breakdown of marriage

3. Between a man and a woman:
   - Marriage can only be between a man and a woman but transsexuals who have had a gender re-assignment surgery and get a new birth certificate to say they are now a woman or man, are counted as being of their new gender

4. To the exclusion of all others:
   - Means that you can’t be married to more than one person at the same time. This is a crime called bigamy
   - But adultery is not in any way against the law
If a marriage is found to be invalid, the court can nullify the marriage. This (‘annulment’) means that marriage is deemed to have never legally taken place. However, the children of the marriage still get the same rights.

Marriageable Age:
- Under the *Marriage Act 1961* □ 18 years of age

Parental Consent:
- People under the age of 16 cannot get married at all
- Nobody over the age of 18 needs parental consent
- Females at 16 or 17 can apply for a grant of marriage
  - *Marriage Act 1961* (Cth)

Prohibited degrees of relationship:
- The refers to the degree of biological closeness of the people getting married. That is, how closely they are related
- Under the *Marriage Act 1961*

Alternative Family Relationships:
1. Aboriginal and Torres Strait Islander People:
   
   Customary Law Marriages
   - ATSI customary law marriages do not comply with the requirements of a valid marriage, such as:
     ● Girls younger than 18 may marry
     ● The marriage may not be entirely voluntary (girls may be promised to men before they are old enough to make the decision)
   - ASTI customary law marriages are treated as a de facto relationship

2. Single Parent Families:
   - There has been a huge increase in the number of single parent families
   - In 2011, 22% of families were headed by a lone parent (‘Australian House-holds and Families’ Australian Institute of Family Studies, 2013)
     ● 66% were a result of divorce or separation
     ● 7% were as a result of death
     ● 27% were their decision

Legal Issue 1:
Child Support
- It used to be that an agreement would be made between the residential and non-residential parent, and they’d have to go to court to force a parent to pay if they weren’t contributing
- This was under the child support scheme

Legal Issue 2:
Shared Parental Responsibility
- Between 2006-2008, changes were made to the Family Law System
- Because of the new emphasis on shared parenting, some men are paying less and women are more than ever, having to pay child support payments

3. Blended Families:
One-third of all registered marriages involve individuals who are marrying for the second time (ABS)

- A blended family can be married or de facto parents

**Legal Issue:**
- The family court can order a step-parent to pay child support if it can be shown that the step-parent has a duty to maintain the child (FLA)
- The process for a step-parent to adopt their partner’s child is much easier than a regular adoption
- Step-children do not have an automatic claim to the estate if their step-parent dies without a will (they have to prove that they were financially dependent on the step parent) *(The Succession Act 2006, NSW)*

4. **De facto Relationships:**
- These are relationships where two people live together on a permanent basis and also share a sexual relationship
- They must live together on a “genuine domestic basis”
- It is people living as a married couple, without being married
- De factor coupes now access the Family Court due to the *Family Law Amendment (De facto financial matters and other measures) Act 2008*
- This means that now when a de facto couple separates the entire separation is resolved through the federal system (dispute resolution, parenting orders, etc.)
- This is better for de facto couples and any children they have had together, as they don’t have to go through two separate courts

**Important Cases:**
- *Ricco v. Jones* = it is up to the person bringing the case to court to prove that there was a de facto relationship
- *Jonah v. White* = the guy was married during the 13-year relationship. They never lived together though, so just adding up the time doesn’t count
- *Sinclair v. Whittaker* = the relationship went for about 6 years but the guy didn’t admit it (the judge said it doesn’t matter whether the person thinks there’s a de factor relationship, so too bad)
- The Facts on De facto, Law Institute Journal (2014)

5. **Same-sex couples:**
- Same-sex couples have not had equal rights under Australian Family Law
- Government Response:
  - The federal government amended 84 Commonwealth acts through the *Same-sex Relationships (Equal Treatment in Commonwealth Law – General Law Reform) Act 2008*, to remove discriminatory treatment of same-sex couples
  - But the *Marriage Act 1961 (Cth)* has still not been amended to allow for same-sex marriage
- The ACT passed the *Marriage Equity (Same-sex) Act 2013*, thinking that the Federal Government was not allowed, under the constitution, to pass laws about same-sex marriage
- The High Court decided that in Commonwealth of Australia v. Australian Capital Territory (2013), that the ACT was wrong
- The High Court decided that:
  1. The Commonwealth Government already has an act that covers all marriage in Australia
  2. The A.C.T act could not operate concurrently with that, so
  3. The A.C.T. act was completely invalid

**Explain the legal rights and obligations of parents and children, including those derived from international law**

There are various legal rights and obligations for parents, but regardless, the main focus will always be the best interest of the child.

**Legislation:**
- Other laws, such as the *Children (Protection and Parental Responsibility Act 1997 (NSW)* considers responsibility of parents to children, whereas...
- *The Children and Young Persons (Care and Protection) Act 1998 (NSW)* focuses on the responsibility of NSW FACS for the care and protection of children who are at the risk of being abused

**Parental Care:**

- **Rights derived from international law:**
  - The main treaty for the care and protection of a person under the age of 18, is the *United Nations Convention on the Rights of the Child (UNCROC)*
  - The act declares that person under the age of 18 must be protected from violence, discrimination, exploitation and neglect
  - Australia ratified UNCROC in 199, and is bound by the treaty

- Parental responsibility under the *Family Law Act 1975 (Cth)*
  - The Family Law Act outlines specific requirements for children’s orders, primarily what the best interests of the child takes into consideration:
    - Meaningful involvement of both parents
    - Protection from harm and abuse
    - Adequate and proper parenting
  - The underlying principles that support the best interests of the child are:
    - Children have the right to know and be cared for by both parents. This includes communication and the right to spend time with both parents
    - Parents should share responsibilities for the children’s care and welfare
    - Children have the right to enjoy their culture, including the right to enjoy it with other people who share it
• Additionally, the Family Law Act 1975 has seen various reforms for children and parental responsibility, particularly:
  ▪ Family Law Reform Act 1995 – shared responsibility – introduction of parenting plans (which focus on parent agreement more so than court imposed decisions
  ▪ Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) – right to meaningful family relationships and care
• There are other responsibilities not provided for in legislation specifically, but are the responsibility of the parent, being to provide:
  ▪ Adequate food and shelter
  ▪ Access to education
  ▪ Discipline
  ▪ Medical treatment
  ▪ Protection from harm and ensuring others are not harming your child

Consequences of Parental Neglect under State Law:

The law allows parents to raise their children as they see fit. Some responsibilities include:
• Providing adequate food and shelter
• Providing access to education
• Consenting to medical treatment

- Criminal:
  • There are consequences for failure to look after your child or provide adequate means
  • One example is neglect, which is the continual failure by a parent to provide a child with the basic things needed for proper growth and development
  • Neglect is an offence under s 228 of the Children and Young Persons (Care and Protection) Act 1998 (NSW) and the Crimes Act 1900 (NSW) – the consequences can be as severe as a gaol sentence

- Family and Community Services (FACS):
  • If child abuse or neglect is reported, FACS will send a caseworker to talk with the parents and other family members, and may follow up with counselling
  • Some of the actions taken by FACS may include the removal of the child from the family home into foster care and referral to police for prosecution

- Tort:
  • A parent can be liable for damage or injury that their child causes and can be forced to pay the injured party compensation

Education:
- In NSW, it is compulsory for a child to attend an educational facility from the age of 6 until the minimum school-leaving age, which is 17 or the completion of year 10
- This is set out in the Education Act 1900 (NSW)
- Failure to enrol a child in school or to provide a child access to education is a criminal offence

Discipline:
- Parents have the right to discipline their children by using ‘reasonable force’, under s 61AA of the *Crimes Act 1900 (NSW)*

**Medical Treatment:**
- Parents have the responsibility to ensure children receive appropriate medical and dental treatment
- A parent must also give consent for a doctor to carry out treatment
- There are different levels of parental consent:
  - Children under 14 require parental and guardian consent
  - Children 14 to 16 require either the child’s consent or a parent’s consent required
  - Children 16 to 17 requires the consent of the young person

**Autonomy of Children:**
- Autonomy refers to the freedom of the will, self-government; the ability to act without outside interference
- A child’s ability to make their own decisions changes as they reach maturity, and this is reflected in laws regarding children’s autonomy and rights

**Ex-nuptial Children:**
1. Ex-nuptial children are children born outside of marriage
2. Previously ex-nuptial children had no legal rights, whereas legitimate children received automatic rights
3. Legitimacy automatically occurred if the child was:
   - Born during marriage
   - Ex-nuptial but the parents of the child later married
   - Adopted
   - In 1996, ex-nuptial children were given the same rights as nuptial children through the *Status of Children Act 1996 (NSW)* – repealed the *Children (Equality of Status) Act 1976 (NSW)*

**Media Articles/Case Examples:**
- Kristi Abrahams jailed for at least 16 years over murder of daughter Keisha Weippeart
- 60 Minutes: Sally Faulkner arrives in Australia after botched child recovery
- Parents face fines for kids who wag school
- Judge allows blood transfusion for Jehovah’s Witness boy, against parents’ wishes

**Adoption:**
- Adoption occurs when a couple or individual legally takes another couple’s child
- For this to happen, the biological parents have to renounce their rights as the legal parents of the child and give consent for the child to be adopted
- The non-biological parent/couple becomes the legal parent of the child
- There has been a 77% decline in the number in the number of adoptions over the past 20 years – *Australian Institute of health and welfare (2013)*
- Adoption is a state matter – every state has different laws
- The state law covering it in NSW is:
- The Adoption Act 2000 (NSW)
  ● The people allowed to adopt are:
- Married couples who have been together for 2 years (Adoption Amendment Act 2008, NSW)
- De facto couples together more than 2 years, including same-sex couples (Adoption Amendment (Same-sex couples) Act 2010)
- Single applicants, straight or gay
  ● The adoptive parents must be:
- Over 21
- Males □ 18 years or more older than the child
- Females □ 16 years or more older than the child
2. RESPONSES TO PROBLEMS IN FAMILY RELATIONSHIPS

Outline the legal processes involved in dealing with problems in family relationships

Divorce:
- Divorce is the legal dissolution (termination) of a marriage by an official court decision
- Divorces are governed by the Family Law Act 1975 (Cth)
- Section 48 of the Family Law Act states that the only ground for divorce is the ‘irretrievable breakdown’ of the marriage

Statistics:
Australian Bureau of Statistics – Marriages and Divorces Australia, 2016
Marriage  △ Increased 4.2% from 2015 to 2016
The median age for getting married has increased by 0.2 years for males and 0.1 years for females from 2015 to 2016 (changing social value)
Divorce △ Decrease of 3.9% in the number of divorces granted from 2015 to 2016
Divorce involving children has decreased from 47.5% in 2015 to 46.9% in 2016

Legislation:
- Matrimonial Causes Act 1959 (Cth):
  - Married couples who wanted a divorce had to do so on the grounds of fault: that is that either one or both of the spouses had to admit to acting in a way that undermined their marriage
  - E.G. □ adultery, domestic violence, insanity and desertion
- Family Law Act 1975 (Cth):
  i. Established the Family Law Court and removed the concept of fault. In order to obtain a divorce, you needed to demonstrate the ‘irretrievable breakdown of a marriage’
  ii. Criteria for divorce under the FLA:
    1. Living separately for 12 months
    2. No likelihood of a reconciliation
    - After 12 months, if all children matters are sorted, a divorce is granted
    - Two steps to finalising the divorce:
      1. Decree Nisi □ an order to signal the intended termination of a marriage, and then one month later;
      2. Decree absolute □ the final order to dissolve the marriage
    - The FLA also has a Kiss and Make up clause (section 50) □ the court does attempt to encourage reconciliation if possible. This section allows parties to live together for a period of time not more than three months without sacrificing the separation period already passed
Legal Consequence of Separation:

*Family Law (Shared Parental Responsibility) Amendment Act 2006*

**Children:**
- The 2006 changes focused on making sure that issues are worked out between the couple as much as possible before taking it to court
- The other main focus is now shared parental responsibility. Under part VII of the FLA, any disputes concerning children must be decided according to what is in *the best interests of the child/ren*
- The courts primary considerations in working out what is in the best interest of the child are:
  1. The child’s right to maintain a meaningful relationship with both parents; and
  2. The need to protect the child from harm
- The order of these considerations was swapped in priority through the Family Law Legislation (Family Violence and Other Measures) Act 2011

**Deciding what to do with children:**
1. Try to work it out together, without mediation
2. If you don’t work it out together, you have to go to Family Dispute Resolution to work out a Parenting Plan together with a mediator
3. If you can’t work it out at FDR, then you can ask a Family Court Judge to decide on a Parenting Order

- A parenting plan is a voluntary agreement and most parents are compliant.
- It is formed by:
  ● Who the child lives with
  ● Who the child spends time with and communicates with
  ● A plan for specific issues
- If parents cannot come to an agreement, then the court will make a parenting order (which has the same parts as a parenting plan, plus child maintenance)
- Judges have only taken domestic violence into account when deciding care arrangement since 1995

**Property:**
- Property includes:
  ● Homes
  ● Bank accounts
  ● Companies
  ● Investments (e.g. shares)
  ● Superannuation, since 2002
Deciding what to do with property:
1. Try to reach an informal agreement about splitting up the property (‘property allocation’). It can then be sold/split and that’s the end of it
2. If they want to make it legally binding they can apply to the Family Court for ‘consent orders’ (the instructions are ordered by the court, but the divorcing couples agrees to it)
3. If the separating couple can’t reach an agreement, the court can order the disputing couple to attend a conference (mediation) to try and get the parties to agree
4. If the mediation process is unsuccessful, the Family Court can make ‘financial orders’ about the allocation of property
- If someone doesn’t comply with the court’s decision, it is an issue of non-compliance and enforceability

Binding Financial Agreements:
- The Family Law Amendment Act 2000 (Cth) allowed the family court to recognise binding financial agreements, as being binding
- They can cover these areas:
  ● Financial arrangements
  ● Property arrangements
  ● Agreements on separation
- But not arrangements to do with children
- Since 2008, separating de facto couples can also make these agreements and they are dealt with by the Family Court or Federal Circuit Court
- It can be made before, during or after the marriage
- (Like a pre-nup in America)
- A BFA can be made void if:
  ● One of the partners didn’t get legal advice before signing the document
  ● One partner made the other sign the agreement under duress
  ● One party can prove that he or she didn’t fully understand the agreement
- Also, if the situation of the couple changed dramatically during the relationship, it can be ignored (e.g. one party becomes unemployed)

Dealing with Domestic Violence:

Types of violence:
- Physical
- Psychological
- Financial
- Sexual
- Emotional
- Social isolation
- Harassment

From a legal standpoint, the law really only looks at physical and sexual abuse, as these are easier to prove and understand (point of possible reform)
**Legislation:**
- *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*
  - outlines the use of ADVO’s (70% success rate)
  - defines domestic violence as personal violence committed against someone with who the offender has/had a domestic relationship with
    - *Children and Young People (Care and Protection) Act 1998 (NSW)*
    - *CROC*
    - *The Family Law Act 1975 (Cth)*
  - applies to all of Australia

**ADVO Issues:**

<table>
<thead>
<tr>
<th>POSITIVE</th>
<th>NEGITIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Quick to issue</td>
<td>- Hard to track perpetrators</td>
</tr>
<tr>
<td>- Accessible</td>
<td>- Limited reports when breached</td>
</tr>
<tr>
<td>- Inexpensive</td>
<td>- Can have the opposite effect, e.g. cause further violence</td>
</tr>
<tr>
<td>- Full support of the criminal law system</td>
<td></td>
</tr>
<tr>
<td>- Limited breaches (70% effective)</td>
<td></td>
</tr>
</tbody>
</table>

**Legal Remedies for Victims:**
- Mandatory counselling for perpetrator
- AVO and ADVO
- Time 4 Action – National councils plan to reduce violence against women and children
- It Stops Here – NSW Government Domestic and Family Violence framework for reform
- GPS tracking of offenders
- Giving a phone to victims
- Extra training for police, social workers and emergency staff

**Evaluation:**
  - made over 187 recommendations for reform
    - SMH reported in 2015, over half of separated parents reported emotional/physical abuse
    - Fragmentation due to separation of powers
    - *Family Violence Act 2011* – included being exposed to DV, protect children
    - Weak criminal laws and lack of political will – good comparison between how quickly the laws surrounding the one punch were reformed
    - Limits to what family court can do when they are not notified of any issues
  - NGO’s:
    - White Ribbon Australia – however men are not represented
    - Media
    - Luke Batty Foundation
Statistics:
- ABS – ‘Personal Safety Study’, 2017:
  ● 16% of Australian women have experienced partner violence, 1 in 6 women
  ● Reported violence has declined from 8.3% in 2005 to 5.4% in 2016

Legal Responses:
- Convention on the Elimination of All Forms of Discrimination against Women and the Declaration on the Elimination of Violence Against Women reflect the legal changes in Australia
- Criminal Procedure Amendment (Domestic Violence Complaints) Act 2014 (NSW) changed the way in which victims of domestic violence provided evidence at the time of the incident. Instead of a written statement, a video or audio recording could be used as part of the victim’s evidence in the chief or main evidence
- Crimes (Domestic and Personal Violence) Act 2007 (NSW) was reformed and amendments included police being able to issue provisional Apprehended Domestic Violence Orders (ADVOs)

Non-Legal Responses:
- NSW Domestic Violence Disclosure Scheme: allows for a party to seek information from police as to the violent nature of their partner
- Safe Pathway NSW: streamlined and integrated approach to safety assessment, referrals and service coordination for victims of domestic violence – safety action meetings operate in 24 locations in NSW
- White Ribbon Australia: NGO that focuses on programs to raise awareness for DV

The Roles of Courts and Dispute Resolution:

Family Dispute Resolution:
- Defined under sec. 10F of the Family Law Act as a non-judicial process where an independent party helps people involved in a separation or divorce to resolve their dispute
- Keeps families out of the court system
- Accessible and enforceable
- Cheaper

Methods:
1. Mediation:
   □ 3rd party involved to help come to a resolution
2. Post-separation Parenting Program:
   □ Effective parenting, putting the well-being of the child/ren first – always the propriety. Develops a parenting plan if the parents cannot come to a decision on their own

Adjudication:
- Determination of a matter by court ruling
- The family court and federal circuit court can make decisions regarding the division of property, maintenance and any decision affecting children
- Any order made by the court is legally enforceable and is demonstrated through the consequences of not complying with an order, such as further court action, financial penalties and criminal sanctions

Family Court of Australia and the Federal Circuit Court:
- The establishment of the Family Court under the Family Law Act affectively met the needs of society by providing a specialist court that has the jurisdiction to hear matters relating to separation and divorce
- To ensure the community still had access to the law in relation to break downs in the family, the Federal Circuit Court was established
- Both effectively protect the best interests of the child, and are effective legal responses in protecting the best interests of the parties involved in family breakdowns

Differences between the two courts:

<table>
<thead>
<tr>
<th>Family Court</th>
<th>Federal Circuit Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deals with more complex cases, such as domestic violence</td>
<td>Less formal</td>
</tr>
<tr>
<td>5% of family breakdowns end up in this court</td>
<td>Cheap</td>
</tr>
<tr>
<td>Expensive</td>
<td>Rules and procedures</td>
</tr>
<tr>
<td>Long process</td>
<td>Divorce cases largely hear here</td>
</tr>
<tr>
<td>Applies nation wide</td>
<td>NSW</td>
</tr>
</tbody>
</table>

The Children’s Court:
- Hears cases relating to the care and protection of children under the Children and Young Persons (Care and Protection) Act 1998 (NSW)
- Cases bought forward by FACS
- Works to protect the best interests of the child as it is a closed court to protect the child
- Also hears criminal matters for young people in accordance with the Young Offenders Act 1997 (NSW)
- Effective legal response for protecting the rights of children during a relationship breakdown

The Role of NGO’s Responding to Family Relationships:
- For example, Anglicare and the Salvation army operated by religious groups that support people in the community in need
- No religious organisations include Relationships Australia and the Smith Family, who provide people with services such as mentoring, support for new parents, counselling, assistance dealing with conflict and mediation
- Effectiveness can be limited by the fact that their activities are not legally enforceable, and many organisations depend on donations and the work of volunteers

The Role of the Media:
- Increases the community accessibility to the law by raising awareness about family issues
- Family law courts have responded to the developments in media technologies by establishing self-help guides on the internet and providing links to documents/application forms on the internet
- Media is restricted to protect the privacy of the individual

3. CONTEMPORARY ISSUES CONCERNING FAMILY LAW

Identify and investigate these contemporary issues relating to family law and evaluate the effectiveness of legal and non-legal responses to these issues

Recognition of Same-sex Relationships:
- *The Marriage Act 1961 (Cth)* and quite a few state laws discriminate against couples in same-sex relationships by giving rights to heterosexual couples that are not given to same-sex couples
- The difficulty is that State AND Commonwealth legislation (e.g. *The Sex-Discrimination Act 1984 (Cth)*) makes this kind of discrimination illegal, but the law-makers are still allowing for unequal rights
- This is not just an historic problem:
  - In 2001, countries around the world started allowing same-sex marriage, including the Netherlands, Spain, Canada, etc.
  - This made conservative politicians in the US and Australia worried that “we might be next”
  - So, in 2004, the Howard Government passed the *Marriage Amendment Act 2004 (Cth)* to include a definition of marriage. The purpose of this law was to make sure that marriage in Australia only included marriage between a man and a woman
  - The *Marriage Amendment Bills 2012* both failed in the parliament

Legal Responses:

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>The NSW Government passed the <em>Property (Relationships) Legislation Amendment Act 1999</em> to change the old <em>De Facto Relationships Act 1984</em> to include same-sex couples as being counted as De Facto</td>
</tr>
<tr>
<td>2000</td>
<td>Since 2000, laws have been passed at a Commonwealth and State level to recognise same-sex relationships</td>
</tr>
<tr>
<td>2007</td>
<td>‘Same-sex: Same Entitlements’, Australian Human Rights Commission (2007): - Report -Outlined the enormous number of laws that continued to discriminate against same-sex couples</td>
</tr>
<tr>
<td>2008</td>
<td>The Commonwealth government passed the <em>Same-sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform)</em> Act 2008 to amend 84 Commonwealth laws to remove discrimination against same-sex couples. The Commonwealth government passed the <em>Family Law Amendment (De Facto Financial and Other Measures)</em> Act 2008 to allow property and</td>
</tr>
</tbody>
</table>
maintenance cases of separating same-sex de facto couples the ability to have their case heard in the Family Court.

The NSW Government passed the *Miscellaneous Acts Amendments Act (Same-Sex Relationships) Act 2008* to give female same-sex couples the ability to have both mothers’ names on their child’s birth certificate.

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>The Greens tried to get the <em>Marriage Equality Amendment Bill 2009</em> passed, but neither party supported the bill. It was defeated in the Senate in 2010.</td>
</tr>
<tr>
<td>2010</td>
<td>The NSW Government allows MPs to have a conscience vote on allowing gay adoption. The <em>Adoption Amendment (Same-Sex Couples) Act 2010</em> was passed (with the exception that religious adoption agencies are still allowed to discriminate against same-sex couples that want to adopt).</td>
</tr>
<tr>
<td>2011</td>
<td>Leader of the Christian Democrats Fred Nile introduced a bull into the NSW Legislative Council to try and repeal the change in the law (<em>Adoption Amendment (Same-Sex Couples Repeal) Bill 2011</em>). It was not passed.</td>
</tr>
<tr>
<td>2012</td>
<td>Two Marriage Amendment Bills failed in Parliament.</td>
</tr>
<tr>
<td>2013</td>
<td>The NSW Government order a Parliamentary Inquiry into Same-Sex Marriage in NSW. The final report argued that the NSW Government had the power to pass a gay marriage law but that it might end up getting challenged in the High Court. The Premier decided not to pass a law that was his idea in the first place because he didn’t want to be challenged by the High Court.</td>
</tr>
<tr>
<td></td>
<td>The ACT passed the <em>Marriage Equality (Same-Sex) Act 2013</em>, thinking that the Federal Government was not allowed, under the Constitution, to pass laws about same sex marriage. The High Court decided in Commonwealth of Australia v. Australian Capital Territory (2013) that the ACT was wrong. The High Court decided that: 1. The Commonwealth government already had an act that covers ALL marriage in Australia (which banned gay marriage) 2. The A.C.T act could not operate concurrently with that 3. The A.C.T act was completely invalid</td>
</tr>
<tr>
<td>2017</td>
<td>The ABS released the Marriage Postal Survey. 61.6% of voters said YES. In December 2017, the Australian Government passed the <em>Marriage Amendment (Definition and Religious Freedoms) Act 2017</em>.</td>
</tr>
</tbody>
</table>

Non-Legal Responses:
- There have been responses by NGOs and the media on both sides of the debate to give same-sex couples greater legal recognition

<table>
<thead>
<tr>
<th>PRO SAME-SEX RIGHTS</th>
<th>ANTI SAME-SEX RIGHTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Marriage Equality</td>
<td>Australian Christian Lobby</td>
</tr>
<tr>
<td>Gay and Lesbian Rights Lobby</td>
<td></td>
</tr>
</tbody>
</table>

Evaluation:
In order for the law to actually change:
1. A significant number of politicians must be willing to change the law
2. The courts have to be willing to change the law
3. Society must be willing to support the changes

<table>
<thead>
<tr>
<th>Effective</th>
<th>Ineffective</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal</strong></td>
<td><strong>Legal</strong></td>
</tr>
<tr>
<td>● There has been increased equality in terms of same-sex couple’s rights (e.g. de facto relationships now include same-sex couples)</td>
<td>● The Howard government’s passing of the <em>Marriage Amendment Act 2004</em> to make sure that marriage could only be between a man and a woman</td>
</tr>
<tr>
<td>● The legal system is more accessible to same-sex couples (e.g. cases now heard in family court for same-sex separations)</td>
<td>● The Rudd/Gillard government’s decision to not allow debate on the issue of gay marriage</td>
</tr>
<tr>
<td>● The creation of agencies that deal with discrimination against same-sex couples</td>
<td>● The <em>Marriage Amendment Bills 2012</em> couldn’t even get through one house of parliament</td>
</tr>
<tr>
<td>● The Parliamentary Inquiry into Same Sex Marriage in NSW 2013 asked the public for their views</td>
<td>● The Commonwealth of Australia v. Australian Capital Territory 2013 case found the ACT’s <em>Marriage Equality (Same-Sex) Act 2013</em> was invalid</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Non-Legal</strong></th>
<th><strong>Non-Legal</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>● Law Reform Commissions and the Australian Human Rights Commission have identified areas of the law where same-sex relationships were not being recognised (e.g. health, insurance, government benefits) and recommended changes to the government (most of which have been made into law)</td>
<td>● The power of the Australian Christian Lobby and other religious groups (including their level of influence in the media) has influenced public opinion with some poor arguments</td>
</tr>
<tr>
<td>● Some parts of the media, as well as NGO’s representing gay rights, have made an issue that directly affects only a minority of the population, a major issue for politicians to deal with</td>
<td></td>
</tr>
</tbody>
</table>
The Changing Nature of Parental Responsibility:

- In the past, parents fought for custody and control over their children
- This law was based on parental rights
- Now the courts are less concerned with parental rights and are more concerned with parental responsibility
- The focus of the law is on making sure that parents fulfil their legal obligations towards their children
- Parents have a joint responsibility towards their children
- This applies equally to children born within a marriage and ex-nuptial children
- Reforms of family law have more recently been based around ensuring that both parents share responsibility more equally, and that children have a right to a meaningful relationship with both parents

Legal Responses:
The 2006 Reforms =
- The 2006 reforms were all about shared parental responsibilities
- Parents were already expected to share responsibility for their children after the breakdown of a relationship, but the reality was different
- Father’s groups were concerned that judges were not applying the law as it was intended. There was a perception that judges, in general, applied the “80/20 Rule”, meaning that it was generally assumed that, unless there was abuse or neglect involved, the child/ren would spend time with their father every second weekend, on Father’s Day and split holidays
- The changes were intended to bring balance back to the system, but the wording of the law created problems
- In his evaluation, former Family Court judge Richard Chisholm argued that:

The changes to the FLA were probably needed to emphasise the fact that both parents are responsible for their children, but the way the act was drafted/written “went too far in the other direction”
- Rather than bring balance, the changes led to a situation where the law needs to be reformed once again to clarify the idea of shared parental responsibility

Shared Parental Responsibility = sharing responsibility for making major decisions in your child’s life

Shared Care = spending equal time with both parents

- The key mistake that has been made is the idea of shared parental responsibility has been misinterpreted to mean 50/50 time. This has caused a greater level of conflict as parents “fight for their rights”, rather than taking care of the best interests of the child
There has also been the insertion of the requirement that the judge must consider equal time when practicable.

The positioning on the “meaningful relationship” principle above the “protection from harm” section of the FLA has led fathers (and some judges and lawyers) to read the law as:

Shared parental responsibility = equal time  □  this is not accurate

**Non-Legal Responses:**
- Church-based organisations (for example, Anglicare) provide support, counselling, education and skills programs to ensure that parents are better able to fulfil their responsibilities as parents (both during their relationship or after the breakdown of their relationship with their partner)
- Relationships Australia provides services (for example, FDR) to make sure that separating parents are aware of their responsibilities and that those are to be shared
- NGO’s that represent the interests of certain groups also provide information and legal assistance to make sure that the people they represent are given the right to fully participate in decision-making that affects their children (for example, the National Council of Women of Australia and DadsLink)

<table>
<thead>
<tr>
<th>Effective</th>
<th>Ineffective</th>
</tr>
</thead>
</table>
| **Legal** | ● It has been a positive step that the law (and the wider community) now recognise that, in most situations, both parents should be involved in the decision-making that affects their child  
● The 2011 reforms (arguably) bought the system back into balance, as they changed the priority order in which custody cases were decided to the best interest of the child | ● The 2006 reforms were not effective in that:  
1. They tipped the balance in the other direction  
2. They were poorly drafter/written and created confusion and misunderstanding |
| **Non-legal** | ● It has been a positive step that the law (and the wider community) now recognise that, in most situations, both parents should be involved in the decision-making that affects their child  
● The media makes communities aware of cases, changes in the law, and where they can seek help (e.g. from NGO’s or legal assistance) | ● Non-legal responses are limited in that they cannot enact change, they can only recommend areas of improvement and support the people who are affected by this |
Surrogacy and Birth Technology:

Birth Technology:
- Birth technology refers to artificial conception – instead of sexual intercourse, the woman gets pregnant through IVF
- The main law for this area is the Artificial Reproductive Technology Act 2007 (NSW)

Issues:
1. If a woman is inserted with the sperm of a donor (a man other than her partner) then when the child is born, the partner of woman (not the sperm donor) is the legal father of the child. This is called the ‘presumption of paternity’ and was introduced as part of the Status of Children Act 1996 (NSW) to make sure that sperm donors don’t have to pay child support
2. The Miscellaneous Acts Amendment (Same-Sex Relationships) Act 2008 (NSW) allowed for the female parented of a woman who gives birth through IVF the same rights as a parent as if she were a man. So lesbian couples can have IVF rights, there can be two mums on the birth certificate.
   □ A gay male couple would have trouble with IVF, but they can be named on a birth certificate if there was a surrogacy arrangement □ Gay dads birth certificate ruling welcomed, ABC News, 2013

Surrogacy:
- This is when one woman carries and delivers a child for another woman

Issues:
1. The main problem is that the surrogate mother (the woman carrying the child) often ends up developing a bond with the child, so sometimes she won’t give the baby over to the “parents” when it is born. This may happen with any type of surrogacy
2. The other problem is worth commercial surrogacy (when the surrogate mother gets paid). This is an issue, because if you get paid for having a child, kids would become property or a service you could sell
3. Also what is stopping the surrogate mother from holding the baby for ransom (agreeing on a price and then when the baby comes asks for double, forcing the adoptive parents to pay or they won’t get the child)

In NSW:
The Surrogacy Act 2010 (NSW):
- Commercial surrogacy (when you get paid for it) is illegal
- ‘Altruistic’ surrogacy (when you don’t get paid for it) is legal

When the surrogate mother delivers the baby, the law states:
- The father is the sperm donor
- The mother is the birth mother
It is still up to the birth mother to give up her child to be adopted by the woman who wants the baby.

**Legal Responses:**
- Until 2011, NSW did not have clear enough surrogacy laws
- The A.R.T Act 2007 (NSW) was unclear and ineffective. This led to cases with bizarre outcomes (e.g. Re: Michael 2011, where neither of the two-people found to be parents were at all biologically related to child, and neither of the biological parents were found to be the parents).
- In response to this problem, the NSW Government held an inquiry (the ‘Surrogacy Inquiry’, 2009). They received submissions from everyone from the Australian Christian Lobby to the Gay and Lesbian Rights Lobby
  - The outcome of the Surrogacy Inquiry:
    - The NSW Government passed the _Surrogacy Act 2010 (NSW)_ came into force in 2011
- The Surrogacy Act 2010 had two goals:
  1. The clarify the law in NSW on altruistic surrogacy:
     - The law now allows for new ‘parent orders’ that can be granted by the Supreme Court to transfer parentage in surrogacy situations
     - The main concern of the court is still the best interest of the child
     - But these cannot be granted if it is case of commercial surrogacy, which leaves kids in those situations vulnerable (Concern over complex laws on surrogacy, SMH 2013)
  2. To ban overseas commercial surrogacy by NSW residents:
     - The NSW Attorney-General believed that this was a “logical step” because commercial surrogacy was already illegal in NSW
     - The reason given for the ban was to stop wealthier couples in NSW from exploiting poorer women overseas (in poor countries like India)
     - The penalties have been seen by some as too harsh (up to two years jail and a $110,000 fine) and not providing enough legal protection for the children involved in such arrangements (Ill-conceived Surrogacy Law, SMH 2011)
- Overseas commercial surrogacy became a big issue in Australia in mid-2014 because of the awful ‘Gammy case’
  - A couple from WA used a surrogate mother in Thailand (which would have been illegal in NSW). She had twins. Once was born with downs-syndrome (Gammy) and was left in Thailand. They took the other baby home
  - The very idea of it was a shock – not only using a woman in a poor country to have your baby, but then leaving her there because she’s not healthy
  - The media’s response was very strong, drawing attention to the issue, which was positive because it made people think about the legal options for preventing another case like this
  - Suggestions included:
    1. Ban overseas surrogacy in every state
    2. Legalise commercial surrogacy in Australia so people don’t have to go overseas
    3. Leave it as it is and hope the issue just goes away (it wouldn’t have been in the news if they’d done the right thing)
However, there is a serious problem when it comes to the jurisdiction of surrogacy. This has led to very different laws in different states.

**Non-Legal Responses:**
- There has been heavy lobbying on both sides of the debate over birth technology and surrogacy.
- When the Queensland government decriminalised altruistic surrogacy in 2010, the Australian Christian Lobby was furious that the law would allow equal rights to same-sex couples and single people. They have promised to spend money campaigning against Members of Parliament who voted for the bill.
- Gay and Lesbian Lobby has obviously fought for equal rights for all people, arguing that the key concern should be that children are taken care of in a loving family of any structure, rather than a heterosexual, married, Christian family, whether it is supportive and loving or not.
- The media has also played a role in increasing awareness of an issue that affects a minority of the population. The debate received the most balanced coverage (despite the titles of the programs) on SBS’s Dateline: India’s Baby Factory (2009), INSIGHT: ‘Baby Business’ (2011), and the ABC’s Foreign Correspondent: ‘The Baby Makers’ (2014).

**Focus On:**

<table>
<thead>
<tr>
<th>Legal Responses</th>
<th>Non-Legal Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>The lack of clear laws on surrogacy in NSW until 2011</td>
<td>That fact that there are laws protecting parents and children in surrogacy situations at all is a positive step</td>
</tr>
<tr>
<td>The lack of protection given to children of commercial surrogacy arrangements under the <em>Surrogacy Act 2010 (NSW)</em></td>
<td>NGO’s fighting for equality have had an effect on the law</td>
</tr>
<tr>
<td>The harshness of the penalties for commercial surrogacy under the <em>Surrogacy Act 2010 (NSW)</em> (may work as a deterrent, but will be ineffective if actually enforced)</td>
<td>There is continued concern about the power of religious lobby groups in influencing politicians</td>
</tr>
<tr>
<td>But more positively, we do now have a law that has created arrangements to protect those involved in altruistic surrogacy arrangements (through the new ‘parentage orders’)</td>
<td></td>
</tr>
</tbody>
</table>
Care and Protection of Children:

- In NSW, Family and Community Services (FACS) is the main part of the government that protects the rights of children to protection from abuse or neglect within the family.
- FACS is authorised to:
  - Provide assistance to families so as to prevent abuse or neglect
  - The intervene where a child is in need of care and protection
- This intervention can involve the extreme actions of:
  1. Removing children from their families
  2. Taking police action against the perpetrators of abuse
- The police also have a role in ensuring the protection of children and young people from abuse and neglect, by investigating allegations of child abuse or neglect that involve criminal conduct, in bringing criminal proceedings against perpetrators of abuse or severe neglect and in applying for ADVOs for the protection of children and young people
- Other services that assist in child protection in NSW:
  - NSW Health
  - The Department of Education and Training
  - Juvenile Justice
  - Disability and Home Care
  - Housing NSW
  - NSW Police offering programs, funding and services

Legal Responses:

<table>
<thead>
<tr>
<th>WHEN?</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990’s</td>
<td>Legalistic way of dealing with care and protection of children</td>
</tr>
<tr>
<td></td>
<td>- Child protection work was focused on developing a legal response to</td>
</tr>
<tr>
<td></td>
<td>allegations of child abuse and neglect and determining whether abuse of</td>
</tr>
<tr>
<td></td>
<td>neglect was serious enough to warrant protective intervention</td>
</tr>
<tr>
<td></td>
<td>- This approach meant that for child protection workers investigative and</td>
</tr>
<tr>
<td></td>
<td>administrative work took up a significant amount of time. Government</td>
</tr>
<tr>
<td></td>
<td>funding for child protection and non-government family support services</td>
</tr>
<tr>
<td></td>
<td>was also significantly cut</td>
</tr>
<tr>
<td></td>
<td>- An example was the Children and Young Persons Care and Protection Act</td>
</tr>
<tr>
<td></td>
<td>1998 (NSW), which bought in penalties for not reporting children “at risk of</td>
</tr>
<tr>
<td></td>
<td>harm”. This led to situations where multiple ‘mandatory reporters’ (e.g.</td>
</tr>
<tr>
<td></td>
<td>teachers) would report the same child to FACS</td>
</tr>
<tr>
<td>21st Century</td>
<td>Finding some balance in dealing with less-serious cases</td>
</tr>
<tr>
<td></td>
<td>- By the late 1990’s, child protection services in all Australian states</td>
</tr>
<tr>
<td></td>
<td>and territories were finding it difficult to cope with high numbers of</td>
</tr>
<tr>
<td></td>
<td>reports of suspected child abuse and neglect</td>
</tr>
<tr>
<td></td>
<td>- The legal approach was being criticised for subjecting low risk families</td>
</tr>
<tr>
<td></td>
<td>to unnecessary investigations, while at the same time letting some high-risk</td>
</tr>
<tr>
<td></td>
<td>families fall through the cracks</td>
</tr>
</tbody>
</table>
- New models of child protection and family support were adopted in most states
- FACS and other parts of the government get their power to assist and/or intervene in families for the protection of children and young people from the *Children and Young Persons (Care and Protection) Act*. In the mid 2000’s, there was a lot of negative publicity following a number of child deaths that attracted media attention
- This resulted in a massive inquiry conducted by former Supreme Court Justice James Wood to look into why the system was failing so many kids
- Justice Wood wrote an 1100-page report that contains 111 recommendations (the ‘Wood Inquiry Report’), which was released in November 2008

**2009**

- *The Children and Young Persons (Wood Inquiry Recommendations) Act 2009*, which included many of the Inquiry’s recommendations, was passed. This legislation will pave the way for implementing 106 of the *Wood Inquiry Recommendations* across a five-year period

Keep Them Safe is the NSW Government’s response to the Wood Inquiry:
- It is a shared approach to child wellbeing. It is a five-year plan of fundamentally change the way children and families are supported and protected
- Its aim: to improve the safety, welfare and wellbeing of all children and young people in NSW
- Two big parts:
  1. The mandatory reporting system has been drastically changed
  2. A lot of the services provided by government are being transferred to the non-government sector. The government will only deal with the most serious cases

1. **Reshaping the mandatory reporting system:**
   - In 2010, a new statutory reporting threshold (level at which something gets reported to FACS) started in NSW
   - Now, when a mandatory reporter (e.g. teacher, social worker, etc.) is concerned about suspected abuse or neglect of a child, they need to think about whether or not the risk of harm to the child or young person is significant
   - This means that only the most serious cases are reported to FACS (where there is a significant risk of harm)

**Non-Legal Responses:**

2. **Increasing Non-Government involvement:**
   - This new law is transferring to the non-government sector the responsibility for early intervention programs
   - Expanding the role of non-government organisations (NGOs) in providing services to children and families is a critical component of Keep Them Safe
   - This means that only the most serious cases are reported to FACS
   - Collaboration and consultation between the government and NGO’s also occurs through the Child Protection Advisory Group (CPAG)
   - The law has pushed NGO’s to provide more of the services that families need
Example: Family Referral Services assist children and young people who do not meet the threshold for child protection intervention but would benefit from accessing support to address current problems and prevent the problems from getting worse. FRS were piloted from 2010 in NSW (e.g. Relationships Australia started a telephone FRS in Mt Druitt. FRS will refer clients to services such as housing, child care, supported play-group, drug and alcohol/mental health services, and youth services. The support provided may include home visiting, parenting education, respite care and some case management.

- The law has pushed NGOs to provide more of the services that families need (e.g. Life Without Barriers is one of the NGOs involved in the foster care cases transferred from FACS)

- The NSW Ombudsman released a report (Review of the NSW Child Protection System – Are Things Improving? 2014), finding that a few years after the Wood Inquiry, there were still serious problems:
  - Good news = the percentage of children reported as being at risk of severe harm who were actually seen by a case worker increased from 21% to 28%
  - Bad news = that still means that more than two/thirds of the children who had been reported didn’t get a face-to-face meeting with a caseworker
  - The report found that thousands of cases were being closed because of inadequate resources, with the only action taken in a lot of cases being a phone call to someone (e.g. the child’s school)

**Media:**

- In Australia, it was the enormous media attention surrounding the deaths of children, which led to public outrage and resulted in significant legal changes in the area of child protection in 1990’s and again in the late 2000’s
- The murder of Darcy Freemen led the media in Victoria to push for further reform of their child protection system (Freeman case sparks call for change, The Age, 2011), but this was difficult given that the father had negotiated time with her himself (rather than the court deciding)
- The Keisha Weippeart (R. Abrahams (2013)) case also drew attention to child neglect and abuse. Even the judge said in sentencing Kristi Abrahams for murder that she was “an inevitable product of entrenched intergenerational failures” (Duty of care: What happened to Keisha?, SMH, 2013)