Chapter 12
Option 3: Family

25% of course time

Principal focus
While examining current issues and examples, students will be investigating the role of the legal system in regard to family relationships and how effective the law is in achieving justice in this area.

Themes and challenges
Themes and challenges to be incorporated throughout this option include:
• using the law to encourage cooperation and resolve conflict in the family context
• dealing with compliance and non-compliance
• changing values in the community resulting in changes to family law
• how family law reform attempts to achieve just outcomes for both family members and society
• effectively achieving just outcomes for families through legal and non-legal means.

At the end of this chapter, you will find a summary of the themes and challenges relating to family. The summary draws on key points from the text and links them to each of the themes and challenges. This summary is designed to help you revise for the external examination.

Chapter objectives
In this chapter, students will:
• identify and apply legal concepts and terminology
• communicate legal information using well-structured and logical arguments
• discuss the problems associated with defining ‘family’ and how the concept of family is changing
• discuss how federal and state family law jurisdiction differs
• explain the requirements of a valid marriage and the changing nature of ‘marriage’
• discuss the legal rights and obligations of family members, including rights derived from international law
• understand and outline the legal processes required in dealing with family relationship problems
• evaluate how effective the law is in protecting victims of domestic violence
• discuss the role of media and other non-government organisations
• evaluate the effectiveness of the law in achieving just outcomes for family members
• identify and investigate contemporary issues that relate to family law and evaluate the effectiveness of legal and non-legal responses to these issues.
Key terms/vocabulary

adoption  breach  extended family
ancestor  celebrant  injunction
annulment  compensation  marriage
Apprehended Domestic  decree absolute  neglect
Violence Order (ADVO)  decree nisi  nullify
Apprehended Violence Order  de facto relationship  nuptial
(AVO)  descendant  polygamous
assault  divorce  relinquishing parent
autonomy  domestic violence  testator
blended family  ex-nuptial

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Marriage Act 1961 (Cth)
Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Property (Relationships) Act 1984 (NSW)
Children (Criminal Proceedings) Act 1987 (NSW)
Children’s Court Act 1987 (NSW)
Child Support (Registration and Collection) Act 1988
(Status of Children Act 1996 (NSW)
Children (Protection and Parental Responsibility) Act
1997 (NSW)
Young Offenders Act 1997 (NSW)

SOME AMENDING ACTS

Family Law Reform Act 1995 (Cth)
Marriage Amendment Act 2004 (Cth)
Family Law Amendment (Shared Parental
Responsibility) Act 2006 (Cth)
Adoption Amendment Act 2008 (NSW)
Family Law Amendment (De Facto Financial Matters
and Other Measures) Act 2008 (Cth)
Miscellaneous Acts Amendment (Same Sex
Relationships) Act 2008 (NSW)
Same-Sex Relationships (Equal Treatment in
Commonwealth Laws – General Law Reform) Act
2008 (Cth)

SIGNIFICANT CASES

Hyde v Hyde and Woodmansee (1866) LR 1 P&D 130
Di Mento v Visalli (1973) 1 ALR 352
B v J (1996) 21 FamLR 212

Children and Young Persons (Care and Protection)
Act 1998 (NSW)
Adoption Act 2000 (NSW)
Succession Act 2006 (NSW)
Crimes (Domestic and Personal Violence) Act 2007
(NSW)
Surrogacy Act 2010 (NSW)
Bail Act 2013 (NSW)
Surveillance Devices Amendment (Police Body-Worn
Video) Act 2014 (NSW)
Convention on Protection of Children and
Cooperation in Respect of Intercountry Adoption

Succession Amendment (Family Provision) Act 2008
(NSW)
Children and Young Persons (Care and Protection)
Act Amendment 2009 (NSW)
Succession Amendment (Intestacy) Act 2009 (NSW)
Adoption Amendment (Same Sex Couples) Act 2010
(NSW)
Family Law Legislation Amendment (Family Violence
and Other Measures) Act 2011 (Cth)
Child Protection Legislation Amendment Act 2014
(NSW)

C and M [2006] FamCA 212
Re Michael: Surrogacy Arrangements [2009] FamCA
691
Legal oddity

A couple was divorced in July 1964, but the wife passed away in November of the same year, before the decree had been made final. The following August, a judge ordered the man to present his late wife’s entire estate ... including the jewellery that had been buried with her. This meant that he had to either exhume her body to get the jewellery, or make up the thousands of dollars out of his own pocket.
12.1 The nature of family law

The concept of family law

Family law is a wide-ranging area of law governing behaviour in the context of the family, including rights and responsibilities regarding children and the disposition of property when a marriage breaks down.

The main function of the family is the care and protection of its members. Law governs family relationships to ensure that people in family relationships are financially secure and that any children of that relationship are cared for. The more traditional and easily recognisable family relationship is one based on marriage. However, as our society has changed, so too has the structure of families, reflecting a great diversity in domestic relationships. The many different family arrangements in Australian society include Aboriginal and Torres Strait Islander customary marriages, de facto relationships, same-sex relationships, single-parent families, blended families and extended families. Family law has continued to change in order to extend protection to all members of these alternative family relationships.

**marriage**

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

**de facto relationship**

a relationship where the partners act as a married couple but are not legally married

**blended family**

a family that is created when a parent remarries; it includes the stepmother or stepfather and stepchildren

**extended family**

a family that includes individuals related through marriage or parentage and not limited to one couple and their children; in some cultures, close family friends are regarded as members of the extended family

Under s 51(xxi) and (xxii) of the *Australian Constitution*, the federal government has the power and authority to make laws governing marriage and divorce. The *Marriage Act 1961* (Cth) established the legal requirements of a valid marriage, and the *Family Law Act 1975* (Cth) sets out the legal duties and obligations that a marriage creates. The principal aim of the *Family Law Act* was to reform the law governing the dissolution (end) of a marriage.

In the past, only state parliaments could pass legislation about de facto relationships. However, most state governments have now referred their powers to the Commonwealth with respect to both parenting disputes and property disputes, in the contexts of a marriage and a de facto relationship. After the passage of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), questions regarding property division and de facto spousal maintenance are now determined under the *Family Law Act 1975* (Cth).

**referral of powers**

the giving up of a state's legislative powers in a certain area to the Commonwealth by passing an Act, pursuant to s 51(37) of the *Australian Constitution*

As of July 2010, de facto couples who usually reside in South Australia are able to apply to the Family Court to determine property settlements. Western Australia has continued to have a separate Family Court of Western Australia, which deals with both state and federal family law issues.

Although family law is concerned with ensuring that the best interests of the child are secured and that individuals meet their family obligations, it is also about family relationships. For this reason, family law focuses more on conciliation and on encouraging compliance than on the use of sanctions or coercion to enforce compliance.

Legal requirements of marriage

Marriage is a legal institution, and individuals who intend to marry must take into consideration the legal consequences of this union. When two people marry, they make a promise, in front of witnesses, to provide and care for one another. The law has evolved to enforce this promise, and to protect the rights of both parties and the rights of any children born during the relationship.

The legal definition of marriage

The descriptions of marriage in Australian legislation are based on the definition in the English case of *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130. Lord Penzance, in his decision, stated that a marriage is the ‘voluntary union for life of one man and one woman, to the exclusion of all others’ (that is, a formal, monogamous and heterosexual union).
These elements can be explained as follows:

- Marriage must be voluntarily entered into. The marriage is not legally binding if one of the parties was forced or tricked into the marriage.
- Marriage, by definition, is for life. However, a married couple do have the right to divorce, thereby ending the marriage legally, before the death of either party.
- The specification of one man and one woman indicates that the parties to the marriage must be of different sexes.
- ‘To the exclusion of all others’ means that marriage is the union of two people only. Some cultures and societies do allow individuals to have more than one spouse – to have polygamous relationships. However, polygamous marriages are not recognised in Australia and are void if entered into within Australia.

**Gender**

In 2004, the Commonwealth Government passed the *Marriage Amendment Act 2004* (Cth) to add the above definition of marriage to the *Marriage Act 1961* (Cth), which had not previously contained one. Section 5(1) of the Act defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’, and s 88EA explicitly states that a same-sex marriage performed in another country will not be recognised in Australia.

**Marriageable age**

A person may marry at the age of 18 years (s 11). If either of the parties wanting to marry is between the ages of 16 and 18, they must apply to a judge or magistrate for an order authorising the marriage (s 12). Such an order will only be granted in circumstances that are sufficiently ‘exceptional and unusual’ (for example, if the couple’s parents consent and/or if the couple are shown to be mature and financially independent). Pregnancy alone will not guarantee an order. No person under 16 years can marry.

**Prohibited relationships**

A person cannot marry anyone who is closely related either by ‘blood’ (consanguinity) or by marriage (affinity). This means that a person cannot marry their descendant, ancestor, brother or sister. This also applies to half-siblings and to adopted siblings, including adopted descendants and ancestors who are related to the person by marriage. However, a person can marry her uncle or his aunt, his niece or her nephew, or a first cousin.

**Notice of marriage**

A couple intending to be married must complete a Notice of Intended Marriage form and give it to the authorised marriage celebrant who will conduct the ceremony, no earlier than 18 months before the marriage and no later than one month and one day before it. The notice must be in writing and be...
signed by both parties in the presence of a witness. Parties who intend to marry must provide proof of age, usually their birth certificates. If either party has been married previously, they must provide evidence that that marriage has been dissolved by death of the spouse or divorce.

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**celebrant**
a person who is authorised to perform a civil or religious marriage ceremony

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**Requirements for a valid marriage ceremony**
The marriage ceremony must meet set criteria. An authorised marriage celebrant must perform the ceremony and there must be two witnesses, both aged over 18. There are no formal requirements concerning the attire, the structure of the ceremony or the words of the ceremony. If the marriage ceremony satisfies the conditions in Parts IV and V of the *Marriage Act*, then it is valid.

The celebrant issues a marriage certificate after the ceremony is completed. This document is legal proof that the ceremony took place according to law. The marriage celebrant usually provides three copies of the certificate. The celebrant, husband, wife and two witnesses must each sign all copies of the marriage certificate. One copy must be lodged at the state Registry of Births, Deaths and Marriages within 14 days of the date of the marriage.

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**Void marriages**
A marriage can be declared void, or invalid, if it fails to meet the definition of marriage – if, for example:

- the parties were of the same sex
- consent was not freely given by one of the parties
- one or both parties at the time of the marriage were married to someone else.

A marriage may also become void if the marriage fails to meet the criteria for a valid marriage – if, for instance:

- one or both parties were too young
- the parties are too closely related, by blood or marriage
- the marriage did not meet the requirements set out in the *Marriage Act 1961* (Cth).

If a marriage is found to be invalid, the court can **nullify** the marriage. This **annulment** means that the marriage, in the eyes of the law, is deemed to have never taken place because it was illegal.

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**In Court**

**Di Mento v Visalli (1973) 1 ALR 352**
Mattia Di Mento, who was 14 years old at the time, was living in Sicily with her parents when she was kidnapped by Visalli, a 20-year-old man. Visalli repeatedly asked her to marry him, but she refused. Di Mento was eventually released; however, her father told her that he would shoot her if she did not marry Visalli.

The father argued that if she did not marry him the family’s reputation would be ruined. Di Mento agreed and married Visalli. Two years later, she gave birth to a child, and when the child was a month old Visalli left her, never to return.

Di Mento emigrated to Australia and sought to have the marriage annulled on the grounds that she did not voluntarily give her consent. The court held that the marriage was void because it was obtained by duress, and noted that the Act does not require that the duress exerted be that of the spouse; in this case, it was exerted by Di Mento’s father.
Alternative family relationships
Aboriginal and Torres Strait Islander peoples’ customary law marriages

Relationships within Aboriginal and Torres Strait Islander communities are bound by traditions and enforced through customary law. Children may be betrothed at an early age and parents or elders generally arrange marriages. Typically, such customary law marriages do not conform to the requirements of a valid marriage under the Marriage Act 1961 (Cth). These marriages are generally not legally recorded, or registered with the relevant authorities. The law, therefore, does not formally recognise Aboriginal and Torres Strait Islander customary law marriages as having any legal standing.

In 1986, the Australian Law Reform Commission tabled a report (Recognition of Aboriginal Customary Laws) in parliament dealing with this. The part of the report focusing on marriage, children and property settlement recommended that traditional marriages of Indigenous Australians should be recognised and given legal status in order to:

• ensure the legitimacy of the children of those relationships
• ensure that any child of those relationships will be given the same protection as children of married couples under adoption and welfare laws

• protect the right of inheritance of the surviving spouse if their partner dies without a will (intestate)
• allow a surviving spouse to claim any compensation payments owing to their partner, including workers’ compensation
• allow the couple to claim the same tax benefits as those that are currently available to de facto or married couples.

compensation
a monetary payment made to a person to make amends for any loss, injury or damage to property they have suffered

The federal government’s response to the report, in 1995, suggested that most of the recommendations were more appropriate for implementation in state and territory law. However, the circumstances of Indigenous children are specifically provided for in legislation such as the Family Law Act 1975 (Cth); for example, s 61F states that a court making decisions about parental responsibility must take into account kinship and the Aboriginal or Torres Strait Islander culture of the child.

The state parliaments have addressed some of the recommendations since then, including recognition of traditional marriages for limited purposes.

Children, ex-nuptial or nuptial, are protected under the Family Law Act 1975 (Cth) and the Status of Children Act 1996 (NSW). If a Aboriginal or Torres Strait Islander customary marriage does break down, the Family Court has the power to determine an appropriate parenting order, including maintenance arrangements and deciding which parent will be given parental responsibility for the child. The orders are made on the basis of what the court determines is in the ‘best interests’ of the child, and of the child’s need to maintain a connection with Aboriginal or Torres Strait Islander culture and traditions.

ex-nuptial
a Latin term meaning ‘outside marriage’; an ex-nuptial child is a child born outside a marriage

nuptial
a Latin term meaning ‘marriage’; a nuptial child is a child born within a marriage

Single-parent families

The increase in the number of divorces, the changes in social attitudes, improved welfare provisions and greater financial independence of women have all contributed to the growth of single-parent families.
According to the Australian Bureau of Statistics, in 2012–13 there were just over 6.7 million families in Australia; of these, 15% were single-parent families. The majority of these families were single-mother families (81% of one-parent families). One in six children (18%) lives in a single-parent family.

Blended families
When a parent and their children from a former marriage or relationship live with another parent and children in similar circumstances, the result is considered a blended family. The family includes the stepmother or stepfather and stepchildren. One out of every four registered marriages in Australia in 2013 involved individuals who were marrying for the second time. Nearly half of those who have been divorced remarry.

Although a step-parent may be viewed as the parent of their partner’s child, step-parents do not have the same legal responsibilities for that child. A step-parent does not have an automatic right or duty to discipline their partner’s child or to make day-to-day decisions concerning the health and welfare of the child. A step-parent is not responsible for the maintenance or support of a partner’s child; the financial obligations towards a child remain with the child’s parents. However, a court may make an order requiring a step-parent to pay financial support if satisfied that the step-parent has a duty to maintain the child (Family Law Act 1975 (Cth) ss 66D, 66M, 66N). A step-parent may also become financially responsible for their partner’s children if the family has existed for a long time and the natural parent is dead or cannot be found.

Step-parents intending to adopt must first apply to the Family Court (Family Law Act 1975 (Cth) s 60G). Upon approval, the step-parent must then apply to the state Supreme Court for an adoption order. For such an order to be granted in New South Wales, the step-parent must have lived with the child and the child’s natural or adoptive parent for no less than two years, and the child must be at least five years old (Adoption Act 2000 (NSW) s 30). If a step-parent does adopt their partner’s children, these children will have the same legal rights as children born naturally into the parental relationship.

Legal Links
For more information on changes to family structures see ‘Australian households and families’, Australian Family Trends No. 4, July 2013 at http://cambridge.edu.au/redirect/?id=6343.
De facto relationships
A de facto relationship is defined in s 4AA of the Family Law Act 1975 (Cth) as one in which the partners:
• are not married to each other by law
• are not related by family, and
• are living together on a genuine domestic basis as a couple.
According to the Australian Bureau of Statistics, in 2013 over 76% of couples who marry have lived together prior to marriage. De facto relationships also include same-sex couples.

Same-sex relationships
State legislation
The law recognises relationships that exist outside the traditional concept of marriage. The De Facto Relationships Act 1984 (NSW) was amended by the Property (Relationships) Legislation Amendment Act 1999 (NSW) and renamed the Property (Relationships) Act 1984 (NSW). The Property (Relationships) Act 1984 (NSW) recognises same-sex relationships as having the same legal standing as heterosexual de facto relationships, and provides the same protection. Section 4 of this Act defines a de facto relationship as ‘a relationship between two adult persons who live together as a couple, and who are not married to one another or related by family’. The Act provides protection to people in same-sex de facto relationships in the areas of property division, inheritance and decision-making in illness and after death.

The definition of ‘de facto’ in this Act also applies to people making an application for family provision under the Succession Act 2008 (NSW), and to entitlements of the de facto partners of individuals who died intestate, under the laws amended by the Succession Amendment (Intestacy) Act 2009 (NSW).

Federal legislation
As discussed at the beginning of this chapter, the ‘marriage power’ is one of the enumerated powers of the Commonwealth Parliament under the Australian Constitution. However, as a result of states referring their powers to the Commonwealth, the Family Law Act 1975 (Cth), as amended by the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth), governs property settlements and maintenance orders for de facto couples who are separating. The federal legislation applies to couples whose relationship broke down on or after 1 March 2009, and to those whose relationship broke down earlier if they choose to be bound by federal rather than state law in this matter. Matters relating to the children of de facto relationships are heard in the Family Court.

Section 4AA(5) of the Family Law Act 1975 (Cth), inserted in March 2010, states that a de facto relationship can exist whether the people are of the same sex or different sexes. Therefore, the Family Law Act now governs property settlements between separating same-sex couples.
Under s 18 of the Evidence Act 1995 (Cth) and s 18 of the New South Wales and Victorian Evidence Acts, which are modelled on that Act (the Uniform Evidence Acts), a de facto partner in either a same-sex or opposite-sex relationship cannot be compelled to give evidence against their partner in certain criminal proceedings. Not all states have such provisions in their Evidence Acts, however.


While these amendments gave same-sex couples most of the same rights as de facto heterosexual and married couples, no federal government has been in favour of amending the Marriage Act 1961 (Cth) to allow same-sex marriage. A bill that would have done so, the Marriage Equality Amendment Bill 2009, was introduced by the Greens but was defeated in the Senate in February 2010. Since then, a number of state and territory governments (New South Wales, South Australia, Tasmania and the Australian Capital Territory) have expressed support for the legalisation of same-sex marriage. However, ‘marriage’ remains within the federal government’s jurisdiction, so even though a growing number of states support same-sex marriage, it will not become legal until the federal government changes the current definition of marriage. A growing number of countries have legalised same-sex marriage, including Canada, France, New Zealand, Norway and the United Kingdom.

**Polygamous marriages**

A polygamous marriage is a relationship that is formed when an individual marries more than one person. While some cultures and religions permit polygamous marriages, polygamous marriages are not legal in Australia. However, under s 6 of the Family Law Act 1975 (Cth), a polygamous marriage that was entered into overseas is deemed to be a marriage for the purpose of children’s matters, property settlements and other court proceedings under the Family Law Act. This means that if an illegal polygamous marriage breaks down, the parties may seek orders for child and/or spousal maintenance, division of property, and parenting plans. A party can also seek domestic violence orders.

### Review 12.3

1. Define ‘de facto relationship’.
2. Explain the status of same-sex relationships with respect to:
   a. property settlements
   b. wills
   c. giving evidence against one’s partner in a criminal proceeding
   d. superannuation and identify whether the matter is governed by state or federal law.
3. ‘Same-sex marriage is a human rights issue.’ Discuss.

### Legal rights and obligations of parents and children

Within the family, the rights of the child are paramount, because children are seen as the most vulnerable members of the family and as such require the greatest legal protection.

As noted above, the Family Law Act 1975 (Cth) governs proceedings for a divorce or annulment of a marriage, as well as maintenance and property proceedings, whether the parties are married or in the process of ending the marriage. Part VII of the Act governs proceedings in relation to children, particularly parenting arrangements. However, most of the laws relating to the care and protection of children are at state or territory level.

Children have the obligation to obey the law just as adults do, though the procedures for enforcing those laws are different from the legal mechanisms that apply to adults.

Some of the Acts concerning children in New South Wales are listed in Table 12.1.
Parental care

Rights derived from international law

The rights of children are articulated and protected by the UN Convention on the Rights of the Child (CROC), which was adopted by the United Nations (UN) in 1989 and has been signed and ratified by all 194 UN member states except Somalia, South Sudan and the United States. The convention declares that people under 18 years of age must be protected from violence, discrimination, exploitation and neglect, and that states must act in the best interests of the child.

Australia ratified CROC in 1990 and so is bound, in international law, to its terms. International instruments may be used by courts in interpreting statutes and in judgements that develop the common law. In addition, CROC was declared a ‘relevant international instrument’ under the Australian Human Rights Commission Act 1986 (Cth), so the Australian Human Rights Commission can refer to it when hearing complaints of discrimination.

However, as with the other human rights treaties to which Australia is a party, no federal legislation has been passed implementing it in Australian domestic law. This means that it is not binding at the domestic level (not enforceable in Australian courts). The 2011 report from the NGO Child Rights, Listen to Children, recommended that CROC should be comprehensively incorporated into Australian law. The Commonwealth has left implementation of CROC obligations to the state governments.

Many of CROC’s principles are already embedded in state child protection legislation. Following art 3 of CROC, legislation in both federal and state jurisdictions states that children’s best interests

Table 12.1 Legislation concerning children in New South Wales

<table>
<thead>
<tr>
<th>Name of the Act</th>
<th>Area covered by the Act</th>
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<tbody>
<tr>
<td>Adoption Act 2000 (NSW)</td>
<td>Adoption of children and access to information relating to adoption</td>
</tr>
<tr>
<td>Child Protection (Offenders Registration) Act 2000 (NSW)</td>
<td>Requirements of people convicted of certain offences against children, including the requirement to register with the police upon their release into the community and to provide specified information about themselves to police</td>
</tr>
<tr>
<td>Children (Criminal Proceedings) Act 1987 (NSW)</td>
<td>Sets out court procedures in dealing with children who commit crime</td>
</tr>
<tr>
<td>Children (Protection and Parental Responsibility) Act 1997 (NSW)</td>
<td>Responsibility of parents for the behaviour of their children; greater police powers in respect of children, such as removal of children from public places and returning them to their parents’ residence</td>
</tr>
<tr>
<td>Children and Young Persons (Care and Protection) Act 1998 (NSW)</td>
<td>Responsibilities of Family and Community Services (in New South Wales) and other agencies regarding the care and protection of children and young people who are at risk of harm or are being abused</td>
</tr>
<tr>
<td>Children and Young Persons (Care and Protection) Amendment Act 2009 (NSW)</td>
<td>This act was amended in 2009 to make further provision for out-of-home care agencies.</td>
</tr>
<tr>
<td>Children’s Court Act 1987 (NSW)</td>
<td>Establishment of a Children’s Court of NSW; its jurisdiction and functions</td>
</tr>
<tr>
<td>Status of Children Act 1996 (NSW)</td>
<td>Ex-nuptial children are recognised as having the same rights as children born in a marriage</td>
</tr>
<tr>
<td>Young Offenders Act 1997 (NSW)</td>
<td>Procedures for dealing with child offenders, including youth justice conferences, cautions and warnings; court proceedings are seen as a last resort</td>
</tr>
</tbody>
</table>
should be a primary consideration in decisions concerning children. Other elements of CROC that are reflected in state legislation include art 12 – a child has the right to express their opinions and be heard in proceedings affecting them, in a manner consistent with the procedural rules of the jurisdiction, and the child’s views are to be given due weight in accordance with the child’s age and maturity. This is reflected in legislation providing for children’s participation in decision-making.

‘Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child’ is one of the aims of legislative provisions that specifically prescribe taking an Indigenous child’s culture into account in decision-making procedures (for example, in Children and Young Persons (Care and Protection) Act 1998 (NSW) ss 11, 12 and 13). For judicial applications, see also In the Marriage of Sanders (1976) 10 ALR 604 and F v Langshaw and Others (1983) 8 Fam LR 832.

Parental responsibility under the Family Law Act 1975 (Cth)

Part VII of the Family Law Act 1975 (Cth) has the object of ensuring that the best interests of children is the chief factor that courts must take into consideration when making parenting orders. ‘Best interests’, as listed in s 60B of the Act, include:

- the opportunity to maintain a meaningful relationship with both parents
- to be protected from harm, including neglect and abuse
- proper parental care.

Section 60B(2) also sets out the principles underlying these objects:

(a) children have the right to know and be cared for by both their parents …

(b) children have the right to spend time … and communicate on a regular basis with, both their parents, and other people significant to their care welfare and development …

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children …

(d) parents should agree about the future parenting of the children; and

(c) children have the right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

The emphasis on responsibilities being shared equally by both parents was introduced in large part by the Family Law Reform Act 1995 (Cth), which made significant amendments to the Family Law Act 1975 (Cth) with respect to children. Further amendments made by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) emphasised the child’s right to meaningful family relationships and care, rather than either parent’s ‘right’ to have the child live with them.
The Family Law Reform Act 1995 (Cth) introduced parenting plans, which are written agreements voluntarily agreed to by parents. In contrast to court orders assigning custody to a parent, parents are encouraged to create such plans themselves. The plans can deal with any aspect of a child’s care and welfare, such as the child’s living arrangements, the amount of time the child will spend with each parent, how the child’s educational, cultural and religious needs will be handled, and what process will be used to make changes to the plan or resolve disagreements. If the parents cannot agree, they will be issued with a parenting order, which is a court-imposed decision. In some cases – such as those involving domestic violence – parents may apply for parenting orders without first attending family dispute resolution.

In those instances where there is reasonable grounds to believe that the child has been subject to abuse or family violence, the presumption of ‘equal shared parental responsibility’ does not apply. The priority for the Family Court is the protection of the child rather than the maintenance of a meaningful relationship with an abusive parent. To this end, the Family Court may take into account any aspects which may adversely affect the future welfare of the child, including the parent’s criminal actions, drunkenness, illicit drug use or mental stability.

The law allows parents to raise their children as they see fit, within general guidelines. Parental responsibilities to a child are not specifically defined in the legislation, but would include:

- providing adequate food and shelter
- providing access to education
- providing discipline
- protecting the child from harm and ensuring that they are not exposed to illegal activities.

Consequences of parental neglect under state laws

Parents who fail in their duty to their child may face any of a number of consequences. These offences, and their consequences, are provided for in state and territory legislation. Ongoing failure by a parent to provide the basic requirements for proper development (food, shelter, hygiene, medical and dental care, adequate supervision and emotional security) may result in criminal prosecution for neglect of the child. Neglect is a criminal offence under both the Children and Young Persons (Care and Protection) Act 1998 (NSW) (s 228), which carries fines of up to $22,000, and the Crimes Act 1900 (NSW) (s 43A), which provides for a jail term of up to five years. Family and Community Services (FaCS) is the main New South Wales department responsible for implementing the laws under the Children and Young Persons (Care and Protection) Act 1998. If child abuse or neglect is suspected, FaCS may initiate a Joint Investigation Response Team (JIRT). JIRTs are comprised of Community Services, police and New South Wales health professionals. The main aim of JIRTs is to provide a timely and coordinated intervention in instances where child neglect or abuse is suspected or is proven. JIRTs may investigate claims of abuse or neglect, provide care and support services, or refer the individual to crisis counselling. In some cases, FaCS will apply to the Children’s Court of NSW for an order (for example, for supervision of the family relationship through visits, support services, or transfer of parental responsibilities, perhaps to another member of the child’s family or foster care). Foster care is usually temporary and involves a couple taking on the parental responsibility of caring for and controlling the child. One alternative to foster care is for children to live in ‘group homes’ under adult supervision, such as under the care of a youth worker and child counsellors.

**neglect**

ongoing failure by a parent to provide a child with the basic requirements for proper growth and development, such as food, shelter, medical care, hygiene and supervision

New legislation passed in 2014 (Child Protection Legislation Amendment Act 2014 (NSW)) focuses on the safety and wellbeing of a child or young person by providing them a secure environment in accordance with ‘permanent placement principles’ (s 10A). This requires child protection authorities to investigate whether putting a vulnerable child up for adoption is preferable to placing the child in temporary foster care. The aim of the laws is to provide children a more stable home environment, which they would not otherwise experience if they were moved from one foster home to another.

In addition, the new laws allow authorities to seize children once they are born if it is proven that the birth mother had a history of drug or alcohol
abuse during the pregnancy (Child Protection Legislation Amendment Act 2014 (NSW) s 38A, ‘Parent responsibility contract’). Finally, courts now have the power to force parents to undergo treatment to deal with issues, such as alcohol or drug addictions under a ‘parent capacity order’ (ss 91A–91I).

The Children and Young Persons (Care and Protection) Act 1998 (NSW) addresses family problems in terms of the child’s needs and care. Other state laws, such as the Children (Protection and Parental Responsibility) Act 1997 (NSW) and the Children (Criminal Proceedings) Act 1987 (NSW), deal with the prevention of juvenile crime and the criminal processes appropriate to people under 18 years.

Education

The right to an education is one of the objects of the Education Act 1900 (NSW), and it is also found in the CROC. The Education Act imposes on the state the duty to ensure that every child receives an adequate education. Parents cannot refuse their child an education, but they do have the right to choose where their child will be educated. There are provisions for the parent to educate the child at home (if government consent has been granted) or by distance education, as long as the child is educated according to curricula approved by the state Board of Studies. Failure to enrol a child in a school or to give the child access to an education is a criminal offence.

Changes to the Education Act 1900 (NSW) in 2009 make it compulsory for a child to attend an educational facility from the age of six until 17 years of age. Children who intend to leave school and have completed Year 10 but are not yet 17 must be in some form of education, training or employment until they turn 17.

Discipline

Parents have the right to discipline their child by using physical force in order to correct their child’s behaviour, but the physical force must be ‘reasonable, having regard to the age, health, maturity or other characteristics of the child, [and] the nature of the alleged misbehaviour or other circumstances’ (Crimes Act 1900 (NSW) s 61AA).

The defence of ‘lawful correction’ in criminal proceedings against a parent or other person for assault is not available if the physical force was not reasonable.

*assault*

*a criminal offence involving the infliction of physical force or the threat of physical force*

What is considered reasonable and acceptable discipline can vary from culture to culture, but punishments that will not be considered reasonable by a court in Australia include striking the head or neck of a child, causing pain lasting for more than a short period, shaking a young child and striking a child with a closed fist.

**Review 12.4**

1. Evaluate the influence of the CROC on family law in Australia.
2. Discuss the concept of ‘the best interests of the child’ and describe what the courts may consider to be in the ‘best interests’ of the child.
3. Explain the concept of parents’ responsibility or obligations to their children, giving examples.
4. Identify the requirements that must be satisfied before a person can leave school.

**Research 12.1**

View the Children (Protection and Parental Responsibility) Act 1997 (NSW) at http://cambridge.edu.au/redirect/?id=6346 and then complete the following tasks.

1. When deciding how to deal with a child under this Act, what factors do the court take into account? (See s 6.)
2. Explain two ways a court might respond to encourage parental responsibility once their child has been found guilty of an offence. (See ss 8 and 9.)
3. Look at Part 3 of the Act, especially ss 18, 19, 20, 21 and 22.

   a. Summarise the specific issue or issues that the Act attempts to address in these sections.
   b. Do you think this Act is the best way to address these issues? Justify your answer.
Medical treatment
Parents are responsible for ensuring that appropriate medical and dental care are available for their child. However, consent must be given before a doctor can carry out any treatment. As with any decision carrying risk, a person’s consent implies an understanding of what is involved and an acceptance of the risks. For children under 14 years old, the consent of a parent (or guardian) is required, and parents have the right to authorise any such treatment they consider in the child’s best interests. For those between 14 and 16, either the child’s consent or a parent’s consent is required. Medical or dental treatment of young people aged 16 or 17 requires the consent of the young person. These requirements are contained in the Minors (Property and Contracts) Act 1970 (NSW) (s 49). If the parents refuse medical or dental treatment (for instance, on religious grounds), a court can authorise the treatment.

If the child is over 16 and is intellectually disabled, such that they do not understand the problem and the treatment, then the Guardianship Act 1987 (NSW) specifies who can give consent. Usually, this will be a ‘person responsible’, such as a parent.

Autonomy of children
Children are regarded as not yet having developed the cognitive abilities and the capacity to understand the consequences of their actions, and are considered unable to make fully informed decisions. In an effort to protect children, the law makes it illegal for them to engage in certain activities. A child’s ability to make their own decisions increases as they get older, and this is reflected in the law regarding children’s autonomy and rights (see Table 12.2).

Ex-nuptial children
In the past, ex-nuptial children (they used to be called illegitimate) had no legal status and therefore had no legal rights. Legitimacy was important because it provided a child with certain rights, such as inheritance and maintenance. Legitimacy automatically existed for a child if the child was:
- born during marriage – that is, was a nuptial child
- ex-nuptial, but the parents of the child later married
- adopted.

The Children (Equality of Status) Act 1976 (NSW) – later replaced by the Status of Children Act 1996 (NSW) – gave ex-nuptial children the same rights as those born to parents who are married. Later Acts have reinforced the status of ex-nuptial children. All children have the right to be cared for by their parents.

The Act allows a presumption that those who say they are a child’s parents are in fact the child’s parents (this is called the ‘presumption of parentage’); evidence has to be provided to a court to disprove that. Parentage can be established through DNA analysis of a blood sample, or through the parent’s voluntary recognition of the child as theirs. If a person making a will wants to exclude any of their children, this must be explicitly stated (for example, by listing only the children the testator wants to inherit their property).

Review 12.5
1. Explain why consent to medical treatment is necessary, and why age determines legal capacity to give consent.
2. Explain the term ‘autonomy’ and how it will change the parent–child legal relationship.
3. Explain the term ‘presumption of parentage’.
The Family Provision Act 1982 (NSW) removed the concept of ‘illegitimacy’ and the Succession Act 2006 (NSW) permits any child to apply for a family provision order, whether the child is nuptial or ex-nuptial.

**Adoption**

Adoption is the process of transferring parental rights and responsibilities from the biological parents to the adoptive parents. The aim of adoption law is to ensure that the best and most appropriate parents are found for the child. The needs of the

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**Table 12.2** Legal autonomy of children in Australia*

<table>
<thead>
<tr>
<th>Area of responsibility</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol and cigarettes</td>
<td>It is illegal for a child under 18 to purchase, possess and/or consume alcohol and cigarettes.</td>
</tr>
<tr>
<td>Arrest</td>
<td>The police can only question a child in the presence of an adult. This adult could be the child’s parent or guardian.</td>
</tr>
<tr>
<td>Civil law</td>
<td>Children can be sued for any damage or injury that they cause. In some situations a child’s parents may be held responsible for the damage their child caused.</td>
</tr>
<tr>
<td>Contracts</td>
<td>A child can only enter into a contract if an adult acts as guarantor. The contract must be for the benefit of the child.</td>
</tr>
<tr>
<td>Criminal responsibility</td>
<td>Children under 10 years old are not criminally responsible for their actions because there is a presumption that they do not have the capacity to understand the difference between right and wrong and so cannot form an intention to commit a criminal act. If the child is aged 10 to 14 years the prosecution must prove that the child understood that their act was illegal (that is, that criminal intent was present). Children aged 14 years or older are considered to be responsible for their criminal actions.</td>
</tr>
<tr>
<td>Driving</td>
<td>A child can obtain their learner’s permit at 16 years in New South Wales. Once the child turns 17 they can obtain a probationary licence.</td>
</tr>
<tr>
<td>Employment</td>
<td>There is no minimum age for starting part-time or casual employment in New South Wales. However, those under 15 who want to leave school and start full-time work must seek permission from the Department of Education and Training. Otherwise, anyone who has completed Year 10 but is under 17 and does not want to stay at school can do an apprenticeship, or work full-time (25 hours per week), or do a combination of approved education or training and paid work (see <a href="http://cambridge.edu.au/redirect/?id=6347">http://cambridge.edu.au/redirect/?id=6347</a> on school leaving age).</td>
</tr>
<tr>
<td>Evidence</td>
<td>Children can give evidence at any age if they understand the nature and consequences of the oath or affirmation.</td>
</tr>
<tr>
<td>Leaving home</td>
<td>There is no minimum age for leaving home in New South Wales. Young people between the ages of 16 and 18 will not normally be forced to return to their parents’ home, as long as they have a safe place to go and can support themselves financially.</td>
</tr>
<tr>
<td>Marriage</td>
<td>A person under 16 cannot marry. A person between the ages of 16 and 18 can marry only with the court’s permission and only in exceptional circumstances.</td>
</tr>
<tr>
<td>Sexual intercourse</td>
<td>The legal age for consensual sex is 16. It is an offence to have sexual intercourse with a child under 16.</td>
</tr>
</tbody>
</table>

*The legal definition of a ‘child’ is any person aged under 14, which is different from a ‘minor’, which refers to anyone under 18. (For more information regarding children and the law, go to the Lawstuff website at http://cambridge.edu.au/redirect/?id=6348.)
adults are secondary to the needs of the child. Adoption re-creates the legal relationship between the child and their parents.

**Adoption**

the legal process of transferring parental rights and responsibilities from the biological parents to the adoptive parents

**Legal requirements and process**

Adoption is a state responsibility. In New South Wales, adoption is governed by the *Adoption Act 2000* (NSW).

If the birth parents are married or in a de facto relationship, both parents must give consent to give up the child for adoption. In the case of a single mother, only the mother need give consent; the father must have been notified prior to the adoption and given 14 days to respond. Children aged over 12 years must consent to their adoption themselves. A birth mother cannot consent to adoption within three days of the child’s birth. Once the birth parent or parents have given consent, there is a 30-day revocation period during which they can change their minds. If the child’s parents cannot be found or are incapable of giving informed consent, the court can give consent.

**Relinquishing parents** can nominate a relative to adopt their child, but all adoption criteria must be met and the adoption can only proceed if the court permits it. Parents who give up their child for adoption can nominate a desired religious upbringing for their child.

**relinquishing parent**

a parent who nominates their child for adoption

Because adoption laws are primarily concerned with the rights of the child, the law has established strict guidelines as to who can apply to adopt:

- The prospective male parent must be at least 18 years older than the child and the female parent must be at least 16 years older than the child.
- The applicant must be a person of good repute, be a fit and proper parent, and be able to fulfil the responsibilities of a good and caring parent. Also, where applicable, the child’s culture, language and religion will be taken into account when determining an adoption order.
- Prospective parents who meet the criteria above are then placed on a waiting list. The decision as to who will adopt is based on what is in the best interests of the child and whether the child’s overall welfare will improve by being adopted by the applicant(s).
- Once the birth parents agree to the adoption, the court will make an adoption order, following official notification from the relevant agency or department. An adoption order creates certain legal changes. The Registrar of Births, Deaths and Marriages will issue a new birth certificate in the child’s adopted name. The birth certificate will include the family details of the adoptive family, such as the full names and dates of birth of the child’s adoptive parents and any other children of the adoptive parents. The birth parents no longer have any rights or obligations concerning the child. The adopting parents have the legal responsibility for the care and wellbeing of the child, who is now legally their child. The adopted child’s rights of inheritance to the estate of their biological parents are removed (unless the child is specifically mentioned in a will), and the adopted child will have the automatic right to inherit from the estate of their adoptive parents.

**Overseas adoptions**

An increasing number of Australian couples are applying to adopt children born overseas. Intercountry adoptions are governed by the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, and by bilateral agreements between Australia and countries that have not ratified the convention. In response to the growing number of intercountry adoptions, the Attorney-General’s Department established in 2015 a new adoption service, Intercountry Adoption Australia. The service includes an informational website providing advice on overseas adoption, links to relevant government sites and a telephone
advice line for families intending to adopt a child from overseas.

In New South Wales, prospective parents must apply through the Department of Family and Community Services to arrange for an inter-country adoption. They will be offered a child from the other country, and if the parents accept the offer they may lodge an adoption visa application, which is then forwarded to the appropriate overseas welfare agency. The child is then subject to standard migration medical checks. If the child satisfies the health requirements, the adoption will either be finalised overseas in the child’s country of origin or the overseas welfare agency will authorise the child to leave so that the adoption can take place in Australia. The child will then be granted permanent residence in Australia. Any intercountry adoption must be in the best interests of the child.

Privately arranged adoption is possible if the adoptive parents can prove they have been living in the overseas country for more than 12 months prior to their application, and if the authorities in the overseas country have approved the departure of the child to Australia. The child must meet migration standards – the Australian Department of Immigration and Border Protection can refuse to grant an entry visa for the child.

Access to information

Previously, all personal information, of both the parent and the child, could only be released by the Reunion and Information Register, and only if both parties placed their information on the Register. This register, maintained by Community Services in New South Wales, is still in operation, but Community Services does not help parties search for each other. The Adoption Amendment Act 2008 (NSW) gives relinquishing parents and adopted children the right to request personal identifying information from Community Services, which they can then use to contact one another and other family members.

Adopted children may apply to Adoption Information Unit to obtain a ‘supply authority’, which contains identifying information of the birth parents. This document then allows them to obtain further information from adoption records. Parents who have given up their child for adoption can also ask for a ‘supply authority’, allowing them to obtain a copy of their child’s amended birth certificate (the one prepared after their adoption), which now contains information about the adoptive family.

Parents and children who do not want to be contacted by the other can lodge a ‘contact veto’. Alternatively, the contact details of adopted children and relinquishing parents can be placed on the Advance Notice Register, which notifies them if any application for information is made. Even though the relinquishing parents or the adopted child may not wish to be contacted, their information will be released once the party seeking the information has signed an undertaking not to make contact. A party who breaches a contact veto may be subject to a fine.

Review 12.6

1. Explain the concept of adoption and discuss how adoption changes the relationship between the child and the relinquishing parents, and the child and their adoptive parents.
2. List the conditions that must be met by prospective adoptive parents. Evaluate these requirements with regards to the child’s ‘best interest’.
3. Explain why adopted children may want their birth parents’ personal information. Critically analyse whether they should have complete access to all information regarding their parents and possible siblings.
and/or imprisonment. Both relinquishing parents and adopted children who want to make contact with one another can enter their names in the Reunion and Information Register.

12.2 Responses to problems in family relationships

Divorce

*Divorce* is the legal dissolution (termination) of a marriage. Under s 48 of the *Family Law Act 1975* (Cth), the only ground for divorce is the irretrievable breakdown of the marriage. This means that there is no chance that the parties to the marriage wish to remain in a relationship.

Although the Act removed fault and established one ground for divorce, it did not intend to encourage divorce. Rather, it was designed to encourage parties to seek an amicable resolution to their problems, including the use of counselling services. The Act allows for one period of reconciliation of up to three months during the period of separation, under s 50 (the ‘kiss and make up clause’). If they do not succeed in reviving the marriage during this interval, the separation period resumes, with the total time before and after the reconciliation period counting towards the 12 months.

If the couple seeking to dissolve their marriage have been married for less than two years, they must attend family counselling before they can divorce. Also, if the court feels there is a chance the parties may be reconciled, the court can order marriage counselling.

Legal consequences of separation

**Children**

If the couple has children, no application for dissolution (divorce) will be approved until the court is satisfied that there are proper arrangements in place for the care of the children. Once this has occurred, the court will order a *decree nisi*, which begins the process of divorce. About one month later, the decree nisi becomes a *decree absolute*, at which time the marriage is legally dissolved.

**decree nisi**
a Family Court order that is made to signal the intended termination of a marriage

**decree absolute**
a final decree of the dissolution of marriage

The focus of the law is not on ‘parental rights’ but on ‘parental responsibility’. Parents are responsible for the long-term care of their children and the presumption is that it is in the best interests of the children for both parents to share this responsibility equally. Therefore, irrespective of where the children reside, both parents are still responsible. Parental responsibility will only cease with a court order, the adoption of the children, the children’s 18th birthday or the children’s marriage. Parents are encouraged to make and voluntarily agree to their own arrangements in relation to the care and responsibility of their children, rather than asking the court to do so.
Under Part VII of the *Family Law Act 1975* (Cth), any disputes concerning children must be decided in the best interests of the child. The court determines ‘best interests’ by reference to primary and additional considerations set out in s 60CC. The two primary considerations include the child’s right to maintain a meaningful relationship with both parents (s 60CC(2)(a)) and the need to protect the child from harm (s 60CC(2)(b)). Other factors taken into account include factors that may modify the ability of parents to share the parenting of the child equally, such as the views of the child, the nature of the child’s relationship with each parent, and where the parent lives.

The presumption that equal shared parental responsibility is in the best interests of the child will not apply ‘if there are reasonable grounds to believe that a parent of the child … has engaged in abuse of the child … or in family violence’ (s 61DA(2)(a) and (b)). The 2006 amendments to the Act, which introduced shared parental responsibility and other provisions of Part VII (via the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)), have been criticised for not dealing adequately with family violence, exposing children who had previously been victims of parental abuse to the possibility of further abuse. Another criticism centres on the idea that the child’s views are not given enough weight. There have also been complaints that the Act does not make clear the distinction between shared parental responsibility and shared care – some parents mistakenly believed that shared parental responsibility entailed 50/50 ‘custody’ of the children.

In 2011, the federal government passed the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). The Act recognises the need to protect children from harm and aims to improve the court’s response to family violence by providing better information concerning the existence or risk of family violence, allowing the court to make provisions for the child’s safety in future parenting arrangements.

Separating parents are required to attend family dispute resolution before they can apply to the court (subject to certain exceptions) for parenting orders. Any agreement reached at this stage can be drafted into consent orders or a parenting plan. Parenting plans must consider the practicality of children having equal time with both parents, contact with other family members, and the day-to-day care of the children, and ensure that the children maintain their cultural links. Parenting plans are voluntary agreements, and most parents comply with them. If parents cannot reach an agreement, they may apply to the Family Law Courts (the Family Court and the Federal Circuit Court of Australia) to make parenting orders. Section 64B of the *Family Law Act* explains that parenting orders may deal with any matters relating to the care and welfare of a child, such as which parent the child is to live with, the time to be spent with the other parent, and maintenance.

### Review 12.7

1. Identify the sole ground for divorce in Australia, and the consequences of there being only one ground.
2. Describe what it means for a couple to be ‘living separately and apart’.
3. Contrast ‘shared parental responsibility’ and ‘shared parental care’.
4. Why might ‘shared parental responsibility’ not be in the ‘best interest of the child’?

*Figure 12.6* Some shared assets may be sold if a couple separates.
Property
The Family Law Act 1975 (Cth) uses a broad definition of ‘property’. Property includes homes, bank accounts, companies and partnerships, shares, superannuation and household goods. If the separating couple reach an agreement as to the allocation of property and want to formalise it and make it binding, they can either apply to the Family Court for consent orders or enter into a financial agreement.

If the division of property is fair and equitable, the court will then make the consent orders legally binding. A couple in dispute regarding property allocation can choose to have the matter heard in the Family Court. When determining property allocation under ss 75 and 79 of the Family Law Act (or ss 90SF and 90SM for de facto spouses), the court will consider a number of factors, which can include:

- the financial and non-financial contribution to the property by both parties (including contributions made as home-maker and carer for children)
- the age of both parties and the income, property and financial resources of both parties
- the financial commitments of the parties in supporting themselves and a child of another person that the party has a duty to maintain
- whether or not each or either party has the care and control of a child of the marriage who is under 18 years of age
- the ability of each party to maintain a reasonable standard of living
- other contributions, such as any inheritance, and the acquisition, conservation and improvement of any assets (including maintenance of the family home or working for the family business).

The court can, and usually will, order the disputing couple to attend a conference in an attempt to have them determine a fair and equitable allocation of property and an agreeable settlement. If this mediation process is unsuccessful, the Family Court can make an order about the allocation of matrimonial property, which is all property purchased or acquired during the marriage. Superannuation is regarded as an asset and the court takes into account the financial and non-financial contributions made by both parties to superannuation entitlements. Since 2002, separating couples have been able to claim superannuation that each spouse had accumulated during the marriage as part of the matrimonial property.

There is no set formula for the distribution of property. The court aims to be as fair as possible and to achieve an equitable outcome for both parties, taking into account their differing needs and contributions.

Financial agreements
Financial agreements can be made between a couple before their marriage (these were formerly known as ‘prenuptial agreements’), during the marriage, or at the end of the marriage (see Family Law Act 1975 (Cth) ss 90B, 90C and 90D). Financial agreements arose out of individuals’ desire to protect their property rights. They can include guidelines for the division of property, debt and other financial concerns if the relationship ends. Such agreements tend to reduce the combative nature of divorce and separation by removing two of the main sources of hostility between parties: money and property.

Financial agreements may prescribe what property is and is not to be included in the settlement, settle questions relating to how property is to be divided after the marriage has ended, or establish who owns what property. Financial agreements can also include provisions as to whether, how and by whom spousal maintenance is to be paid.

In the past, agreements between spouses were not binding, and were just one of the matters that a court could consider when determining a property settlement. Amendments to the Family Law Act in 2000 allow the Family Court to recognise them as binding financial agreements. A party can apply to the Family Court to have the agreement set aside, but this can be a costly and time-consuming process.

The grounds on which they can be set aside are set out in s 90K (marriages) and s 90UM (de facto relationships) of the Act.

As discussed earlier in this chapter, property settlements for separating de facto couples are now governed by the Family Law Act. De facto couples can also have binding financial agreements, just like married couples, for property settlements if they separate. They can be made before, during or after the breakdown of a relationship (see Family Law Act 1975 (Cth) ss 90UB, 90UC and 90UD).
Legal responses to domestic violence

Domestic violence has become a major social, judicial and economic issue within the Australian community. The Australian Law Reform Commission conducted an inquiry into domestic violence in response to the findings of the National Council to Reduce Violence against Women and their Children, Time for Action (2009). The ALRC examined the existing federal and state domestic violence laws. Issues the commission considered included the role of police, bail and the effectiveness of protection orders, the prevalence of domestic violence and child protection.

The Crimes (Domestic and Personal Violence) Act 2007 (NSW) describes domestic violence as any act, whether verbal or physical, of a violent or abusive nature that takes place within a domestic relationship.

Domestic violence may include physical violence, sexual assault, economic abuse, emotional or psychological abuse, stalking, damage to property and behaviour that causes a child to be exposed to the effects of domestic violence. It also includes ‘threatening behaviour’ that coerces, controls or causes the victim to be ‘fearful’.

The definition of ‘domestic relationship’ in the Act is so wide that it incorporates almost every domestic arrangement imaginable. The Act does not stipulate a time limit for these relationships,
so even if a relationship only existed for a short period in the past, it still qualifies as a domestic relationship for the purpose of the Act. The words ‘intimate personal relationship’ are not defined, but the section stipulates that the relationship between parties need not be nor have been sexual in nature. The wording of the Act also indicates that those in a ‘domestic relationship’ would include boyfriends and girlfriends, and those in same-sex relationships.

In enacting the legislation governing domestic violence, the New South Wales Parliament expressly stated that domestic violence in all its forms, including behaviour that extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years, is unacceptable. The legislation also recognises that domestic violence is predominantly perpetrated by men against women and children, and that it occurs in all sectors of the community (Crimes (Domestic and Personal Violence) Act 2007 s 9 (3)).

Domestic violence can include:
- physical violence, such as punching, kicking and shoving
- sexual assault, including coercing the victim to be sexually compliant
- economic abuse, such as controlling the victim’s access to money
- threatening behaviours, such as stalking and damaging the victim’s property.

There are many reasons why families experience interpersonal problems. Causes of family crises can range from psychological or social problems to financial difficulties. Examples of these problems are listed in Table 12.3.

### Violence between spouses

Violence between spouses may, as noted above, take the form of physical, verbal, emotional, financial, psychological and/or sexual abuse, social isolation, or actual or threatened violence or harassment. Males tend to commit more domestic violence than women and the majority of domestic violence victims are women and children. However, men are also victims of domestic violence.

The 2012 Personal Safety Survey estimated that 49% of men and 41% of women since the age of 15 have experienced some form of violence. Women are more likely to experience violence in the context of their homes. A significant number of women tend to experience violence perpetrated in the home (62%) compared to men (8%). Even though both men and women experience sexual assault (an estimated 17% of women and 4% of men), women are nearly four times as likely to have been assaulted by a known person than by a stranger.

Domestic Violence NSW, a political lobby group, announced in 2014 that it had launched an online petition calling for zero tolerance of domestic violence. This was in response to the increasing prevalence of domestic violence and the increasing numbers of women being murdered by their spouse or partner. According to the New South Wales

<table>
<thead>
<tr>
<th>Table 12.3 Causes of family problems</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Psychological problems</td>
<td>Social problems</td>
</tr>
<tr>
<td>• Lack of self-esteem and poor self-image</td>
<td>• Drug dependency, including alcoholism and addiction to prescribed drugs or illegal substances</td>
</tr>
<tr>
<td>• Inability to express anger or frustration appropriately</td>
<td>• Disputes over housework, or other domestic duties</td>
</tr>
<tr>
<td>• Strong desire to control or dominate others</td>
<td>• Disputes over child discipline issues</td>
</tr>
<tr>
<td>• Cycle of violence: an abused child may become an abusing adult</td>
<td>• Lack of quality time spent with family members</td>
</tr>
<tr>
<td>• Mental illness, including depression</td>
<td>• Cultural or geographic isolation</td>
</tr>
</tbody>
</table>
Bureau of Crime Statics and Research (BOCSAR), in 2014 there were 29,070 domestic related assaults in New South Wales and 30% of all homicide victims (nearly one woman per week) were killed in domestic-related incidents. The estimated cost to the Australian economy in 2014 was estimated to be $14.4 billion.

In its attempt to curb this alarming statistic, the New South Wales Government has proposed that abusive partners should be listed on a domestic violence register, which would enable concerned individuals to seek information regarding their partner. The prevalence of domestic violence and its growing importance as a social issue has been recognised by authorities. In 2015, the Australian of the Year, Rosie Batty, whose son was beaten to death by his father at cricket training, received the honour for her work in trying to rid the Australian community of domestic violence.

Domestic assaults accounted for over half (54.4%) of all assaults. Women are at greater risk of experiencing violence at the hands of someone they know; and of all women assaulted, approximately 73% will experience repeated attacks. Sadly, of women subjected to domestic violence, 61% will have children in their care. It is estimated that family violence costs the community of New South Wales $4.5 billion each year (see http://cambridge.edu.au/redirect/?id=6349).

Victims of domestic violence can press criminal charges, or they can apply to the Local Court for a family violence order or an Apprehended Violence Order (AVO) or, more specifically, an Apprehended Domestic Violence Order (ADVO). It may also be possible to apply to the Family Court for an injunction for personal protection, but these are often more complex than an ADVO, and they are less easily enforced by local police.

The issuing of an ADVO does not mean the person is charged with a criminal offence. However, if the person breaches the order, they may be charged with a criminal offence; if there is sufficient evidence to support a conviction for this offence and any associated offence, police will arrest and charge the person.

<table>
<thead>
<tr>
<th>Apprehended Violence Order (AVO)</th>
<th>a court order that aims to protect the applicant from violence and other forms of intimidation or abuse by another person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apprehended Domestic Violence Order (ADVO)</td>
<td>a specific type of AVO issued under Part 4 of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) when the perpetrator of violence is a family member</td>
</tr>
<tr>
<td>injunction</td>
<td>a court order directing someone to do something or prohibiting someone from doing something</td>
</tr>
<tr>
<td>breach</td>
<td>to fail to obey</td>
</tr>
</tbody>
</table>

**Figure 12.7** Violence against spouses can take many forms.

Research 12.2

Go to http://cambridge.edu.au/redirect/?id=6352 for information on domestic and family violence and complete the following tasks.

1. What is domestic violence?
2. How does domestic violence affect families and children?
3. What is the Domestic Violence Line and what services does it provide?
4. Discuss the ‘Staying Home Leaving Violence’ program. Why is this program needed?
Violence involving children
Violence against children

Article 19 of CROC declares that no child should be subjected to violence and it is the responsibility of the state to protect ‘the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child’ (CROC art 19).

The Children and Young Persons (Care and Protection) Act 1998 (NSW) covers abuse as well as neglect. Specifically, s 227 prohibits intentional acts resulting or likely to result in physical injury or sexual abuse, emotional or psychological harm, or harm to health or physical development. Children can be included on an adult’s AVO or ADVO application, or a separate application, a child protection order, can be made for children by the Children’s Court.

A police officer is the only person who can apply for an AVO for children under 16 years of age; those over 16 can apply for their own AVOs. However, a court may grant an AVO for the protection of a child even if the application was not made by a police officer (Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 38(5)). If there is a parenting order in place that allows the offender access to the children, and their safety is at risk, the applicant for an AVO must inform the court of its existence (s 42(1)).

In New South Wales, certain professionals are required by law to report to Community Services if they suspect that a child is at risk of harm (Children and Young Persons (Care and Protection) Act (NSW) 1998 ss 24–27). These people include teachers, doctors, school counsellors and anyone who works with children. If a report has been made, Community Services is legally required to investigate. Possible outcomes after notification include the following:

- If the notification concerns a threat of abuse or actual abuse, an AVO is made.
- The police can charge the accused.
- The Family Court can restrict contact by the offender with any children the court feels are at risk.
- Community Services can apply for a variety of care and protection orders, including the removal of the child from a violent environment.

Additional changes to the care and protection of children have been made under the Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 (NSW). The Act introduced the concept of ‘significant harm’, simplified Children’s Court processes and established Child Wellbeing Units in government agencies that deal with children, including the Department of Human Services, the Department of Education and Training, NSW Health and the NSW Police Force. Less serious cases reported to Community Services are referred to these Child Wellbeing Units.

Violence by children

Violent acts are not committed solely by adults. However, the law deals with child offenders differently. Laws relating to child offenders reflect the basic philosophy underlying the UN Convention on the Rights of the Child: all decisions relating to children should be in the best interests of the child.

Section 5 of the Children (Criminal Proceedings) Act 1987 (NSW) states that children under the age of 10 cannot be guilty of a criminal offence. The law considers a child under 10 as being unable to understand the consequences of their actions. Children aged between 10 and 14 years are also presumed to be incapable of committing a crime; it is up to the prosecution in a case where the accused is in this age range to rebut the presumption by proving that the child committed the alleged act and that they knew that it was wrong. If this is proved the child can be held criminally liable.

Once a charge is laid, the child or young person will usually face proceedings in the Children’s Court, but the Young Offenders Act 1997 (NSW) does provide alternative options for young offenders. They include warnings and cautions and youth justice conferences. Having the child offender face proceedings in the Children’s Court is the last
resort. The emphasis is on preventing the child from coming into contact with the justice system, by employing a welfare approach through counselling and education, and by encouraging young offenders to take responsibility for their actions, rather than to punish them. The long-term goal is to prevent the child from becoming an offender as an adult.

Effectiveness of the law in protecting victims of domestic violence

Recent educational campaigns have raised community awareness of domestic violence as an important social issue, and helped the community understand that domestic violence is not a ‘private matter’, and is not acceptable. Legislative reforms reflect this changing attitude to domestic violence. Domestic violence is recognised as a community problem, not an individual or isolated occurrence, and most people now appreciate that reducing its incidence is in some respects a societal responsibility.

ADVOs have become an important means of reducing the incidence of domestic violence. One advantage of these orders is that they are a quick, inexpensive and accessible form of protection, and they are complemented and supported by the full weight of the criminal law if they are breached. However, it has been argued that only people who are normally law abiding will comply, and that these orders do little to deter persistent offenders. In addition, protection orders can only be effective if they are policed. But it is unfair to state that laws aimed at domestic violence have failed utterly. Rather, these laws have slowly evolved in response to circumstances that legislators or the courts had not considered.

For example, the concept of ‘battered wife syndrome’, which was originally applied only to women in heterosexual marriages, has been extended to include battered partners in de facto relationships, including same-sex relationships. Also, the automatic presumption in favour of bail was removed after several women were stalked and killed by their partners who had been released on bail, and although gun-related crime is relatively low in Australia, the Firearms Act 1996 (NSW) offers the additional protection of prohibiting the issue of, or revoking, a gun licence or permit if the individual has been subject to an AVO. The Surveillance Devices Amendment (Police Body-Worn Video) Act 2014 (NSW) allows police to use video evidence when prosecuting perpetrators of domestic violence. Under these amendments, videoed statements and footage of the scene of the alleged crime may be used as evidence in court. It is anticipated that these changes will help in achieving a greater percentage of successful prosecutions by reducing the possibility of the victim withdrawing or changing their statement when the matter goes to court. All of these legislative changes have been in response to community pressure and specific instances of domestic violence.

Several states have introduced mandatory counselling for perpetrators of domestic violence. Criminal penalties apply if they fail to attend. New South Wales does not have such a program. There is little evidence to support such allegations.

The current approaches in dealing with domestic violence have been heavily criticised. In response, in 2010 the Commonwealth Government launched Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children 2009–21. The aim of the national plan is to bring together the state and territory governments in order to consolidate and implement strategies aimed at reducing the levels of violence against women and children. The National Plan is made up of four

Review 12.9

1 Identify and explain the various factors that may cause problems within a family.
2 Explain what AVOs and ADVOs are.
3 Outline the legal remedies that are available to victims of domestic violence.
4 Explain how the law deals with juvenile offenders.
three-year plans, each of which will be reviewed at its end. The focus will be on preventing violence, building respectful relationships, gender equality and encouraging behavioural change.

The New South Wales Government announced in 2012 its own response to combat the alarming growth in domestic violence with ‘It Stops Here – the NSW Government’s Domestic and Family Violence Framework for Reform’. These reforms centre on the welfare of the victim and include new referral pathways, coordinated community services to cater for the needs of victims, and reducing the stress and trauma felt by victims when they are recounting their experiences. The reforms also focus on preventing domestic and family violence and aim to provide support to the perpetrator to end the cycle of violence.

In September 2015, the federal government announced it would spend $100 million on a range of initiatives to combat domestic violence. These include:
- GPS tracking of offenders
- giving mobile phones to victims to help them evade their abusers
- more training for police, social workers and emergency staff in supporting victims
- training for hospital staff to help them recognise signs of domestic violence
- increasing the number of Community Engagement Police Officers in Northern Territory remote Indigenous communities
- expanding the Safer Schools website to provide resources on respectful relationships.

In 2011, the federal government passed the Family Law Legislation Amendment (Family Violence and other Measures) Act (Cth). The Act redefined domestic violence and placed more weight on the safety of the child. The priority is no longer ‘shared parental responsibility’ and the maintenance of a ‘meaningful relationship’ but rather that the child should be ‘protected from harm’. For example, if a parent has been charged with a crime related to child abuse, that parent’s access to their child may be limited or access may be granted only if it is supervised. Under these changes ‘family violence’ would also

Case Study

The New South Wales Domestic Violence Intervention Court Model

Two specialist courts operating in Campbelltown and Wagga Wagga were established in 2005 to hear domestic violence cases. The initial aim of these courts was to improve the criminal justice system response to cases involving domestic violence.

Under this model police and courts adopted a more proactive approach to domestic violence, including improvements in the collection of evidence, better support for victims and the referral of perpetrators to appropriate counselling programs.

A 2012 review of the model by the NSW Bureau of Crime Statistics and Research found that it had met with limited success. There have been improvements in victim support, the management of domestic violence offenders, and a reduction in the time taken to hear domestic violence cases, but there has been no change in the number of alleged offenders being charged or in the number of charged offenders who plead guilty.

Review 12.10

Read the media article on page 357 and complete the following tasks.

1. To what extent was the mother responsible for the death of her son?
2. Explain what the relevant authorities could have done to prevent the child’s death.

Research 12.3

Read the article ‘Violence, abuse and the limits of shared parental responsibility’ (available on the Australian Institute of Family Studies website at http://cambridge.edu.au/redirect/?id=6353) and discuss this statement: ‘Parenthood should be dissoluble in certain situations.’
be redefined to include actual or threatened conduct that causes a family member to reasonably fear or be concerned about their safety.

In recognising the need to provide children additional protection, all state and territory governments have endorsed the National Framework for Protecting Australia’s Children 2009–2020. This framework aims to provide a long-term national approach to protecting children and tackling the issues surrounding child abuse. However, the main responsibilities for statutory child protection are retained by state and territory governments.

Methods of resolving disputes

Family dispute resolution

Family dispute resolution is defined in s 10F of the Family Law Act 1975 (Cth) as a non-judicial process in which an independent practitioner helps people affected by a separation or divorce resolve some of their disputes with each other.

Section 60I of the Family Law Act 1975 (Cth) requires couples who have a dispute about matters that may be dealt with by a court order under Part VII of the Act (involving children) to make a genuine effort to resolve their dispute, using family dispute resolution, before applying for an order. If there is a history of family violence, family dispute resolution may not be appropriate.

Sydney mother pleads guilty to manslaughter of her son, 7, who had ‘plethora of injuries’

Sydney Morning Herald, 31 March 2015

The mother of a 7 year old boy pleaded guilty to manslaughter. The mother had originally claimed that the boy had died of injuries sustained when he had fallen off his pogo stick.

During the post-mortem examination it was discovered that the boy had a ‘plethora of injuries’. Injuries sustained by the child included a fractured skull, fractured ribs and bruising consistent with repeated physical abuse.

The mother who had once been described as ‘attentive’, adopted the extreme religious views of her boyfriend, especially his approach to parenting which centred on severe physical abuse and neglect to make the child ‘strong and so he would grow to be a man’.

Over several months the boy was subjected to sustained physical abuse from the woman’s boyfriend, including being beaten by a branch while running along a beach, denied adequate food, clothing and shelter. At one stage the child was forced to eat his own faeces.

In March 2013 the mother filmed the man assaulting the boy.

The boy was the youngest of three children. All three children had been withdrawn from school.

The night before the child died he was subjected to 6 hours of physical abuse from the boyfriend, including squatting against a wall and being forced to stand for hours on a coffee tin. Police stated that the mother had failed to seek medical help for the child despite having found the boy unconscious.

The boyfriend had told the woman to lie to the police about the accident.

The woman was charged with consenting to the use of her child to produce child abuse material, possessing and distributing child abuse material, reckless wounding and manslaughter.

Her boyfriend was charged with the boy’s murder.
Different forms of dispute resolution are provided by Family Relationship Centres – government-funded community centres that help couples and families at all stages of relationships (see Family Relationships Online at http://cambridge.edu.au/redirect/?id=6354) – but disputing parties can go to private providers of counselling services if they choose. The Family Court and the Federal Circuit Court of Australia (the Family Law Courts) can refer disputing parties to an extensive range of counselling services for both adults and children, and can also order separating couples to attend dispute resolution. Although individuals have to pay for these services, some associated costs may be subsidised by the government, depending on the financial circumstances of the individual parties.

Types of dispute resolution services include:

- **reconciliation counselling** – for separating couples who are attempting to reconcile
- **post-separation parenting programs** – for couples whose issues adversely affect their carrying out of parenting responsibilities; the program usually takes the form of family counselling, group lectures and discussions, and teaching techniques to resolve disputes
- **mediation** – for separating couples who have made an application to the Family Court, mediation involves a neutral, impartial third party (a mediator) helping them identify issues, formulate options, consider alternatives and reach agreement; this service may be used before a court hearing.

Couples are more likely to comply with an agreement that they have had some say in. Individuals also learn additional skills, such as better communication, which may help reduce future conflicts. In addition, dispute resolution is less costly than court proceedings, in terms of both time and money, and less stressful for all parties involved.

Individual counselling is available to any child whose parents are separating. The counsellor (mediator) will meet and discuss with the child their needs, issues, fears and concerns. The counsellor will then present a family report, which will include a summary of the information that the child has given to the counsellor, to the presiding judge. The purpose of this process is to ensure that the needs and welfare of the child are identified and met by any parenting order issued by the Family Court.

Once an agreement has been reached, separating parents enter into a parenting plan or file consent orders with the court. All matters relating to the children of the relationship must be finalised before the divorce is granted. If parties fail to reach an agreement, or if there are issues relating to abuse or family violence, the matter will be heard by a court.

**Adjudication**

Adjudication is the determination of a matter by a court judgement or ruling. The Federal Circuit Court of Australia and the Family Court can make decisions regarding division of property, and maintenance, and can make any decision that may affect children of a relationship. Divorce is automatic if the parties can show irretrievable breakdown of marriage and the required period of separation. Once the court has made its decision it will impose an order, such as a parenting order, which both parties must comply with. Unlike a parenting plan (agreement), any breach of the court order may result in further court action, financial penalties or other criminal sanctions.

Individuals wishing to divorce can now file an application for divorce online through the Commonwealth Courts Portal (see http://cambridge.edu.au/redirect/?id=6355). A small administrative fee is payable once the application has been made. This fee can be waived in certain circumstances (for those who hold government concession cards or are experiencing financial hardship, for example).

**The role of the courts in family law matters**

The law is primarily concerned with protecting the rights of family members and ensuring that individuals meet their family obligations. But the law also aims to provide structures and processes that will help disputing parties reach an amicable resolution. For this reason, the Family Court focuses more on reconciliation and on encouraging compliance than on arbitration and the use of sanctions or coercion.

**Family Court of Australia and Federal Circuit Court of Australia**

Before the establishment of the Family Court in 1975, the state courts would hear matters relating to divorce. The Family Court is a specialised court –
that is, outside the judicial hierarchy – and it hears matters relating to separation, divorce and other disputes related to marriage. Its jurisdiction is limited to those areas controlled by the Family Law Act 1975 (Cth), which include property and financial matters, maintenance, and parenting arrangements.

In late 1999, the Federal Magistrates Court, now known as the Federal Circuit Court of Australia, was established to relieve some of the case load of the Federal Court and the Family Court, and to reduce the cost and time required to deal with some federal matters. The Federal Circuit Court of Australia has a similar jurisdiction to the Family Court in that it can hear matters relating to divorce, the division of property, maintenance and children, and it can hear these for both married and de facto couples. It cannot hear any matters related to adoption, applications concerning nullity (that the marriage did not exist in the first place) or the validity of a marriage.

The majority of divorce applications are now heard in the Federal Circuit Court of Australia, and more complex issues, such as the intention of a parent to move interstate or to emigrate, and serious allegations of family violence or child abuse (Magellan cases) are heard in the Family Court. All other issues (such as adoption, inheritance and wills) are heard in the appropriate state court.

Initially, the jurisdiction of the Family Court did not extend to ex-nuptial children. This is because the Commonwealth Parliament’s constitutional power to enact legislation only extended to marriage and divorce, and matrimonial issues arising from divorce; therefore only children of a marriage came within the Act. However, all the states except Western Australia referred their power to pass law regarding certain matters relating to children to the Commonwealth in 1986, through Acts such as the Commonwealth Powers (Family Law – Children) Act 1986 (NSW). In New South Wales, any matter relating to the care and maintenance of a child will now be heard in the Family Court, and the same federal provisions cover all children.

**Review 12.11**

1. Explain the concept and purposes of ‘family dispute resolution’.
2. Explain the difference between adjudication and other methods of dispute resolution.
3. Outline and contrast the tasks of the Family Court and the family law jurisdiction of the Federal Circuit Court of Australia.

**The Children’s Court**

The Children’s Court is a state court. New South Wales has six permanent Children’s Courts, as well as children’s magistrates who can conduct hearings in other locations. The President of the Children’s Court is also chairperson of the Children’s Court Advisory Committee, which provides advice on the rules, practice and procedure of the court.

The Children’s Legal Service, which operates through Legal Aid NSW, provides representation for children and young people in both criminal cases and child welfare cases before the Children’s Court.

The Children’s Court Clinic is part of the Children’s Court, and provides independent clinical assessment of children, young people and

**Legal Links**

Visit the Family Law Courts website (http://cambridge.edu.au/redirect/?id=6356) to learn more about the family law system in Australia.
their families. The clinic provides a report to the Children’s Court to help the court make decisions regarding the care and protection of children.

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). Such cases are usually brought by Community Services, a division of Family and Community Services in New South Wales. They are responsible for keeping children and young people safe from harm, and supporting their families.

The Children’s Court is a closed court, which means that people not directly involved in the case are not allowed to be present unless the court otherwise orders. Court proceedings are informal and each step is explained to the child. During the hearing the child will be represented by a solicitor. The standard of proof required is that it is ‘very highly probable’ that the child is in need of care.

If the Children’s Court finds that a child is in need of care, it can make a variety of orders, which can be either short term or long term. Community Services may be required to supervise the parents to ensure that they fulfil their parental responsibilities. Alternatively, the court may decide to place the child with a relative, foster family or other appropriate adult. If this decision is reached, the child’s parents no longer have control over their child. Contact visits may be permitted to allow the parent(s) and child to maintain a personal relationship, but such visits are closely supervised and regulated. A variety of support services may be provided to both parents and children, including educational, psychological and welfare services. Orders by the Children’s Court cease when the child turns 18 years old.

The jurisdiction of the Children’s Court also includes crimes committed by people who were under 18 at the time of the alleged offence.

Bringing a child to court for a criminal offence is seen as the last resort. Many have argued that the earlier a child comes into contact with the law, the more likely they are is to commit serious offences upon reaching adulthood. Consequently, the legal system should minimise contact between children and the legal system, in the hope that fewer children will become repeat offenders. This view underlies the objectives set out in s 3 of the *Young Offenders Act 1997* (NSW):

(a) to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings, and
(b) to establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences, and
(c) to establish and use youth justice conferences to deal with alleged offenders in a way that:
   (i) enables a community based negotiated response to offences involving all the affected parties, and
   (ii) emphasizes restitution by the offender and the acceptance of responsibility by the offender for their behaviour, and
   (iii) meets the needs of victims and offenders, and
(d) to address the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings.

The role of non-government organisations (NGOs)

There are a number of NGOs that provide support for families and individuals who may be struggling with personal relationships and other family issues. Many of the better-known organisations are operated by religious groups such as the Salvation Army, or by churches such as Family and Relationship Services Australia (http://cambridge.edu.au/redirect/?id=6357) and Anglicare (http://cambridge.edu.au/redirect/?id=6358).

NGOs that are not associated with religious groups and that provide similar services include Relationships Australia (http://cambridge.edu.au/redirect/?id=6359) and the Smith Family (http://cambridge.edu.au/redirect/?id=6360). Services provided by these organisations include mentoring, support for new parents, counselling and relationship advice, assistance with managing conflict and dealing with violence in the family, emotional support to children of separating parents, mediation, and advice on creating parenting plans. Many of these organisations are dependent on donations and the goodwill of volunteers, and/or have to apply for government funding. Under the ‘Keep Them Safe’ initiative, the New South Wales Government has committed $750 million to...
expanding the role of NGOs in providing help and support to families in crisis. The aim is to encourage NGOs to take over the provision of services that are currently delivered by the state government.

**The role of the media**

The media has changed dramatically within the last few years and will continue to change with the development of new communications technologies. The Family Law Courts have embraced new media technologies, placing self-help guides, brochures and forms, and links to other sites on their own websites, and establishing the National Enquiry Centre to answer telephone and email enquiries about general court procedures and individual cases, to provide referrals to legal advice and other services, and to provide forms and publications.

The courts have effectively used new media technologies to provide better information about rights and obligations under family law, as well as additional support services. They are also keenly aware of the need to protect the privacy of individuals affected by the breakdown of a relationship, so they restrict how the media publish court proceedings, thus balancing the provision of information and legal direction with the protection of personal information about separating families.

**12.3 Contemporary issue: Recognition of same-sex relationships**

**About the issue**

The Marriage Act 1961 (Cth) and various state statutes give heterosexual couples a number of rights and obligations from which same-sex couples are excluded and, although the Sex Discrimination Act 1984 (Cth) and state anti-discrimination Acts protect heterosexual de facto couples against discrimination on the basis of marital status, same-sex couples do not enjoy the same protection because their legal marital status remains ‘single’.

In 2001, The Netherlands became the first country to recognise same-sex relationships. Since then a number of countries have enacted legislation recognising same-sex marriage. These countries include the United States, England, France, Brazil, Canada and New Zealand. A number of countries have indicated that they intend to create legislation recognising same-sex marriages. Under the as yet un-enacted Relationships Register Amendment (Recognition of Same-sex and Gender-Diverse Relationships) Bill 2014 (NSW) same-sex couples who marry overseas can have their marital status recognised by the NSW Relationships Register for administrative purposes. This means that same-sex couples will be able to register their marriage and declare themselves as ‘married’ when completing forms. Tasmania (2010) and Queensland (2011) have already passed similar legislation recognising...
same-sex marriage performed overseas. This does not mean that same-sex ‘marriages’ have any legal standing within Australia. For some same-sex couples, the desire for legal recognition of their relationship does not necessarily mean that they want the right to be married. The removal of institutionalised discrimination and the provision of adequate legal protections may be a more pressing concern.

The Commonwealth Government reaffirmed the traditional concept of marriage as ‘the union of a man and a woman’ when it passed the Marriage Amendment Act 2004 (Cth), which amended the definition by adding those words to s 5(1) of the Marriage Act. The purpose of the amendment was to clarify that parties to a marriage must be one man and one woman. This means that any same-sex marriage is automatically void in Australia, including the marriage of any same-sex couple who had previously married in a country that granted same-sex marriages. It will not be possible for any same-sex marriage to gain legal standing in Australia until this definition has been amended to allow same-sex marriages. The debate concerning the legalising of same-sex marriages continues.

Changes to the law have been slow and haphazard, but the law is gradually changing. Such changes are to be encouraged if the law is to continue to protect the rights and mutual obligations that are created when two individuals form a relationship. In addition, there are cumulative benefits for our society in protecting any mutually supportive relationship, not least of which is the economic benefit associated with a two-income family (which is more likely than a heterosexual relationship to be without children). This purchasing power has been acknowledged with a two-income family (which is more likely than a heterosexual relationship to be without children).

Legal responses

The law has recognised relationships that exist outside the traditional concept of marriage. Originally these relationships were covered by the De Facto Relationships Act 1984 (NSW). This Act was later amended by the Property (Relationships) Legislation Amendment Act 1999 (NSW) and renamed the Property (Relationships) Act 1984 (NSW). The Property (Relationships) Act 1984 (NSW) recognises same-sex relationships as having the same legal standing as heterosexual de facto relationships, and provides the same protection.

Between 2000 and 2009, various Australian states and territories introduced a number of law reforms recognising same-sex relationships in specific areas. Under the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth), property and maintenance matters for separating same-sex couples are determined by the Family Court or the Federal Circuit Court of Australia. The Act extends the definition of ‘de facto’ to include two people who are not married or related by blood and who live together ‘on a genuine basis’. The Act does not distinguish between heterosexual and same-sex relationships. Finally, under changes to the Family Law Act, all matters related to children, including children of same-sex couples, are heard in the Family Court.

But same-sex relationships were still not recognised as having the same status as a ‘marriage’ under federal laws. In 2008, following the Australian Human Rights Commission’s report Same-Sex: Same Entitlements, the Australian Government introduced reforms with the aim of removing discrimination and giving same-sex couples the same entitlements as those presently enjoyed by heterosexual de facto couples. Since 2008, under the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth), federal law reforms have removed areas of discrimination from a range of laws and programs by amending or extending definitions such as ‘de facto partner’, ‘child’, ‘parent’, ‘couple’ and ‘family’ to include same-sex relationships.

For example, the Health Insurance Act 1973 (Cth) now allows a same-sex couple and their children to register as a family for Medicare and receive the same entitlements as a heterosexual couple and their children. Additional areas amended have been tax, social security, family law, superannuation, workers’ compensation and child support. Same-sex couples will be able to claim the same tax concession as those presently available to married or heterosexual de facto couples. They and their children will be able to claim superannuation benefits, and to receive the same social security and family assistance payments as heterosexual couples.

A major change in state laws concerns the recognition of a same-sex partner as the ‘parent’ of
their partner’s child. Male partners in a heterosexual marriage or de facto relationship have parental rights and responsibilities towards a child conceived during the relationship – that is, biological parents are regarded as having joint responsibility for the child. However, a partner of the same sex had no legal standing and could not make decisions about the day-to-day care of the child unless the Family Court had so ordered. Children conceived through donor insemination or assisted reproduction had only the mother listed on their birth certificates. The Miscellaneous Acts Amendment (Same-Sex Relationships) Act 2008 (NSW) granted equal parenting rights for the female partners of mothers, and both are listed as mothers on the child’s birth certificate. This change gives children born into same-sex relationships equal rights to inheritance from both parents and protects the rights of both mothers in matters involving the children if the relationship ends.

In September 2010 the New South Wales Parliament passed a law allowing same-sex couples to adopt.

Non-legal responses

Non-legal responses to the reforms have been varied, ranging from complete support to criticisms of the various state and federal governments for not going far enough in granting same-sex couples equal rights, to individuals and groups who are highly critical of any added protection of the rights of same-sex couples. However, it should be noted that there has been a steady shift in public opinion in favour of same-sex marriage. In a Nielsen poll conducted in 2013, 65% of respondents supported same-sex marriage. Seventy-two per cent of respondents supported same-sex marriage in a similar poll conducted by CrosbyTextor in 2014.

The Australian Human Rights Commission (AHRC) has held a number of inquiries into areas of discrimination and human rights violations. AHRC also makes recommendations to the government regarding the removal of institutionalised discrimination and legislation that does not comply with UN human rights treaties. In 2007, the AHRC report Same-Sex: Same Entitlements recommended amending federal laws that discriminated against same-sex couples and their children in the area of financial and work-related entitlements and benefits.

Other groups that actively lobby and campaign for the legal rights and social equality of gay and lesbian couples include Australian Marriage Equality (http://cambridge.edu.au/redirect/?id=6363) and the NSW Gay and Lesbian Rights Lobby (http://cambridge.edu.au/redirect/?id=6364). Australian Marriage Equality argues that the legally recognised institution of marriage should not exclude these couples. A different classification sends the message that their relationships are of a lesser standard or character and that the people are second-class citizens. Justice requires changing the law to make marriage available to all Australians who choose it, not classifying same-sex couples as de facto couples or permitting them only to form ‘civil unions’. The Gay and Lesbian Rights Lobby has a wide-ranging agenda, including advocacy, lobbying government and the media to address discrimination, hosting consultations, educating the gay and lesbian community on their rights and providing referrals to legal and welfare services.

Some sections of the media have been critical of these changes and have resorted to ridicule. For example, in 2003 two radio program hosts made comments ‘capable of inciting severe ridicule of homosexual men’ and therefore were held to have breached the vilification provisions of the Anti-Discrimination Act 1977 (NSW). In 2008, the hosts’ appeal was settled, with a public apology on air and a written apology in the Sydney Morning Herald.

Figure 12.9 Many believe that same-sex couples deserve equal rights. Our current laws discriminate against same-sex couples wishing to marry.
In 2012, a Queensland politician was widely criticised in the media for portraying gay marriage in a negative manner in order to undermine his political opponent.

Most of the lobby groups that oppose equal rights for homosexual couples have a religious affiliation: see the Australian Christian Lobby (http://cambridge.edu.au/redirect/?id=6365), for example. Under the current discrimination laws, religious groups continue to be able to discriminate on the basis of sex, sexuality, race, disability and age. This allows these organisations to withhold services to individuals.

**Responsiveness of the legal system**

In order to change the law, courts have to be willing to act, a significant number of politicians must support legislative reform, and there also needs to be a societal change. Law reform bodies have the task of investigating and recommending changes.

The Anti-Discrimination Board of New South Wales is part of the New South Wales Department of Attorney-General and Justice. It administers the anti-discrimination laws of New South Wales. It handles complaints of discrimination, and also informs the public of how individuals can prevent and deal with discrimination, through consultations, education programs, seminars, talks, community functions and publications. The board’s third function is to advise the government and make recommendations. It has made a number of submissions to both the state and federal governments concerning changes to current legislation that are necessary in order to give same-sex couples the same legal rights and protections that are now enjoyed by married couples.

In 2013, there was an attempt to introduce legislation which would have recognised same-sex marriages entered into overseas. These proposed changes followed the introduction of legislation allowing same-sex marriages in New Zealand and would have allowed any Australian same-sex couple marrying in New Zealand having their marriage recognised in Australia.

Although a successful referendum regarding changing the definition of marriage was held in Ireland in May 2015 legalising same-sex marriage, there has been heavy criticism of the outcome, most notably from the Catholic Church. Marriage in Ireland may occur between two people irrespective of their sex. In June 2015, the US Supreme Court ruled that all US states must grant marriage licences to same-sex couples wishing to marry and that marriages that have taken place in states that had already recognised same-sex marriages must also be recognised in all states. This effectively has meant that same-sex marriages are now legal throughout the United States.

However, arguments against the recognition of same-sex relationships continue to exert an influence in the public sphere. The legislative changes to de facto entitlements by the federal government in 2008, while welcomed, sat alongside a continuing refusal to amend the *Marriage Act* to permit same-sex marriage.

**Conclusion**

In his speech at the Conference on Legal Recognition of Same-Sex Partnerships in 1999, then High Court Justice Michael Kirby stated:

As a people committed to equal justice for all under the law, I have confidence that the Australian legal system, and those who make laws in Australia, will, in due course, eradicate unfair discrimination on the basis of sexuality. The scales are dropping rapidly.

**Review 12.13**

1. List the issues surrounding same-sex relationships and discuss the effectiveness of legal and non-legal responses in addressing them.
2. Discuss the changing social attitudes towards same-sex marriage and whether or not the Australian Government has responded to this issue appropriately.
from our eyes. Injustice and irrational prejudice cannot survive the scrutiny of just men and women.

Both the state and federal governments take note of and continue to respond to issues surrounding discrimination. These issues are not limited to same-sex relationships. Similar recognition, rights and protections for non-traditional and alternative or extended family relationships are also needed.

12.4 Contemporary issue: The changing nature of parental responsibility

About the issue
The concept of parental responsibility has changed. In the past, parents sought ‘custody and control’ over their children, enforcing their parental rights. Now the courts are less concerned with parental rights and more concerned with parental responsibility. The focus of the law is on ensuring that parents fulfil their legal obligations towards their children.

Parents have joint responsibility for the child (see Family Law Act 1975 (Cth) ss 61B and 61C). Reforms to parental responsibility were made in 2006 under the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth). Shared parental responsibility applies equally to a child born within marriage (nuptial) and to a child born outside of marriage (ex-nuptial). This responsibility is not altered if the parents separate, marry or remarry, unless there is a court order otherwise. Reforms to family law have tended to focus on maintaining positive and supportive family structures even when parents separate. But the law has also focused on ensuring that parents meet their responsibilities towards their children.

There is a perception that the ideal of shared parental responsibility is frequently not reflected in reality. There are always instances where the child will spend a disproportionate amount of their time with one parent. This could be because of financial or geographic constraints, or issues such as a parent’s alcohol abuse or poor health. In more than 60% of parenting plans and orders, children spend more than half of their time with their mother. The main reason for a child to spend no time or less than 30% of their time with a male parent was concern about abuse or family violence and entrenched conflict. For women it was concerns regarding their mental health, and issues surrounding transport or finances, as well as abuse.

A key point to remember is that shared parental responsibility, or shared responsibility for major decision-making, is not the same as shared care (equal time with both parents). However, it can be argued that the 2006 family law changes, which were aimed at encouraging parents to share both responsibility and care more equally, have had some unintended and undesirable consequences. One of these was that more parents mistakenly believe that they are now entitled to 50/50 shared care of their children. Another is that the legislation’s emphasis on a child’s right to a relationship with both parents has been given more weight than is warranted.

Legal responses
Reforms introduced by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) included two types of considerations to be taken into account by a court in respect of the ‘best interests’ of the child (Family Law Act 1975 (Cth) s 60CC). The court will now take into account ‘primary’ and ‘additional’ considerations. Primary considerations include the benefit of the child having a positive and meaningful relationship with both parents, and the need to protect the child from abuse and family violence. Additional considerations include
the child’s wishes, the nature of the relationship between the child and the parent, the financial ability of the parent to care for the child and the ability of the parent to provide for the intellectual and emotional needs of the child. Where there is the risk of violence, the court may consider that further contact may not be in the best interests of the child.

Another change involved the notion of the child spending ‘substantial and significant time’ with each parent, where equal time is not considered to be in the best interests of the child (Family Law Act’s 65DAA). Some have argued that this provision has not been sufficient to address parents’ misperception that both are ‘entitled to’ time with the child, and that they should both have ‘substantial and significant time’ even when there are other factors suggesting otherwise.

When more time with children is coupled with reduced child support payments, the motivations for seeking shared care become less clear, and courts may have a harder time reconciling the aim of facilitating the child’s relationship with both parents with the actual facts of the particular family situation.

A parent who has been pressured into allowing the other parent more time with the child may be discouraged from raising concerns about family violence, and may think that the court will order shared care anyway.

The federal government’s Time for Action: The National Council’s Plan to Reduce Violence Against Women and Their Children 2009–21 identified a range of issues which undermined the effectiveness of the present domestic violence and child protection legislative framework. In response, the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) was passed. Under that Act, courts must now take into consideration evidence of and any findings made in relevant domestic violence order proceedings in determining parenting matters. If there are reasonable grounds to believe that one or both parents have neglected or abused their child, this overrules the presumption of equally shared parental responsibility. Under the 2011 amendment, the priority is to protect children from harm rather than to ensure that children maintain a meaningful relationship with a parent.

Non-legal responses

Community and church-based institutions, as well as nation-wide organisations such as Relationships Australia, can help separating parents negotiate their own parenting agreements and can also provide a range of information and referrals. Counselling, education and skills training not only help parents develop better parenting skills, but may also assist in recognising gender issues that affect relationships with children in negative ways (for example, the attitude that fathers are inherently less competent than mothers in caring for toddlers, or that a good work–life balance is essential for mothers but less important for fathers).

Resolving problematic issues about shared parenting and shared responsibility requires changes in societal attitudes, and these interact with legislative enactments and amendments. Successful shared care was occurring before the 2006 amendments, where the parents involved were willing to cooperate to achieve the best circumstances for their children. Non-legal mechanisms such as women’s resource centres, the National Council of Women of Australia and parenting networks for mothers, fathers or both may be of value in furthering this aim. Dads in Distress Support Services provide support for men who are going through a divorce, separation or relationship breakdown. The service provides counselling, a helpline, referrals and advocacy. A second support group, Interrelate, provides ‘fathering programs’ and aims to help men build and maintain positive relationships with members of their families. It also provides counselling and referrals to other agencies.

Responsiveness of the legal system

Sometimes changes to the law have led to changes in what the community accepts as moral behaviour, and sometimes they reflect these social changes. The obligation to take responsibility for the care and financial support of a child is now, for example, considered one that should be met by both parents.

In addition, views about men and women have expanded to accommodate a much wider range of roles for fathers as well as mothers. A significant number of Australians now believe that fathers...
are equally capable of parenting, just as mothers are equally capable of fulfilling other roles seen as important aspects of a satisfying and productive human life.

In order to ensure that parents meet their responsibilities, the government has enacted a number of laws. Some of the trends that have arisen since the 2006 reforms to the Family Law Act suggest that courts – and society – still need to distinguish between families in which shared care is desirable and those in which there are concerns that override this aim. The most obvious legal response would be to change the law to distinguish between equal responsibility and equal time.

**Conclusion**

The emphasis on children’s rights reflects the idea that children are vulnerable members of our society and need greater protection. All decisions must be in the best interests of the child; the interests of their parents or care-givers are secondary. It is important to protect the child’s right to maintain a quality relationship with both parents, but the law also needs to ensure that parental responsibility entails more than the child merely spending half their time with each parent.

**Review 12.14**

1. List the issues surrounding equal parental responsibility and discuss the effectiveness of legal and non-legal responses to these issues.
2. Consider and discuss whether further legislative reforms would be useful to address the problems raised by parents’ misunderstanding the idea of shared parental responsibility.

**12.5 Contemporary issue: Surrogacy and birth technologies**

**About the issue**

**Birth technologies**

Under common law, the mother of a child is the woman who gave birth to the child. The father is the man who acknowledges and accepts the responsibility for the child or who is proved to be the father in court. Advances in birth technology mean that it is no longer possible to presume the identity of the biological parents. Birth technologies include:

- artificial insemination – where donated sperm are artificially introduced into the vagina or uterus
- IVF (in vitro fertilisation) – where fertilisation takes place outside the uterus using the sperm of a parent or donor and the ovum of a parent or donor, and the resulting embryo is then implanted in a uterus
- use of genetic manipulation, gene shearing or donated genetic material to alter a foetus in utero.

Birth technology has created many legal issues, from paternity and rights of inheritance to who has care of and control over the child. The father of the child may not necessarily be the ‘natural father’. For any child conceived via artificial insemination or in vitro fertilisation, the parents (whether married or not) are considered to be the legal and natural parents of the child and have all the obligations of maintaining and caring for the child. Under the *Status of Children Act 1996* (NSW), these children have the same legal status as children conceived naturally.

The *Status of Children Act* created the notion that ‘presumption of paternity’ is automatic, and is irrefutable if the couple are married or in a de facto relationship. Under this Act, ‘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) 21 Fam LR 186, the father refused to pay maintenance, arguing that the child was not his child and that maintenance was the responsibility of the sperm donor because the donor’s name appeared on the child’s birth certificate. The court rejected...
this argument. Under the ‘presumption of paternity’ he automatically became the child’s father because he was in a relationship with the child’s mother, and he therefore had all of the responsibilities and obligations in respect of the maintenance and care of the child, who was born within the relationship. A sperm donor is automatically presumed not to be the father (to have no paternity), and thus is not required to pay maintenance even if his name appears on the child’s birth certificate. However, any such presumption about the sperm donor may be altered if he makes a written application, signed by the mother and lodged with the Registry of Births, Deaths and Marriages. If paternity is in dispute, the Act allows the identity of the father to be determined by blood tests.

**Surrogacy**

Surrogacy involves an agreement between a commissioning couple and a woman, where the woman agrees to bear a child for the commissioning couple and then give the baby to the couple when he or she is born. Under the law, it is usually the woman who gives birth to the child – whether the child is conceived naturally or artificially – who is the mother. Before 2010, even if the birth mother used both donor ova and donor sperm or a donated embryo to achieve the pregnancy, she was still considered the legal and natural mother of the child. The status of the natural mother as the birth mother can be found in the *Status of Children Act 1996* (NSW), the *Family Law Act 1975* (Cth) and the *Marriage Act 1961* (Cth), and under common law. However, under the *Surrogacy Act 2010* (NSW), it is now possible to transfer the parentage of the child from the birth parent to the prospective parent in the surrogacy contract. This will in effect avoid the commissioning parents having to go through a formal adoption process. Any parentage order must be made in the best interests of the child. Under the *Surrogacy Act*, commercial surrogacy remains illegal even when carried out overseas.

**Summary**

Surrogacy raises many complex social, emotional and parenting issues, including the legal recognition of genetic parents. The law distinguishes between commercial surrogacy and altruistic surrogacy. Commercial surrogacy is an agreement involving a fee or reward paid to the woman who gives birth to the child, and the transfer of custody and parental responsibility for the child to another person, by adoption or agreement, with the child to be treated as the child of that other person. As noted above, commercial surrogacy remains illegal. Altruistic surrogacy, by contrast, is an arrangement in which the surrogate receives no financial payment for the pregnancy or the transfer of the child, though the commissioning parents may pay expenses related to her pregnancy and the birth.

**Legal responses**

The laws concerning surrogacy in Australia are state or territory based. Until recently, as noted, these laws have been inconsistent and provided inadequate protections and guidance. Some state and territory laws prohibited both altruistic and commercial surrogacy, some allowed altruistic but prohibited commercial surrogacy, and other laws were silent on the issue.

In 2008, the Standing Committee of Attorneys-General, a ministerial council drawn from state and Commonwealth parliaments and including the New Zealand Minister of Justice, agreed that a national model law regulating surrogacy was needed. In 2010, the standing committee released a draft of

![Figure 12.11 Surrogacy laws vary from state to state. In recent times, Australian surrogacy laws have created issues involving parents who travel overseas for surrogacy services.]
15 principles for a national surrogacy model which would include the following:

- The informed consent of all parties is essential, along with specialist counselling.
- Court orders should be available to recognise the commissioning parents as the legal parents if that is in the best interests of the child.
- Court orders should not be granted for commercial surrogacy.

In May 2009, the Legislative Council Standing Committee on Law and Justice tabled a report on altruistic surrogacy in New South Wales which aimed to clarify the legal rights and responsibilities of commissioning parents and birth parents, and clarify the rights of children born through surrogacy. Drawing on the recommendations of the national and state committees, the New South Wales Parliament introduced new legislation in 2010 to regulate surrogacy arrangements in New South Wales. The New South Wales Parliament passed the Surrogacy Act 2010 (NSW), which commenced in early 2011.

Prior to the commencement of the Act, in most cases in New South Wales the Status of Children Act 1996 (NSW) meant that a child’s legal parents were presumed to be the birth parents. This meant that commissioning parents in a surrogacy arrangement, although in practice the parents of the child, would not be recognised as the legal parents and could face difficulties if trying to enrol the child in a school, access certain government benefits or apply for a passport for the child. In addition, where the child was conceived in a stable relationship, the male partner of the surrogate could be assumed to be the father even if he was not the biological parent. This would mean that the child’s biological father had no rights in regard to his child. It was also illegal for the surrogate mother to ‘give’ her child to the commissioning parents, as placing a child with a person who is not a relative for more than 28 days is illegal under the Children (Care and Protection) Act 1987 (NSW). If, however, one of the commissioning parents was also a biological parent of the child, this would be permitted.

Some aspects of altruistic surrogacy were previously covered by the Human Tissue Act 1983 (NSW) or as adoption issues under the Adoption Act 2000 (NSW). There were also a few federal provisions addressing surrogacy issues in the Family Law Act 1975 (Cth), but these were not adequate to address all of the potential issues surrounding surrogacy. One important case involving commissioning parents attempting to have parentage rights recognised was the case Re Michael: Surrogacy Arrangements [2009] FamCA 691. The case was heard under the Family Law Act because, as noted above, New South Wales at the time lacked clear state legislation relating to surrogacy. The commissioning parents were attempting to apply to the Family Court to adopt the child under s 60G of the Family Law Act 1975 (Cth). The essential question was, ‘Who are the parents of a child born as a result of a surrogacy agreement?’ In this case, the two biological parents (Sharon and Paul) sought an order to adopt their child after the surrogate mother (Lauren) had given birth to Michael. There was no dispute between the parties over who should have custody and responsibility for Michael, but the court had to determine whether Sharon and Paul were Michael’s legal parents, in order to decide whether or not they could initiate proceedings to adopt him. However, under the Family Law Act, if no orders have been made under state law regarding parentage, the child is deemed to be the child of the woman who gave birth and her partner (s 60H) – in this case, Lauren, the surrogate mother, and her partner Clive, neither of whom contributed genetic material. It was irrelevant that Lauren and Clive did not intend to be the legal parents. Even though Michael’s birth certificate named Sharon and Paul as his parents, the court found that the presumption of their parentage based on the birth certificate (s 69R) was rebutted (by s 60H). The court could not make an order for Sharon and Paul’s adoption of Michael. However, they could apply to the Supreme Court of New South Wales for an adoption order under the Adoption Act 2000 (NSW).

The Surrogacy Act 2010 (NSW) introduced a system of parenting orders where parties can apply to the NSW Supreme Court for an order to transfer full legal parentage of the child from the birth parent in a surrogacy arrangement to the commissioning parent. The new parentage orders grant the commissioning parents full legal capacity to make decisions in the child’s interests and aim to provide relief and certainty for all parties involved in surrogacy arrangements.

Under the new system, the commissioning parents must apply for a parentage order between
30 days and six months after the child’s birth. The first 30 days are intended to operate as a cooling-off period for the birth mother, to encourage careful consideration before any consent to the grant of a parentage order. The orders also apply to de facto couples (including same-sex). A parentage order requires that if two people enter into a surrogacy arrangement as intended parents, they must be a couple. Some of the other requirements of the new framework are:

- An order can be made only if it is in the best interests of the child.
- An order cannot be made in relation to a commercial surrogacy.
- The parties must have counselling and legal advice before entering into a surrogacy arrangement to ensure that they fully understand the implications, and the arrangement must be in writing.
- The birth mother must be at least 25 years old before entering the arrangement.
- The consent of the birth parents is required before an order can be made.
- There must have been a ‘medical or social need’ for the arrangement.

The Act also made certain amendments to other New South Wales legislation to ensure that the parentage orders and the status of the child would be recognised in matters concerning, for example, wills, property, relationship registers and other government entitlements.

While it permits and provides a legal framework for altruistic surrogacy, the New South Wales legislation expressly prohibits arrangements involving commercial surrogacy. The commissioning couple may pay for ‘reasonable costs’ associated with the pregnancy and birth of the child (Surrogacy Act 2010 (NSW) s 7). New South Wales residents who procure commercial surrogacies now risk a fine of over $100 000 and/or imprisonment for up to two years.

More and more prospective parents are pursuing surrogacy arrangements overseas. In 2008, there were 423 and in 2012 there were 978. This may be due to two broad factors: one is the difficulty in securing an altruistic surrogacy in New South Wales and the second is that surrogacy is poorly regulated in many countries. This second reason raises issues surrounding the exploitation of women in poor or developing nations and concerns surrounding the welfare of any child born in such arrangements.

The problematic nature of international surrogacy was raised in 2014 when Australian couples who had entered into a surrogacy arrangements refused to take both children when the surrogate mother gave birth to twins. In one instance, ‘Baby Gammy’, who was born with Down syndrome, was rejected by the commissioning couple who then returned to Australia with his twin sister, leaving the boy with his mother in Thailand. In the second instance, a commissioning couple refused to take both children, instead choosing to take only one and leaving the second child with their Indian surrogate mother. This had occurred in 2012 but only came to light in 2014. There have also been reported cases where parents have discovered that children born to surrogate mothers in India may in fact not be their biological children. The Family Law Council of Australia received a submission from the Department of Immigration and Citizenship (as it was then called) in 2013 which raised numerous issues surrounding the growing number of Australian couples engaging in international surrogacy. These concerns included the legal, ethical and moral issues raised by the lack of a legal framework governing international surrogacy. Some of these issues include:

- The Australian Citizenship Act 2007 (Cth) does not define ‘parent’; this means that a child born in India, which currently allows commercial surrogacy, will be granted Australian citizenship by descent but the child’s intending parents may not be considered the child’s legal parents.
- There are inconsistent requirements concerning surrogacy and the risk of unauthorised adoptions being described as ‘surrogate’ to avoid specific immigration requirements.
- There is a growing risk of ‘child trafficking’ in the guise of ‘surrogacy’, and the exploitation of young girls and women in developing and poor nations.

Presently an international legal framework governing surrogacy does not exist and in light of the growing number of international surrogacies there is a growing need to devise such a framework. However, such a framework is problematic as surrogacy, whether altruistic or commercial, is a
contentious issue and raises specific moral and legal issues within individual countries which may never be able to be resolved in one international instrument.

**Non-legal responses**

Various organisations and lobby groups have opposed surrogacy on moral grounds, usually based on religious principles. These concerns centre on the concept of a traditional family, especially because surrogacy may provide an avenue for same-sex couples to have children. These lobby groups have expressed a desire that surrogacy be restricted to infertile heterosexual couples. They have claimed that families with parents of the same sex face difficulties ranging from problems in accompanying one’s small child of the opposite sex to a public toilet to social stigma. A slippery-slope argument has also been employed; for example, the Australian Christian Lobby claimed in 2009 that surrogacy ‘would pave the way for two men or two women to “order” a baby they are not even genetically connected to’, and would deny the child either a male or a female parent and role model.

There has been a growth in commercial surrogacy centres, particularly in India where commercial surrogacy is permitted. Commercial surrogacy has become increasingly popular, particular for women in poorer nations like India who can now earn $5000 to $7000 per child, which may provide their own families enough money to purchase their own homes and a better life. It is estimated that global surrogacy has become a billion dollar industry (see http://cambridge.edu.au/redirect/?id=6368).

**Responsiveness of the legal system**

The federal government has been slow to pass laws relating to surrogacy issues and the courts are constrained by existing legislation. There remain wide inconsistencies in surrogacy laws between the states and territories. In New South Wales, previous laws were inadequate and people who sought to become parents under surrogacy arrangements were forced to deal with legal schemes that were not designed for those situations.

The *Surrogacy Act 2010* (NSW) encourages parties to a surrogacy arrangement to make sure they thoroughly understand the psychological, social and legal complexity of their decisions and the impact on the child. This new framework is an important development in increasing legal certainty for people who are parties to a surrogacy arrangement because they are otherwise unable to have children, but also in protecting the interests of children who are born into surrogacy arrangements.

**Conclusion**

Advances in birth technology have created a great need for law reform. When considering the new laws in this area, both parliaments and the courts need to address a multitude of conflicting ethical views. The rapid development of birth technology has challenged long-standing moral and legal conceptions of ‘family’ and ‘parent’. Prior to IVF, the woman who gave birth and her husband or partner were the child’s parents. However, the legal definition of ‘parent’ has now been extended to meet the challenges of new family arrangements and technological advances.

**Review 12.15**

1. List the issues surrounding surrogacy and discuss the effectiveness of legal and non-legal responses to these issues.

2. Identify the jurisdictional problems in the area of surrogacy.
12.6 Contemporary issue: Care and protection of children

About the issue
All states and territories, together with the Commonwealth Government, have passed laws regarding family violence, child abuse and child neglect. The focus of the Children and Young Persons (Care and Protection) Act 1998 (NSW) is on safeguarding the health and wellbeing of children, including protecting them from violence or abuse, and on the mandatory reporting of concerns to Community Services – teachers, doctors, nurses and other professionals must report if they believe there is a risk of harm from family violence or abuse. The amendments to the Family Law Act 1975 (Cth) by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), which aimed to ensure that children have a meaningful relationship with both their parents, require the court to consider the child’s best interests rather than parental interests. The Child Protection Legislation Amendment Act 2014 (NSW) amended the Children and Young Persons (Care and Protection) Act 1998 (NSW), the Adoption Act 2000 (NSW) and the Child Protection (Working with Children) Act 2010 (NSW). The aim of the amendments is to improve early intervention services, introduce parental capacity orders and allow adopted children to maintain a connection with their biological parents.

According to the submission of the NSW Ombudsman to the Wood Inquiry (Special Commission of Inquiry into Child Protection Services in NSW) on mandatory reporting, the number of ‘at risk of harm’ reports made to Community Services has increased steadily and continues to grow. According to the Australian Institute of Health and Welfare report Child Protection Australia 2014, in 2012–13 there were 184 216 children suspected of being harmed or at risk of harm from abuse and or neglect nationally. In total there were 272 980 notifications, with 53 666 or 20% of these claims being substantiated; 26 860 or 50% of all substantiated claims of abuse or neglect were in New South Wales and 13 146 children or 32% of substantiated reports were admitted to care or protection orders. Of those children who were admitted into care, 4877 or 43% were under the age of five (AIHW 2014, Child Protection Australia 2012–13, Child Welfare Series 58, Cat. no. CWS 49, Canberra: AIHW).

Legal responses
The Family Law Act 1975 (Cth) defines ‘family violence’ as any action or threat of violence by one family
member against another, including witnessing that action or threat, that causes fear or apprehension about personal safety. The 2006 amendments to the *Family Law Act 1975* (Cth) endeavoured to ensure that children are protected from both direct harm and harm resulting from exposure to family violence. The presumption of equal shared parental responsibility does not apply if there is a risk of child abuse or family violence (*Family Law Act 1975* (Cth) s 61DA).

If there is evidence of family violence, the court may order that the child’s contact with the offending parent is restricted or that the contact takes place within a controlled environment, such as with a social worker present. In this instance the concept of ‘shared parental responsibility’ does not apply. If relevant authorities consider that the child or young person is in urgent need of protection, Community Services can apply to the Children’s Court for an Emergency Care and Protection Order.

In cases where there is evidence that family violence has occurred, family dispute resolution may be inappropriate. The court will hear cases that raise family violence issues quickly so that it can take appropriate action to protect vulnerable family members.

The Family Court can order relevant state and territory agencies to provide information regarding allegations of family violence.

When Community Services NSW receives a ‘risk of harm’ report involving allegations of physical or sexual abuse, neglect or other criminal conduct regarding a child, a caseworker makes an assessment to determine the extent of the risk. Almost two-thirds of all reports are referred to a Community Services centre or a JIRT for further assessment and investigation. Members of this team include Community Services representatives, police and representatives from the NSW Health. Once the

![Figure 12.13 Graffiti in Lisbon depicting a priest chasing two children in criticism of the child abuse scandals of the church](image-url)
report has been made, the response team will speak to the young victim and act to protect the child if the child is in immediate danger.

If police decide that there is evidence of a crime, the suspect will be charged, the child will be assigned a caseworker, and the child will receive medical attention if needed. The response teams were established to improve interagency collaboration between NSW Health, the police and Community Services, and to provide counselling and trauma support for victims.

Reporting reduces the amount of administrative work for a caseworker and reduces the call load on Helpline, thus allowing caseworkers to focus on assessment. According to the NSW Family and Community Services Annual Statistical Report 2012/13, there were fewer calls to Helpline in 2012–13 compared to 2011–12. In 2012–13 Helpline received fewer calls (134,486) compared to 2011–12 (145,425), but there was a slight increase in faxes (8582 in 2013–13 compared to 8282 in 2011–12). Reporting of child abuse or neglect via eReports continues to increase. In 2010–11 there were 7480, in 2011–12 eReports increased to 11,963 and in 2012–13 eReports increased further to 13,524. The fall in calls to Helpline may largely be due to a new efficiency strategy introduced in 2012 where Helpline Community Service Officers (CSOs) now answer calls from non-mandatory reporters, thereby reducing the total number of calls answered by Helpline.

**Non-legal responses**

Churches and organisations such as the Salvation Army have traditionally provided extensive support and educational services to children in need. These services include childcare centres, counselling services (for example, for addiction and bereavement), and emergency housing and youth support programs. Although these groups have provided necessary help and support to children and families in crisis, some groups have also been heavily criticised for their lack of action in dealing with accusations of child abuse made against their own members.

Clergy members of various churches have been accused and found guilty of serious misconduct and child abuse. Some church organisations have been heavily criticised for their lack of support for victims of abuse at the hands of the clergy and some churches have been accused of protecting known child sex offenders within their ranks.

In response, the Anglican Church established a Professional Standards Unit that investigates complaints involving clergy and ancillary staff. In 2002, the Anglican Church made a public apology for the misconduct of clergy and staff and reaffirmed the church’s condemnation of such behaviours. In 1996, the Catholic Church established the Melbourne Response to investigate claims of clergy abusing young children. This has been heavily criticised as inadequate, with the average compensation paid to victims of systemic church abuse being $50,000.

Victims of abuse have been encouraged to contact the relevant church authorities to lodge a complaint. All major religious bodies which have contact with children and young people have established internal procedures for investigating abuse claims. As part of this process, each has established counselling services for abuse victims and compensation funds to pay future claims made by victims.

There are also a number of initiatives to provide support for families and children in crisis. These include:

- **Child Abuse Prevention Service (CAPS)** ([http://cambridge.edu.au/redirect/?id=6369](http://cambridge.edu.au/redirect/?id=6369)) – aims to alleviate child abuse by educating the community about child abuse issues and providing counselling and ongoing support for victims and perpetrators
- **Child Protection and Family Crisis Service** – provides 24-hour telephone counselling
- **the Benevolent Society** ([http://cambridge.edu.au/redirect/?id=6370](http://cambridge.edu.au/redirect/?id=6370)) – offers programs supporting families to overcome stresses that lead to abuse and neglect; services include counselling, home visits, access to child health professionals, play groups, social groups for parents, art therapy and links to local services
- **Families NSW** – a state government initiative which aims to make parenting easier by helping parents become better parents.

Various local municipal councils also offer programs providing help and support for children and young people.
Responsiveness of the legal system

Criticisms of child protection in New South Wales have been made about Community Services, the police, the courts and community groups. A review of the New South Wales child protection system began in 2006. A Children’s Commissioner was established to monitor state programs to eradicate child abuse and strengthen existing child protection. The review also proposed that a national framework for child protection should be established. No such framework yet exists.

The legal system has been accused of acting too slowly to protect child victims of abuse and there are claims that existing mechanisms to protect children are inadequate. An increasing number of people under 18 have been placed on care and protection orders. The Australian Institute of Health and Welfare in 2014 reported that nationally more than 135,000 children were receiving child protection services (investigation, care and protection orders and/or out-of-home care). During 2012–13, there were 51,997 children on care and protection orders. While some would argue that this indicates that people, once they are aware of their rights, will seek ADVOs to protect themselves and their children from harm, it also indicates that support and counselling services provided to perpetrators have been less than successful in modifying their abusive behaviours.

Sadly, in 2012, 88 children who had been previously reported to Community Services as being at risk of harm died at the hands of their abusive parent or carer. Many of the victims were less than five years old. Hampered by dwindling financial resources and staff cuts, Community Services has been unable to provide adequate protection and support for families and victims of child abuse.

Keep Them Safe: A Shared Approach to Child Wellbeing was a report from the 2008 New South Wales government inquiry into Child Protection Services. The report highlighted the importance of the wellbeing of all children and aimed to provide appropriate support to families to reduce the growing number of families requiring statutory child prevention.

The federal government has recognised child abuse and neglect as major issues and is seeking to create a national framework for protecting children. This will necessitate the coordination of government and NGOs, the creation of uniform child protection laws, and a focus on early intervention and prevention strategies to protect children from abuse and reduce the harmful effects that abuse has on children.

In January 2013, a Royal Commission was set up to investigate institutional responses to child sexual abuse. The six-member Royal Commission, with the Honourable Justice Peter McClellan serving as Chair, has held numerous formal public hearings to hear evidence of institutionalised child sexual abuse. The focus of these hearings has been on how various institutions, such as the Catholic Church, the YMCA, Salvation Army and various private educational facilities, have responded to allegations of child sexual abuse. The commission also heard evidence from survivors of child sex abuse of their experience of the ‘Towards Healing’ process. This process was established by the Catholic Church after the Wood Royal Commission and is largely a ‘pastoral response’ intended to encourage victims and survivors to enter into a pastoral relationship rather than an adversarial one with the church. This process has been criticised extensively as being inadequate in meeting the emotional and financial needs of victims and their families.

Conclusion

Children are vulnerable members of our society and as such they deserve, and are in greater need of, higher levels of protection than adults. The legal system has strengthened legislation surrounding the care and protection of children. Neglect and the abuse of children are now considered serious crimes.

Review 12.16

List the issues surrounding the care and protection of children and discuss the effectiveness of legal and non-legal responses in addressing them.
Chapter summary

• The concept of family includes nuclear, extended, blended and single-parent families, and the main function of the family is the care and protection of its members.
• Marriage is the ‘voluntary union for life of one man and one woman, to the exclusion of all others’. A valid marriage is between one man and one woman, who must be adults and not closely related.
• Marriage imposes legal rights and obligations on both husband and wife. These include matters relating to maintenance, property and wills.
• The Australian Government has the power and authority to make laws governing marriage and divorce. However, state laws regulate de facto and other domestic relationships, including adoption.
• Parents have legal and moral obligations to their children. Children have the right to the care and protection of their parents, and the right to education, medical treatment and inheritance. Recent reforms to the Family Law Act centre on shared parental responsibility.
• The UN Convention on the Rights of the Child (CROC) recognised the need for the universal protection of children’s rights. The convention has influenced family law within Australia.
• There is only one ground for divorce in Australia: irretrievable breakdown of marriage.
• The spouses must live separately and apart for 12 months before a divorce order will be granted. A divorce will not be granted if there are any outstanding issues related to any children of the relationship.
• In property settlements, courts will consider financial and non-financial contributions, age, income, childcare factors and other specific characteristics of the parties.
• Binding financial agreements can be made before, during or after a marriage.
• A main focus of family law is the protection of children. Many of the amendments made to legislation centre on enforcing parental responsibility and ensuring that decisions concerning children are made in the best interests of the children.
• The law also aims to provide dispute resolution structures and processes that will help parties reach an amicable termination of their relationship. The court focuses more on reconciliation and on encouraging compliance than on enforcement through the use of sanctions.
• Legal responses to domestic violence include AVOs/ADVOs, injunctions and criminal charges.
• A number of countries around the world have recognised same-sex marriage.
• Advances in birth technology have raised a number of new ethical and legal issues. The concept of parentage has expanded. Surrogacy remains a problematic area within family law.

Chapter summary questions

Multiple-choice questions

1 Marriage in Australian society:
   A can only be entered into by a person of sound mind and understanding
   B is the joining of two people to live together for the remainder of their lives
   C is defined in legislation and not in case law
   D is based on the idea of romance and can only occur once the couple have become engaged

2 A parenting plan is an agreement between parents covering:
   A living arrangements only
   B living arrangements and maintenance agreements
   C living arrangements, maintenance agreements, religion, culture, education, health and other issues
   D living arrangements and maintenance agreements but not religion, culture, education, health and other issues
3 If an ADVO is breached, police can arrest the offender:
   A if there is sufficient evidence to prove that such a breach occurred
   B although sufficient evidence is not necessarily required to prove that such a breach occurred
   C if they suspect the offender of previous breaches
   D but they don’t have to investigate claims of domestic violence

4 Family Relationship Centres were established to:
   A help people find a partner
   B help individuals maintain healthy relationships and encourage good parenting practices
   C provide information, referrals and assistance to individuals seeking to have the dominant share of responsibility and care for their children
   D provide a forum for disputing parents to negotiate a settlement

5 Individuals who enjoy greater protection of their rights than others include:
   A adults, who have more rights because they can earn money
   B children, who have rights until they are 18 years of age
   C adults, because they are seen as vulnerable members of our community, especially in their dealings with the law and with other adults
   D children, because they are seen as vulnerable members of our community, especially in their dealings with the law and with adults

**Short-answer questions**

1 If a marriage breaks down, should the dependent spouse be entitled to maintenance? Outline and explain the various factors that should be taken into account when determining maintenance issues.

2 Discuss the issues surrounding blended families and explain why a step-parent is not financially responsible for the children of their spouse.

3 Briefly explain how family law has responded to changing social values, such as increased incidence of divorce and the acceptance of de facto and same-sex relationships.

4 Create a table listing in chronological order the legislative and common law changes in family law and their effects.

5 Outline the legal issues surrounding family violence, and evaluate the effectiveness of current family law remedies in achieving just outcomes for all family members.

**Extended-response questions**

1 Evaluate the effectiveness of existing legislation in protecting individuals from domestic violence.

2 Identify and evaluate the arguments for and against changing the definition of marriage to include same-sex couples. Discuss, with reference to the claim that practical benefits such as superannuation, tax, property rights and medical consent issues are more important than the symbolic social role of marriage.

3 What weight should be given to children’s views with respect to disputes about parental responsibility?

4 Discuss the role of the media and NGOs in family law.

5 Identify and critically evaluate current Australian surrogacy laws. Suggest reforms that could be made in this area.

In Section III of the HSC Legal Studies examination you will be expected to complete an extended response question for two different options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000 words in length (approximately eight examination writing booklet pages). Marking criteria for extended-response questions can be found at http://cambridge.edu.au/redirect/?id=6371. Refer to these criteria when planning and writing your response.
Themes and challenges

The role of the law in encouraging cooperation and resolving conflict in regard to family

- An emphasis on mediation and counselling as primary dispute resolution processes has encouraged greater levels of cooperation between separating couples, and the vast majority of family disputes are now resolved without arbitration.
- This has been enhanced by court provision of information via websites and do-it-yourself kits.
- Disputing couples are required to attend compulsory family dispute resolution and family counselling sessions.
- The Family Court has reviewed its own internal processes and made substantial changes to make them less complex.

Issues of compliance and non-compliance

- The Family Law Council (a Commonwealth statutory authority established under s 115 of the Family Law Act 1975 (Cth) to advise the federal Attorney-General) has recommended that an enforcement agency be established to oversee the enforcement of parenting orders and assist in bringing complaints before the court.
- It is only when parties cannot reach an agreement that the dispute will be heard in the Family Court. Court intervention is seen as a ‘last resort’ because individuals are more likely to comply with a decision that they negotiated and reached voluntarily. Enforcement of Family Court orders therefore only comes into effect when there is a breach. The court will act to protect individual rights and enforce spousal or parental responsibilities.
- An individual must apply to the court to enforce orders breached by another party. Once the court is satisfied that a breach has occurred, it can impose various sanctions depending on the type, magnitude and number of breaches.
- If the breach was of orders pertaining to children, the court has a range of actions available to it. Remedies available to the court include variation of parenting orders, compulsory attendance at parenting programs, community service orders and, in extreme circumstances, imprisonment (Division 13A of Part VII of the Family Law Act 1975 (Cth)).
- Although AVOs/ADVOs are designed to provide protection against harm, there are concerns about their effectiveness. Approximately 10% of individuals do not comply with protection orders. AVOs depend on the named individual’s voluntary compliance with the order, the active policing of the AVO, and the victim’s willingness to report any breaches to the police.

Changes to family law as a response to changing values in the community

- The law reflects community values. Individuals are therefore more likely to obey the law if they believe that the law is essentially enforcing and promoting ‘right’ behaviours. Family law is concerned with managing human relationships, which is complicated by the multicultural nature of our society. The legal system must balance different cultures, ethical systems, religious values, social and family attitudes, and individual rights in the effort to develop the best processes for society as a whole.
- When children born in Australia to migrant parents adopt the cultural beliefs and practices of their new country, family conflict can result.
- The first major change in family law was the introduction of no-fault divorce. The declining influence of religion, an interest in removing the conflicts and difficulties resulting from blame, and the idea that marriage does not always last ‘for life’ were social factors that influenced this change, reflected in the Family Law Act 1975 (Cth), as well as the introduction of the sole ground for divorce – ‘irretrievable breakdown of the marriage’.
- Another important change in social attitudes has been in the increasing acceptance of gay and lesbian relationships. Recent law reforms have centred on providing same-sex couples the same rights and obligations as
de facto heterosexual couples and removing discrimination based on sexuality.

• The concept of responsible parenthood with respect to the care and financial support of a child is considered an important moral obligation that should be met by both parents. The Australian Government has enacted legislation to encourage and enforce parental responsibility through the legal system.

• Many of the changes in the law have revolved around protecting children. The emphasis on children’s rights reflects the idea that children are vulnerable members of our society and need greater protection. All decisions regarding children must be in the children’s best interests, and the interests of their parents or caregivers are secondary. This change can be seen in the emphasis on parenting plans and parental responsibility, in contrast to ‘residence’ and ‘custody’. The legal system’s aim is to protect the child’s right to maintain a quality relationship with both parents.

• Although a majority of people in Australia support same-sex marriage, parliament remains hesitant to act on this issue, instead reinforcing the legal definition of marriage as being between one man and one woman.

The role of law reform in achieving just outcomes for family members and society

• Agencies of reform are not limited to parliament and the courts. Law reform may be initiated by interest groups, the Law Reform Commission, international treaty bodies and government departments. Other agents of law reform include lobby or pressure groups attempting to influence members of parliament who will support the group’s aims.

• The Australian Human Rights Commission monitors and investigates any breaches of human rights recognised under Australian law. If the commission determines that a breach of human rights has occurred, it can make recommendations for legislative change to Parliament.

• One perennial criticism of the law is that it moves too slowly and does not adjust to changed circumstances fast enough. However, if the law changes too quickly, it may become poor law – too broad or too narrow, contradictory and hard to enforce.

• One of the main criticisms of legislative reform is the recurring problem of time delays between proposing legislative change, drafting and enacting the change. Any unnecessary delay may have enormous consequences; however, passing legislation without due consideration can lead to an unjust outcome.

The effectiveness of legal and non-legal responses in achieving just outcomes for family members

• The legal system acts to protect the values that the whole community holds important. The principles of fairness, justice and equity constitute key values. In addition, our community believes that it is important to protect the disadvantaged, or those who cannot act to preserve their own rights – particularly children.

• Domestic violence continues to be a large societal issue. There have been numerous law reforms concerned with eradicating family violence and protecting its victims. Law reforms include mandatory reporting and changes to the Bail Act 2013 (NSW). Non-legislative mechanisms include services provided by government and NGOs to assist families with conflict resolution, such as counselling and mediation.

• Changes to the Surveillance Devices Amendment (Police Body-Worn Video) Act 2014 allow police to videotape evidence and statements taken at the scene of the offence to be used in court. This removes the need for victims to testify in court and shows the immediate impact of domestic violence to the court.

• There are still concerns about the effectiveness of child protection services. Community Services NSW has been inundated with reports of alleged abuse. There is evidence that the laws relating to domestic violence and the protection of children are inadequate, particularly when considering the deaths of children identified as being at risk.