



Submission in response to Issues Paper 48

Australian Law Reform Commission Review of the Family Law System

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Objectives and principles

Question 1. What should be the role and objectives of the modern family law system?

It is noteworthy that, despite the frequency of exercise in case law of the statement of guiding principles for parenting matters at s 60B, the *Family Law Act, 1975* ('FLA') does not contain an overall objects clause. Marrickville Legal Centre ('MLC') considers that inclusion of an objects clause for the Act would provide additional clarity and guidance to the community on the purpose of legislation, would provide greater guidance to decision-makers in applying the Act, and provide a measure of accountability for evaluation of practice in relation to the Act, and the operation of the family law system overall. In the context that many stakeholders (both parties and practitioners, as reported to us) experience iatrogenic outcomes within the system, we consider that a standard should be set for the operation of the Act as an effective social regulatory and policy tool.

MLC supports the functions described at para. 38 IP48 as providing a solid basis for an overall statement of objectives. Additionally, we would support the inclusions of the objects of:

- **accessibility.** Most families negotiate post-separation arrangements privately, without recourse to the family law system. Often, they do this with significant effort on their part to arrange their affairs by reference to the FLA. The notion of 'bargaining in the shadow of the (family) law' is an important, and, we submit, an under-studied concept. Australians need their family law to be accessible and comprehensible so that they can bargain in the shadow of the law. The FLA is currently too complex to acquit this important social and efficiency function effectively. As a community legal centre with an ethnically diverse metropolitan catchment, a very high proportion of our family law and family violence clients have culturally and linguistically diverse (CALD) backgrounds. We find that these clients have particular difficulty in gaining any fluency in utilisation of the law or of the system, even with language support. But lay people of *any* background struggle to use the FLA as a guidelight. It is virtually un-navigable for any of the populations of vulnerable and disadvantaged people without significant professional support.
- **equity.** In MLC's day-to-day experience with disadvantaged clients in the family law system, we see that outcomes relate to strongly to the extent of the economic means of the respective participants. This is inequitable. Equitable participation in the Australia's

family law system should be affordable for all and should be an express principle underpinning the design of, and practice in, the FLA.

- **timeliness.** The current delays in the system detract significantly from the benefit that participation would otherwise bring.
- **the rights of children.** We support the continuation of the object, currently situated at s.60B(1), that the object of Part VII of the Act is to give effect to the United Nations *Convention on the Rights of the Child*. We do not agree with criticisms of its inclusion that this object increases uncertainty and provides for grounds for contention between the parties.¹ As we will argue in later parts of this submission, it is our view that Australian family law should move quickly and strongly towards closer compliance with the international standard.
- **facilitation of non-litigious decision-making and dispute resolution.** An objective of this type would further promote the idea of ‘family law as a guide-light’ for private decision-making. It would give recognition and status to the importance of the family dispute resolution (FDR) reforms that have arguably been one of the most significant successes of the system in recent decades. It would provide a basis for further legal and procedural reforms for more embedded, longitudinal engagement of FDR throughout the history of a case. It provides a basis, too, for any legal and procedural reform that addresses the reduction of adversarial behaviour by parties.

We strongly agree that the adversarial process is anathema to the effective dispute resolution in the family context. It is damaging and likely to lead to inappropriate, inequitable, unsafe and anti-therapeutic outcomes for particularly for children but also for adult participants where one or both of the parties are self-represented litigants.

Question 2. What principles should guide any re-development of the family law system?

MLC sees the issue of principle in two frames: as a set of considerations to be applied by the courts in the exercise of jurisdiction under the Act, and secondly, as a set of concerns to guide the re-development of the system.

¹ P. Parkinson, P. ‘The Family Law Act and the UN Convention on Children’s Rights: A New Focus on Children.’ In *Right Now: Human Rights in Australia* <http://rightnow.org.au/opinion-3/the-family-law-act-and-the-un-convention-on-childrens-rights-a-new-focus-on-children/> (Accessed 13 May, 2018).

In the first context, we agree with the continuation of the existing provisions of s. 43, subject to the deletion of reference to ‘the need to preserve and protect the institution of marriage as the union of two people to the exclusion of all others voluntarily entered into for life’ (para (a)), and also of para. (d) which refers to assisting parties towards reconciliation. These aims are not consistent with the growing societal conceptualisation of marriage, and possibly of marriages, as part of serial experience within contemporary life, nor of the waning influence of Christianity in Australian life.

Additionally, and with a view to current and likely future trends in family life, we support the addition, at para (c), after the word ‘welfare’, of the words ‘and development of the individual child’. Further, we would like to see new principles embedded in the law for recognising:

- the changing and multi-faceted composition of the notion of family and the need to ensure equality of treatment; and
- the importance and relevance of Indigenous and ethnic culture in family relationships, family breakdown, in post-separation arrangements and in resolution of disputes.

In the second context, we would argue that reforms to the family law system should take place in a fabric of principle that valorises:

- **simplicity** – a law that ordinary people can read, understand and use to structure and support their private arrangements
- **child-focus** – with a view to the discerning post-separation arrangements most appropriate for the welfare and development of the individual child
- **multi-disciplinarity+case management** – Many post-separation family problems do not naturally lend themselves to regulation in the form of law. To state the obvious, it is family law that creates a legal problem out of conflict that is relational at its base. The dynamics involved in family conflict have complex emotional, cultural, social, health and economic underpinnings. Characterisation of family conflict as a ‘legal problem’ does not assist, and frequently exacerbates, dispute. Successful design and implementation of post-separation arrangements, for child issues particularly, if the parents cannot arrange this themselves, requires the co-ordinated input of a range of expertise (from psychologists, social workers, independent financial consultants, addiction specialists, cultural and community representatives and others).

- **Cross-jurisdictional integration and coordination** – Better integration of family law, child protection and domestic violence, justice and health systems is crucial to the better management of complex family law issues. Representatives from these systems could be integrated within a partnership or panel model of complex case management as appropriate. There is further discussion of models of integration in later sections of this submission.
- **Safety, health and well-being** – of women and children particularly, but for all individuals involved in the process. Participation in family law processes should not decrease personal security, nor should it involve the negative impacts on health and well-being that are so often the experience of parties (caused by chronic delay, inefficiency, inequity, and the failure to address the developmental needs of children).
- **Longitudinal rather than event-based focus.** We agree with statement of need for re-orientation of the temporal focus of family court process from a build-up to a single, large decision-making event, towards the constitution of a family matter *a series of decision events*. The series might continue to lead from one decision event to the next while the requirement for decision-making support from the system is still apparent, but it might also cease at any point that resolution is reached (by whatever idiosyncratic pathway of support the facts of the case have suggested).
- **Increased funding for no- or low-cost services** supporting effective engagement in family law and associated jurisdictions’ processes, and particularly to the child-focused, child-inclusive services (supervised contact, family dispute resolution, services specific for vulnerable and disadvantaged groups, court-based services).

Access and engagement

Question 3. In what ways could access to information about family law and family law related services, including family violence services, be improved?

As noted previously, we recommend that the law itself should be greatly simplified to the minimum necessary to perform its stated objectives. ‘Bargaining in the shadow of the law’- a powerful and effective concept, could then take place more effectively, in private and in family dispute resolution, with less recourse necessary to formal processes.

Additionally, MLC recommends the provision of better funding for low- or no-cost family law support services, particularly for duty lawyer, family law advisory and case management services

performed by community legal centres, legal aid offices, duty solicitor or other court-based support, for supervised contact services, for more accessible family dispute resolution and for specialised family dispute resolution services for addressing complex family profiles.

We appreciate and value the helpfulness of family law court registry staff, and the utility of the Commonwealth Courts portal live chat-line. These types of resources should be supported and extended.

Face-to-face educational resources to assist the very many clients of the system who do not have English-language literacy, or digitally literacy or resources, should be freely and widely available also.

Question 4. How might people with family law related needs be assisted to navigate the family law system?

We recommend better funding for low- or no-cost family law support services, particularly for duty lawyer, family law advisory and case management services performed by community legal centres, legal aid offices and duty solicitor or other court-based support.

We support an approach to web- and hard-copy literature that:

- focusses not only on court events and elements of process, such as forms, but also on a problem-focussed, FAQ perspective: ‘How do I...?’ ‘Will it matter if I...?’;
- provides sample completed forms and form sets; and
- includes more flow-charts and video-links to support visual and spatial learners, and those with disability, or with cultural disadvantage relative to the system;
- includes more culturally specific resources; and
- includes more resources for children and young people

If the law continues as it currently is - complex, and effectively navigable only by lawyers - we recommend the provision of appropriately calibrated public legal education: on the workings of the major sections of the law itself, on the intersection of family law with domestic violence and child protection, on divorce, de facto relationships, principles of evidence and trial management.

We support the funding of National Legal Aid, as described in para. 50 IP48, to provide a form of community legal education resource, but suggest that regular face-to-face education should be available also. Many users, and particularly those with complex needs who are represented strongly

in our client base, do not find private literature-based study a viable method for effective learning. Many of them do not have access to the internet, digital resources or the skills to access digital resources effectively.

MLC supports the provision of navigation assistance for the family law system, within a model of case management for all.

Question 5. How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

We submit that the effective and equitable participation of Aboriginal and Torres Strait Islander people in the family law system is currently and significantly hampered by issues of affordability, language, safety, accessibility and cultural inappropriateness. We strongly support:

- development and delivery of specific Aboriginal and Torres Strait Islander system responses;
- participation of Aboriginal and Torres Strait Islander workers in multi-disciplinary advisory and potentially also, decision-making, panels;
- development of Aboriginal and Torres Strait Islander workforces for all roles within the family law system; and
- work with Aboriginal and Torres Strait Islander communities to develop tailored education programs.

MLC supports the recommendations of the Family Law Council in *Improving the Family Law System for Aboriginal and Torres Strait Islander Client*.²

MLC would welcome specific funding and further research in the development of a more appropriate model or theory of family violence in Aboriginal and Torres Strait Islander communities.

² Family Law Council, 'Improving the family law system for Aboriginal and Torres Strait Islander clients' (February 2012) available at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf> (Accessed 13 May 2018) at 99-103.

Question 6. How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

It is MLC’s experience that culturally and linguistically disadvantaged clients have some of the worst experiences in the family law system. They come to us with court orders, including consent orders, that they don’t understand and don’t know how they received, and with need for representation in significant court processes at very short notice, quite often with strong domestic violence as an overlay. With the international element in their case histories, the facts of their family law matters are often quite complex, involving relocations, passports and the airport watch list, quite apart from sometimes significant cultural differences that don’t align comfortably with the underlying principles of Australian law in property and parenting matters.

We support any system development that identifies and brokers satisfaction of needs for cultural or linguistic support at the earliest possible stages of a party’s engagement with the system. We support greater funding for the development and equitable distribution (i.e. not just in metropolitan areas) of effective support services.

We also support involvement of representatives of the culturally and linguistically diverse communities on a multi-disciplinary advisory panel, assisting in family law case management and decision-making.

We look forward to the results of the Family Relationship Centre pilots on legally-assisted, culturally-appropriate FDR.

We acknowledge that the costs of facilitating cultural competency in family law, across different cultural communities in Australia, may be significant. But an increasingly multi-lingual, multi-cultural Australia is our current and future reality. The challenge to enable effective and equitable participation in this most fundamental social regulatory system must be met.

Question 7. How can the accessibility of the family law system be improved for people with disability?

We agree that women and girls with disabilities are particularly vulnerable to family violence and sexual abuse, and that family law system has insufficient support mechanisms to assist them.

We strongly recommend additional funding provision for the development of specialist service and support streams for people with intellectual disability, mental illness, developmental disorders

and Acquired Brain Injury who experience family violence and sexual abuse, and who have legal issues in family law.

We support the development of a litigation guardian role within the context of a model of supported decision-making consistent with the right of people with disability to exercise their legal capacity as provided by the United Nations *Convention on the Rights of Persons with Disabilities*.

Question 8. How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

We agree that the existing provisions for recognition of parenthood where artificial conception is involved do not provide appropriate coverage for the children of male, same-sex relationships, nor for recognition of non-biological lesbian parents. We support reforms that would rectify this.

We agree that service provision in family law and in family violence is not currently configured for the needs of clients from LGBTIQ groups. We support the provision of additional funding to community-based services for development of LGBTIQ-specific service streams.

Question 9. How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

We recommend increased funding for regionally located community service centres, for legal aid services by private family lawyers, for extension of existing legal aid outreach, for improved family support and domestic violence support services in regional centres, and for training of local/magistrates court staff and judges in family law and domestic violence.

We support the development of digitally-based communications in the provision of support services, and also in relation to court appearances.

As noted previously, we recommend early and significant investment in development of the Aboriginal and Torres Strait Islander workforce in all roles relevant to service provision, decision-making and support to appropriately assist Aboriginal and Torres Strait Islander clients and potential clients of family law and family violence systems in rural and remote communities.

Question 10. What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

We agree that the high cost of family law litigation is a major barrier to the realisation of fair and legally appropriate outcomes, due to parties' failure to take action, to not seek advice at all, or to agree a premature settlement resulting in parenting arrangements that are not in the best interests of children, and which may indeed be unsafe for children and/or for one or more parties.

We submit that this is the case for parties that commence litigation, but also for parties seeking to resolve their issues privately or would like to do so in family dispute resolution but who do not have adequate access to affordable mediation assistance for property and financial family law matters.

We frequently deal with clients who are unable to pursue or maintain their positions in relation to parenting or financial disputes, who then settle 'early' for other than fair, sustainable and safe outcomes for the separated family's future care and financial arrangements.

We strongly advocate for more funding for legally-assisted and specialist forms of family dispute resolution, including in cases involving family violence and for property disputes.

MLC is greatly concerned about the inequity of outcomes for children where some parties are able to fund privately prepared family reports and some are not. We support the development of a fee schedule to regulate the costs of family reports and other expert witnesses.

MLC supports initiatives for unbundled legal assistance and the development of publicly funded, community-based, on-line family legal services.

Question 11. What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

MLC expects that the proportion of self-represented litigants ('SRLs') will continue to grow from the current 50% (referred to at para. 110 IP48) of the total of parties in the family court. As this is the case, and even if it was not as 50% is a sufficiently large proportion of users to warrant special attention in any case, equity demands that the design of 'service' that the family courts effectively provide, as well as its enabling and foundational law, should be tailored to the needs of this primary

SRL stakeholder group. And yet this is so far from the case. The family law and system, in all its complexity and arcane legality, vastly favours legally represented parties.

We strongly agree on the particular sources of difficulties cited at para. 111 IL48, including finding and completing forms, collating and filing necessary documents, gathering and preparing evidence, the confusion created by the two courts, the complexity of the law itself, legal language problems and the outstanding difficulty of preparing and running a self-litigated hearing, including the difficulties, particularly for family violence victims, of cross-examination.

We strongly contend that current Australian family law is suitable and accessible for use only by lawyers, and an utterly alien and estranging environment for the balance of the people of Australia that it ostensibly serves.

MLC supports all measures that redress this imbalance. Fundamentally, we support *de-legalisation* and *re-socialisation* of the system. We have written elsewhere in this submission in relation to our support for the proposed piloted PMH (Parenting Management Hearings) concept, with its panel of relevant experts. We strongly support development of this model with the maximum extend of its decision-making authority, such as constitutional parameters may permit. We support the extension of the model to property matters.

For the complex and meritorious matters that proceed to judge-managed processes, we recommend conduct of root cause analysis on the failure of the LAT model implementation, followed by rectification and re-introduction. We agree that inquisitorial process, though not a perfect answer to the problem of the level-playing field when there is only one self-represented party, is a suitable way forward for management and resolution of cases involving SRLs.

In refining the detail of design of the PMH model, we recommend close consultation with SRL stakeholder representatives.

Similarly, we recommend the plain-English re-design of forms, and the website, in close consultation with SRL stakeholders. Website information should be addressed from a 'specific problem' or FAQ perspective, as well as through the narrative lens. For example, it should be possible to google for an answer to the fundamental question 'what will happen if I don't file a Response' and to be directed to an answer on an Australian family law system website

As we have mentioned elsewhere, we strongly recommend increased funding for community legal centres to provide free legal advice, to legally-assist in mediation, and to conduct community legal

education in family law, particularly in relation to a new system. Community legal centres are already more ‘tuned’ to the social, community and relationship aspects of legal disputes. In MLC’s case, address to the whole context of a family law problem, with its legal and non-legal conditions, is a specific strategy of our approach to dispute resolution and the realisation of positive outcomes for our clients. Our costs are low compared to the costs of the court system. There would be efficiency for the family law system as a whole, as well as better outcomes, if there was increased investment in our more holistic approach.

We also support increased funding for the legal assistance sector as a whole.

At the most basic level, however, we support the many suggestions for simplified legislation, and refer to our responses, supra, in the 'Legal Principles' section.

Question 12. What other changes are needed to support people who do not have legal representation to resolve their family law problems?

We agree that there is little scope within the structure of the current design of the family law, and the system overall, for SRLs to be afforded genuine procedural fairness.

If more than half of family law litigants are self-represented (para. 110 IP48), with the trend suggesting this proportion will continue to rise, then the law and the system must shift to address the needs of this principal stakeholder group, and the range of vulnerable and disadvantaged groups it contains, rather the wealthy, literate lawyers for whom the law, procedure, and indeed the entire system, is currently designed.

Towards this very important reform, we support:

- continuation of support for and emphasis on FDR mechanisms, with extension of development of affordable FDR solutions for property and financial matters;
- extension of court-based mediation, with additional powers to mediators under the Act and relevant rules facilitating their stronger direction towards settlement;
- enforcement of pre-action procedures in property matters; and
- the development of specialised FDR service streams for complex cases and specific groups of vulnerable and disadvantaged people.

We support the development and implementation of a compulsory model of court process involving:

- multi-disciplinary, case-specific panel of experts in a decision-making role;
- an inquisitorial, longitudinal, case management, problem-solving approach;
- address to complex cases; and
- much-reduced formality (including no cross examination and reduced application of the rules of evidence).

We recommend application of this model in both parenting and property matters, towards replacement of traditional adversarial forms of process, to the extent constitutional limitations permit.³ We welcome the allocation of funding, in 2017,⁴ to the development of the Parenting Management Hearing pilots as an important step in this direction.

We also recommend improving the nexus between FRCs and the courts, including co-location where possible. Co-location of FDR and court processes would foster appreciation of each as variations on a continuum of dispute resolution options. Integration would encourage and facilitate more legally-assisted or at least legally-informed FDR, and, vice versa, more integrated FDR throughout the length of court processes.

We favour co-location, further, with other family-oriented service providers, including counsellors, social workers, community legal educators, family relationship educators, financial counselling services, and specific group support services (Aboriginal and Torres Strait islander, other cultural groups, youth, family violence support, women, men, disability, LGBTIQ). This would enhance both the perception and reality of our family law system as one that *helps people design solutions to their own post-separation arrangements and difficulties*, rather than about a law and a system that ‘feeds on itself’ for the benefit only of lawyers. There would be cost-savings also.

We also support:

- free training for self-represented litigants;
- any action that can be taken immediately to stream-line existing case handling;
- immediate funding for engagement of additional family consultants;
- merger of the existing courts (to save costs and reduce confusion);

³ R. Maurice, R. ‘A New System? Affordable Family Law?’, Legalwise Seminars, 2017.

⁴ Commonwealth of Australia, ‘Budget measures: Budget paper No. 2: 2017–18’ at 69.

- the law itself but also forms, rules and practice directions in plain-English; and
- significantly reduced complexity in the legislative and procedural framework overall.

Question 13. What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

We strongly support the suggestions set out in para. 120 IP48 for increasing the safety and well-being of court attendees.

Additionally, we support any strategies that reduce the stress and anxiety of participants, and that are consistent with the conception of a new system which is problem-solving, rather than punitive and magisterial. Our additional suggestions include:

- the development of smaller dispute resolution (court) spaces that have a much more informal tone (as do many tribunal hearing rooms);
- use of break-out spaces attached to court spaces as suggested at para. 122, IP48;
- utilisation of safe and appropriate existing, non-court, community spaces, including outdoor spaces as dispute resolution spaces;
- use of therapy dogs;
- roaming, ‘dynamic’ security as suggested at para.122, IP48; and
- roaming registry workers (like the ‘helpers’ at banks and local government/transport hubs).

Legal principles in relation to parenting and property

Question 14. What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

We agree with the perspective of Professor Richard Chisholm on the need to simplify Part VII provisions, reforming them to reflect a singular focus on children’s needs and children’s rights,

and to provide for the need for education, and societal change, in areas such as violence and parenting, by tools more effective than legislation.⁵ We particularly agree with his suggestions to:

- remove all legislative mechanisms linking care arrangements and parental responsibility and which arguably point to a default 50:50 care arrangement between the parents including:
 - abolition of the presumption of equal, shared parental responsibility (s 61DA) and the requirement for the court to ‘consider’ equal time or substantial and significant time (s 65DAA);
 - removal of the second of the twin pillars at s60CC: the benefit to the child of having a meaningful relationship with both child’s parents; and
 - removal of the word ‘equal’ from ‘shared parental responsibility’;
- remove the complexity of distinction between primary and additional best interests considerations at s 60CC, retaining one list of considerations which clearly prioritise the physiological and psychological safety of children; and
- re-frame the court’s task at s 60CC(1), in applying the ‘best interests’ considerations, such that the court should ‘seek to identify the arrangements most likely to advance the child’s best interests in the circumstances of each case’.
- amend s 60B(1)(a) and s 60B(2): replace ‘to the maximum extent consistent with the best interests of the child’ with ‘to the extent that would advance the best interests of the child’;
- adjust the joint decision-making requirement to be more practical and reduce the potential for dispute. (It is our experience that parties find the requirement to make decisions ‘jointly’ difficult to understand and to put into practice in the post-separation context.)

Additionally, we recommend deletion of s 60B(2) (a) to (d) inclusive: In our view, these provisions are clumsy, ineffective and inappropriate attempts to mandate shared parenting and again, to set up a default 50-50 agenda. They are part of a now-historic political ephemera that has no place in a simpler, streamlined, child-focussed family law that addresses specific and complex needs in the contemporary and future Australian society.

⁵ R Chisholm, ‘Family Law and Family Violence: Reforms and possibilities’ Legal Aid Conference, Sydney, 26 August 2011 and R Chisholm, ‘Re-writing Part VII of the Family Law Act: A Modest Proposal’ (2015) 23(3) Australian Family Lawyer 17.

MLC submits that orders about the care of children should be tailored according to the specific child's developmental needs, with no default arrangements or standardised patterns of care in play, no assumptions about who is, or should be, acting in a parenting role. The notion of 'what is a family' has broadened considerably in recent years, and will likely to continue to do so, as the profile of Australian society shifts in the global context. The Act should be respectful, receptive to and supportive of relationships that are beneficial for the individual child, whether or not they involve any particular type of parent (biological, step, 'foster', same-sex, surrogate, donor, adoptive) or other individuals who have become important in a child's life (including siblings, grandparents, friends, extended kinship and community members). What matters is not the label of the relationship, but its quality, benefit to the child, and the capacity of the respective individuals to provide support and fulfil the needs of the specific child in his or her own circumstances.

To this end, we recommend change in the language, away from 'parenting orders' to, simply, 'child orders'.

Specifically, we recommend changes to recognise the value and benefit to children of the historical, cultural and kinship connections of involvement with siblings and extended family, including grandparents.

Question 15. What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

We support the continuation of the 'coercion and control' element in the family violence definition provided it continues to be expressed in the alternative to the 'fearfulness of the family member' element. We support the expansion of the definition to include psychological abuse, and also misuse of process (including processes such as repeated reports to police, to care and protection services, and the range of other strategies listed at para.190 IP48).

We support the suggestions at para.133 IP48 for a simple and clarified decision-making framework for interim parenting matters, and a dedicated pathway for decision-making for family violence cases.

Question 17. What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

MLC would support and encourages action towards:

- introduction of a paramount consideration of the best interests of children into the property adjustment assessment process;
- the provision of clearer guidance about how domestic violence will be taken into account in proceedings for the adjustment of property;
- amendments to increase scope for splitting or transferring unsecured debt;
- simplification of the superannuation splitting provisions; and
- merger of the property provisions for married and de facto couples.

Resolution and adjudication processes

Question 21. Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

MLC supports the development of a triage approach to the processing of court applications, the setting of budgets for matters and concurrent, and parallel access to FDR processes, with encouragement to access those processes throughout the life of a case.

Question 22. How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

Question 24. Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

FRCs should be funded to provide low-cost mediation for property matters. We agree that there is huge gap in service provision for this need.

If FRCs are not co-located with family courts, we recommend additional court-based availability of mediation services, with mediators empowered with ‘conciliation’ function – that is, with

express authority to express views, and to steer parties towards outcomes in ‘the shadow of the law’.

We support new provision for a requirement that parties involved in property disputes undertake mediation prior to commencing litigation for property adjustment.

As mentioned previously, we also support research into and funding for development of specialist mediation and FDR professional expertise and protocols to appropriately support victims of domestic violence, and other parties with special needs, including parties with disability, parties from an Aboriginal or Torres Strait Islander background, CALD parties, young people and parties with multiple complex needs.

As mentioned previously also, and towards the greater integration of formal and informal dispute resolution mechanisms, (the law in mediation and vice versa), we support increased availability of legal assistance in both FDR and property mediation processes.

Question 28. Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

We refer to previous suggestions about the greater integration of formal and informal dispute resolution mechanisms on a systemic level, and the development of specialist expertise and protocols for parties with complex and specific needs.

We support further investigation of the potential for adapting the Hague’s *Justice42* tool as described in para. 209 IP48. It would support a specific lack in the support for effective, low-conflict private decision-making in property and parenting arrangements. Existing FDR conceptualisation, the only available support currently, pre-supposes the notion of ‘dispute’: this may be unnecessary and self-fulfilling.

Question 29. Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

MLC strongly supports the re-constitution of the family court system with a social, problem-solving focus. We refer to our earlier suggestions for co-location of dispute resolution and other support services with the court, the greater integration of formal and informal dispute resolution processes, longitudinal case management-oriented process and multi-disciplinary decision-making panels. The two approaches set out at para. 220 IP48 reflect all of these concepts in one or the other. We support the development of conceptualisation around both of them, and do not regard them as mutually exclusive. Indeed, the most appropriate pathway of two resolution tracks might be assessed at an initial intake/triage/service needs assessment process for any new case.

Question 30. Should family-inclusive decision-making processes be incorporated into the family law system? How could this be done?

MLC strongly supports the provision of family-inclusive decision-making processes in family law cases, including family law cases involving family violence. It is our experience that the current system responses to family violence entail some sacrifice of the sense of the personal agency of the victim (in order to provide appropriate protections). We support all measures that ‘re-empower’ victims of domestic violence whilst continuing to ensure protection.

We believe that the Family Group Conferencing and Family Led Decision-Making models, as described at paras. 222-224 IP48, would give back to parties a sense of contribution and agency, in a controlled context, with potential for the crafting of idiosyncratic, creative solutions for individual families and children in the light of each of their unique sets of circumstances.

Question 31. How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

MLC strongly supports the integration of multi-disciplinary supports for families with multiple and complex needs, provided as a function of an intake and assessment process at the point of entry into the family law system, case-managed from within the system, but then either provided within the system (court-located) or warmly referred to appropriate, specialist external agencies.

This concept incorporates elements of both the Family Safety Model, and the Family Advocacy and Support Service model referred to in paras. 233-239 IP48. They would be better supported, and their efficiency and effectiveness and capacity to communicate, collaborate and respond to cases -- would be much greater if they were co-location at court (either of the entire service or an outreach worker/office).

Question 32. What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

MLC agrees that the access to justice would be enhanced by greater preparedness on the part of state and territory courts to make decisions with the consent of parties, at least to the extent of their considerable, existing powers to do so. We see this as important, particularly, in regional centres. It is especially important in the context of family law disputes in which state or territory domestic violence orders have been or would be made. We would be concerned, however, that pressures on local/magistrates courts to deal with more family law matters not increase without additional funding and support for training, for more magistrates to address the higher workload, and for the provision of appropriate local/magistrates court-located support services.

Children’s experiences and perspectives

Question 34. How can children’s experiences of participation in court processes be improved?

MLC objects to the currently limited standing afforded to children and young people to commence proceedings under the FLA. Section 65C provides that a parenting order in relation to a child may be applied for by:

- (a) either or both of the child's parents; or
- (b) the child; or
- (ba) a grandparent of the child; or
- (c) any other person concerned with the care, welfare or development of the child.

It is uncertain whether another child or young person (that is, a child other than ‘the child’) would be regarded by the court as a ‘person’ under this provision.

The *Family Law Rules 2004* are more explicit. Rule 6.08 provides that a child can commence proceedings but only by a ‘case guardian’, who is an independent adult, who has no interest in the case: rule 6.09. This requirement for a case guardian may be waived *if* the court can be satisfied that the child understands the nature and possible consequences of the case and is capable of conducting it: rule 6.08. An assumption of the *absence of capacity* in the child to conduct family law proceedings, then, is the ‘default’ position.

This arrangement in relation to the rights of children to commence, join, and leave family law proceedings is arguably out-of-step with the position at international law, as provided by the *Convention on the Rights of the Child*, which recognises that children do have capacity to participate in legal proceedings that affect them.⁶

Section 60B(4) expressly identifies intention to give effect to that Convention as an objective of the Part VII of the Act. We argue that the present provisions give effect neither to the letter nor the spirit of that undertaking.

There are two contexts in which a person under the age of 18 might seek to direct legal proceedings on their own account.

The first is where a child might seek to apply, on their own account, for orders that they might live and spend time with, or to not to live or spend time with, particular individuals, or in particular places, or in relation to other specific issues affecting their own care, welfare and development. This is a discussion that we consider will become progressively more important in the future, with the increasing complexity of the family, greater societal recognition and respect for young people’s agency and rights to participate, and greater readiness on the part of young people to take action on their own behalf.

In the second context, in which we submit presents as a current and pressing imperative for reform, a child may seek to apply for orders in relation to another child (being ‘the child’ under s 65C(c)). For example, a young person under the age of 18, who is not living with their siblings, may wish to spend time or perhaps even live with those siblings, but does not have the support of

⁶ *Convention on the Rights of the Child (CRC)*, entered into force 2 September 1990, Article 12 which states.1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child...2. For this purpose, the child shall in particular be provide the opportunity to be heard in any judicial and administrative proceeding affecting the child...

a parent or other person with sufficient parental responsibility for the siblings, to make arrangements for this to happen, nor indeed to file an application for such an order.

MLC presently has two current cases in which young people aged 16 and 17 are being prevented from seeing their siblings by a single biological parent.

Both cases involve the sexual abuse of the young person by a parent, who has been charged with sexual abuse offences and taken into custody. In both cases, the young people no longer live in the family home, in which remain the other biological parent and younger siblings. In both cases, the remaining biological parent continues to support the position of the offending parent and refuses to facilitate time between the young victim and the siblings. In the context of all that has been taken away from these young people, the loss of the remaining familial relationships of real value to them, being that they previously enjoyed with their younger siblings, has devastating and damaging effect. The young people in these cases are articulate and capable and have more than the necessary mental capacity and maturity to be able to direct their own legal proceedings to apply for a ‘parenting’ order to be able to reclaim the only vestige of emotionally positive connection in their original families – that is, for the young person to be able to communicate and spend time with their siblings.

We are currently considering action that would test the court’s preparedness to acknowledge these young people’s standing to make an application under s 65C(c). There is no understanding or indication however, whether, even if the applications were accepted, the court would exercise its discretion under rule 6.08 to waive the requirement for a case guardian. In the only recent ‘sibling order’ case of which we are aware, these issues did not arise.⁷ The applicant was aged 18 at the time of hearing, though the case was initially commenced on his behalf by an adult party.

We understand that it is extremely uncommon for children to attempt to exercise their existing capacity to commence and direct proceedings as a party under the Family Law Act.⁸ Given the obscurity and lack of certainty of the existing standing, however, we are not surprised that this is so. It should not be the case, however, that a young person with a serious and legitimate cause of family law action relating directly to their own care, welfare and development, and also the care and welfare of other children, has so little certainty of their own standing to prosecute that cause.

⁷ 3 Harry & Barndon [2013] FCCA 1616 (21 October 2013)

⁸ G. Monahan, ‘Autonomy vs Beneficence: Ethics and the representation of children and young people in legal proceedings’ Vol 8 No 2 *Queensland University of Technology Law and Justice Journal* at 400. Available at <http://www.austlii.edu.au/au/journals/QUTLawJl/2008/22.pdf>. (Accessed 16 May 2018)

We understand that, in many family law cases involving children and young people, a child does not participate in FDR, a Family Report is not prepared, the judge does not seek to speak with the child, an Independent Children’s Lawyer is not appointed, or if there is one or likely to be one, that the young person does not consider that their views has been or will be appropriately represented in that mode. An alternative clear option of direct participation should be available.

Accordingly, we recommend:

- the addition of ‘including a sibling of the child’ after ‘other relative of the child’ at s 64B(2);
- the addition of ‘a sibling of the child’ at s 65C;
- the reversal of the assumption at Rule 6.08, with the effect that a case guardian may be appointed if the court considers that a young person does not have sufficient understanding or maturity to direct proceedings.

Question 36. What mechanisms are best adapted to ensure children’s views are heard in court proceedings?

We support all and any mechanisms that would increase the options available for ensuring the factoring of the child’s view in family law disputes.

We note in particular, however, that IP48 also does not raise the issue of the availability of direct representation of children and young people. MLC considers this a vitally important additional issue for reform in the current review and is greatly concerned about its absence as an identified issue for public discussion.

Direct representation of a child is a model of advocacy in which the legal representative receives and acts on the instructions of a young person, as it would an adult client, irrespective of what the representative considers to be in the best interests of the child.⁹

As described at paras. 257 to 259 IP48, the alternative and only model of advocacy facilitated under the *Family Law Act* other than the very limited role of the case guardian, is the model of best interests advocacy implicit in the Independent Children’s Lawyer (ICL) mechanism. The ICL of the child must form and represent to the court a view of the outcomes that are in the best interests of the child. The best interests of the child is, of course, precisely what the court is tasked to

⁹ Law Society of NSW, ‘Representation Principles for Children’s Lawyers’, August 2014. Available at <https://www.lawsociety.com.au/sites/default/files/2018-03/Representing%20Children.pdf> (Accessed 13 May 2018)

ultimately decide. The real views of children and young people are highly relevant to this decision, as is recognised by the requirement for them to be considered under s 60CC(3)(b). Under the current system, however, including the ‘filter’ of the ICL’s assessment of best interests and interpretation of the child’s views, the court may never receive them.

The best interests model is part of the ‘child protectionist’ discourse that has prevailed in family law in recent decades, and which is intended to protect children from direct involvement in the effects of conflict, from the opportunity for them to be pressured or manipulated by adults, and on the basis of an assumption that they do not have capacity to understand and contribute towards their own interests effectively.¹⁰

The hegemony of this discourse is now under challenge however. The alternative ‘enlightenment and empowerment’ rationale suggests that children have much to contribute to informed decision-making and the crafting of workable and sustainable outcomes. It is argued that children actually benefit from being afforded greater agency, respect and recognition in family law processes, while being effectively protected.¹¹

Several sets of reports and recommendations in recent years support the availability of direct representation of children in family law proceedings.¹² It is notable that in the closely related jurisdiction of child care and protection, direct representation of the competent child is available in South Australia, Victoria, Western Australia and Tasmania. It has been argued, and we agree, that there is no justification for distinguishing the support for children’s rights so significantly in such similar jurisdictions:

...the unavailability of direct representation for any child or young person in the Family Court seems out of step with contemporary research, natural justice and significant developments in other jurisdictions, including proceedings where deeply sensitive issues relating to a child’s

¹⁰ A. Roy, G McKinnon & H. Yates, Office of the ACT Children and Young People Commissioner, ‘Talking with children and young people about participation in family court proceedings’ (August 2013) at 5. Available at <http://www.hrc.act.gov.au/res/Family%20Court%20Report.pdf>. (Accessed 2 April 2018)

¹¹ J. Cashmore & P. Parkinson, ‘Children’s participation in family law disputes: The views of children, parents, lawyers and counsellors’ (2009) 82 Family Matters 15 at 15.

¹² For example: Family Law Council, ‘Pathways for Children: A review of children’s representation in family law’ (August 2004) Available at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Pathways%20for%20children.pdf> at 7; and A. Roy et al op. cit. at 13; and Australian Law Reform Commission ‘Seen and heard: priority for children in the legal process (ALRC Report 84)’ at Recommendation 70; and G. Monahan, op. cit. at 413

relationships with his or her parents, allegations of abuse and neglect, and conflicting view on living arrangements, are in heated dispute.¹³

The availability of direct representation of children in the family law jurisdiction would not only align it with current best practice in the balance of the Australian civil and criminal law, but with the Article 12 of the *Convention on the Rights of the Child* which requires that children be permitted to participate in proceedings that concern them.

In the light of the considerable dissatisfaction (as described in IP48 and as reported by our own clients) with the existing mechanisms for representation of the views of the ICL, and the breach of children’s rights that they represent, MLC strongly recommends reforms enabling the direct representation of children.

As this issue was not presented for public discussion in IP48, MLC urges the Commission to make alternative arrangements for the contribution of views in relation to this potential reform that is so germane to the crafting of a contemporaneous family law system that reflects the needs of Australians and supports sustainable, efficient outcomes in the best interests of children and young people.

Question 37. How can children be supported to participate in family dispute resolution processes?

MLC supports the continued development and increased funding and wide availability of child-inclusive and child-focussed FDR services. It is our experience that children and young people very often wish to be involved in FDR that concerns arrangements for their futures.

In particular, we have found great difficulty in finding FDR services willing to support our family law clients who are young people. In managing the course of the sibling cases referred to in our response to Question 35 supra, we could find *no FDR service prepared to commit to the conduct of joint FDR with our young clients and the other party*, a biological parent. We understand and agree that there are important issues of protection and safety, and some complexity in managing the influence of the adults involved. As noted previously, however, there are also questions of right, and the value of the child’s views in the development of sustainable, decisions in the best interests of the child.

¹³ A. Roy et al op.cit. at 13.

In addition to standing to commence proceedings, however, young people have a right, not only under the *CRC* but potentially also under age discrimination legislation, to access to services, such as FDR, that have such strong potential to resolve difficulties that might otherwise result in commencement of litigation.

Whilst we accept the evidence underlying the Kids Talk program, as explained at para. 265, that restricts access to the program to families where the parents are assessed as having capacity to take on their children’s views, and support the availability of such services, we strongly advocate for the greatly increased availability of child-inclusive FDR services, whether or not the parents are assessed initially as having that capacity. An important initial goal of FDR, in the event that they are not so assessed, might be to understand and come to terms with the views of their child.

In particular, we recommend development and funding of child-inclusive FDR services that are available at the instigation of a young person with standing to commence family law proceedings.

Professional skills and wellbeing

Question 41. What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

MLC concurs with the list of skill gaps and deficiencies at paras 281 and 282 IP48. In addition, we would like to note the limited number and limited competency of some of the family dispute resolution practitioners in relation to property and financial matters.

Question 44. What approaches are needed to promote the well-being of family law system professionals and judicial officers?

Family law legal practice is fundamentally a form of social professional practice. (If this isn’t the case in a particular family lawyer’s case, that lawyer may well be adding to the litigious load of the court, encouraging adversarial behaviour by their clients, and not effecting long-term sustainable and fair outcomes in the overall best interests of their clients and any children who may be involved.)

A lawyer or judge who does engage effectively with the social aspects of their work is at risk of developing mental health issues in the same way any provider of human services in a community

context is at risk. Current best practice for social and community service providers, including family dispute resolution practitioners, includes protocols for regular (monthly) clinical supervision. MLC supports the availability, for all family law practitioners, of free clinical supervision in the form of de-briefing and well-being checks carried out by trained and professional counsellors, if possible, or at least by a more senior family law practitioner.