SUBMISSION TO THE REVIEW OF THE FAMILY LAW SYSTEM IP48:

AUSTRALIAN INTERNATIONAL FAMILY LAW

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This submission relates specifically to **Question 6**: How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities.

Issues Paper 48 notes the high proportion of Australians born overseas (26%) (p 26). While the Issues Paper suggests that 'people from culturally and linguistically diverse backgrounds are under-represented as users of the family law system' (p 26), the following Table demonstrates that in 2016, almost 50% of marriages celebrated in Australia, and almost 50% of divorces granted in Australia involve at least one party who was not born in Australia. This Table also demonstrates an upwards trend.

Table 1: Marriages celebrated and divorces granted in which at least one party was not born in Australia[1]

	1996	2006	2016
Marriage	35.7%	38.9%	45.5%
Divorce	43.7%	44%	47.5%

This shows that the international family is almost the norm in Australia, and that members of international families do indeed use the Australian family law system. This seems not to be widely appreciated, or its implications understood.

This submission argues that the current Australian laws which are only used in litigation involving international families (loosely defined to mean families which have connections to more than one country) – that is, the body of laws referred to as private international law, or the conflict of laws – are problematic. Families which do not have connections to countries other than Australia also face problems in terms of the accessibility and the complexity of the law, but these problems are exacerbated for international families because international family litigation involves an additional layer of complicated and technical legal issues; and litigants in this area are

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1 Source: Australian Bureau of Statistics, 3310.0 Marriages and Divorces, Australia, 2016 Released 28/11/2017, available at http://www.abs.gov.au/ausstats/abs@.nsf/mf/3310.0

likely also to face language issues, and a family law system that may be entirely different to that or those with which they are familiar. In some extremely complicated international family disputes, one party or both parties lacked legal representation.[2]

Australian private international law relevant specifically to family litigation is highly problematic. Relevantly to Question 6 in the Issues Paper, the law is inaccessible. It is extremely difficult to locate all relevant laws. These laws are contained in the *Family Law Act 1975*, various regulations made pursuant to that Act, the *Trans-Tasman Proceedings Act 2010* (Cth), the *Marriage Act 1961* (Cth), and case law. The Australian law has been substantially modified by a number of different Hague Conventions,[3] which have been added to the legislation sometimes apparently without fully considering the coherence of the added principles with the pre-existing laws. This is clear in that even where the principles are found in the same legislation, the statute tends not directly to address the inter-relationship between the particular laws relevant to related issues. For example, the inter-relationship between the rules of jurisdictional competency in *Family Law Act 1975* (Cth) s 39 (dealing with divorce and matrimonial causes) and s 111CD (dealing with matters involving children), both of which would be relevant in many family disputes is very unclear from the legislation. Nor is it clear that in such a case, different rules apply to determine whether a court, which is competent under ss 39 and 111CD, might decline to exercise jurisdiction depending on whether the matter is governed by s 39 or s 111CD.

Some of the most important principles of private international family law, including the principle of *forum non conveniens*, the rules on anti-suit injunctions, and some choice of law rules, are derived not from the legislation but from case law which is extremely difficult to access, interpret and apply, even for native speaking litigants.

Determining the inter-relationship between these several sources of law is extremely complicated.

The Australian law is also complicated because it contains significant inconsistencies. For example, the principle of *forum non conveniens* that applies in trans-Tasman family litigation[4] is quite different to that which applies in other international cases,[5] but laypeople and foreign and

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2 E.g. *In the Marriage of Khademollah* (2000) 26 Fam LR 686; [2000] FamCA 1045 (Full Court) (both parties appeared in person).

3 Namely, the Divorce Convention, the Maintenance Convention, the Marriage Convention, the Child Abduction Convention, the Adoption Convention, and the Child Protection Convention. Most of these are brought into effect by the Family Law Act and regulations made pursuant to that Act. The Marriage Convention is given effect in the Marriage Act 1961 (Cth).

4 *Trans-Tasman Proceedings Act 2010* (Cth) s 17(1) (requiring an Australian court to stay proceedings if the New Zealand court is 'the more appropriate forum).

5 *Henry v Henry* (1996) 185 CLR 571 (requiring an Australian court to stay proceedings if the Australian court is a 'clearly inappropriate' forum).

Australian lawyers who are not specialist in this field may not appreciate that there is a different regime applicable to trans-Tasman cases.

In addition to problems of the accessibility of the current laws relevant to cross-border family disputes, there are also problems with the substance of the laws, although this is beyond the scope of Question 6 of the Issues Paper and so is not addressed in this submission.

Currently, the Australian government is working on the International Civil Law Bill, which is intended inter alia to bring the Hague Choice of Court Agreements Convention into effect in Australia. I suggest that the least that should be considered, for international family law, is that the provisions of the legislation dealing with international family law should be gathered together in a dedicated International Family Law Act. This would considerably improve the accessibility of the relevant law. Ideally, the opportunity should also be taken to legislate related principles which are currently found in the case law (including the principle of *forum non conveniens*), and also to remove anomalies in the current law, if not to consider how the law could be positively improved, for example by considering the possibility of extending the use of habitual residence as a primary connecting factor for not only jurisdiction but also choice of law, as is done in the Hague Child Protection Convention, which is part of Australian law.