



SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

House of Representatives Standing Committee on
Social Policy and Legal Affairs: Inquiry into family,
domestic and sexual violence

6 August 2020

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,380 barristers who principally practice in NSW. Currently, 212 of our members report practicing in the area of family law and guardianship. We also include amongst our members judges, academics, and retired practitioners and judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Family Law Committee. If you would like any further information regarding this submission, please contact the Association's Director of Policy and Public Affairs, [REDACTED] at first instance or [REDACTED]

Contents

- A Executive Summary
- B Recommendations
- C The role of a properly resourced family law system in protecting survivors of domestic violence
- D The importance of specialised services, including a stand-alone Family Court, in dealing appropriately with family violence

A. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the House of Representatives Standing Committee on Social Policy and Legal Affairs (**the Committee**) for the opportunity to make submissions to this important Inquiry. This submission addresses two critical issues: first, the role of a properly resourced family law system in protecting survivors of domestic violence; and second, the importance of specialist services, including a stand-alone Family Court, in dealing appropriately with family violence.
2. The prevalence of domestic violence in this country is a national shame. Regrettably, it continues to impact on many Australians. Abuse of and violence against all women and their children is repugnant. The 2016 *Personal Safety Survey* found that 17% of women (1.6 million) and 6% of men (547,600)¹ had experienced violence by an intimate partner since the age of 15. This included both physical and sexual violence. Intimate partner homicide is the most prevalent type of homicide in Australia,² with one woman dying at the hands of her partner every nine days and one man killed by his partner every 29 days.³ Female victims of intimate partner homicide are more likely to be killed after separating, or expressing intention to separate, from their partner.⁴
3. Almost 70% of matters before the Commonwealth family Courts involve allegations of family violence.⁵ At any given time, Family Violence Prevention Legal Services have to turn away between 30 to 40% of people contacting them for support because they simply do not have the resources to meet community demand.⁶ Delayed access to the family law Courts, primarily caused by chronic under-funding and under-resourcing, can be used by perpetrators of family violence as a further tool of abuse. Once accessed, chronic delays in the determination of issues by the Courts exacerbate those issues. Some families are having to wait up to three years,⁷ or longer, to have their family law disputes resolved. Different combinations of frontline services may be called upon at different times, to provide both immediate and sustained support in the longer term to assist survivors of family violence. These services must be resourced to provide support both on initial contact and an ongoing basis for as long as that support is required. Crises place further pressure on these critical services, which simply cannot respond nimbly or effectively to need if they have not been appropriately resourced previously to build resilience and responsiveness.
4. The Courts and the family law system must therefore be equipped with the necessary funding, resourcing and specialisation to support survivors of family violence at all times.

¹ Australian Bureau of Statistics, *Personal Safety Survey 2016*, 1.

² S Bricknell, 'Homicide in Australia 2017-18' (2020) *Statistical Report No 23*, Australian Institute of Criminology.

³ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story*, Report (2019) 50.

⁴ Australian Institute of Health and Welfare, above n 3, 53.

⁵ Women's Legal Services Australia, *Safety first in family law* (2019) <www.wlsa.org.au/campaigns/safety_first_in_family_law>; see also House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (2017) [1.6].

⁶ Australian Women Against Violence Alliance, 'Women's lives will be at risk because of decision not to act today – domestic violence experts' (Media Release, March 2020) <https://awava.org.au/2020/03/13/media-release/womens-lives-will-be-at-risk-because-of-decision-not-to-act-today-domestic-violence-experts?doing_wp_cron=1589642604.5754508972167968750000>.

⁷ Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018, [53]; Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2019, [59].

B. Recommendations

5. The Association recommends that:
 - a. This Committee advocate to the Parliament to properly fund and resource the family law system, including legal assistance, as a front-line service and critical protection for survivors of family violence, and commit to doing so on an ongoing basis;
 - b. This Committee advocate to Parliament to consistently and adequately resource domestic violence support services;
 - c. This Committee advocate to Parliament to properly resource the Cross-examination of Parties scheme;
 - d. The Federal Circuit and Family Court of Australia Bill 2019 (Cth) and accompanying transitional amendments bill (**the Amended Merger Bills**) should not be passed by the Parliament;
 - e. A specialist, stand-alone and properly resourced Family Court be maintained in Australia to continue to provide specialist assistance to children, families and survivors of family violence;
 - f. This Committee advocate to the Parliament to adopt the Association's Family Court 2.0 Model and relocate judicial officers hearing family law matters and the family law jurisdiction of the Federal Circuit Court into a second division within the Family Court;
 - g. This Committee advocate to the Parliament to carefully consider and engage with the 60 recommendations of the Australian Law Reform Commission's (ALRC) landmark review of the family law system,⁸ including recommendations to overcome any jurisdictional gaps and improve information sharing between state-based child protection and family violence prevention, and Commonwealth family jurisdiction;
 - h. This Committee advocate to the Parliament to ensure due considerations, protections and safeguards for vulnerable people are built around any potential permanent changes to national or state e-witnessing and e-signature laws;
 - i. This Committee inform itself and build upon the findings and recommendations of previous reports and inquiries into family law and family violence, including the ALRC Report and the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs report *A better family law system to support and protect those affected by family violence* (**House of Representatives Report**).
6. This submission is informed by the experience and expertise of the Association's members, who practice on a daily basis in the Commonwealth family law Courts and the State Courts and can speak to the challenges that face survivors of family violence in engaging with this system.
7. The Association is committed to advocating for meaningful reform to protect survivors and uphold a fair, just and accessible legal system in Australia.

⁸ Australian Law Reform Commission, *Review of the Family Law System* (Report No 135, 2019) (**ALRC Report**).

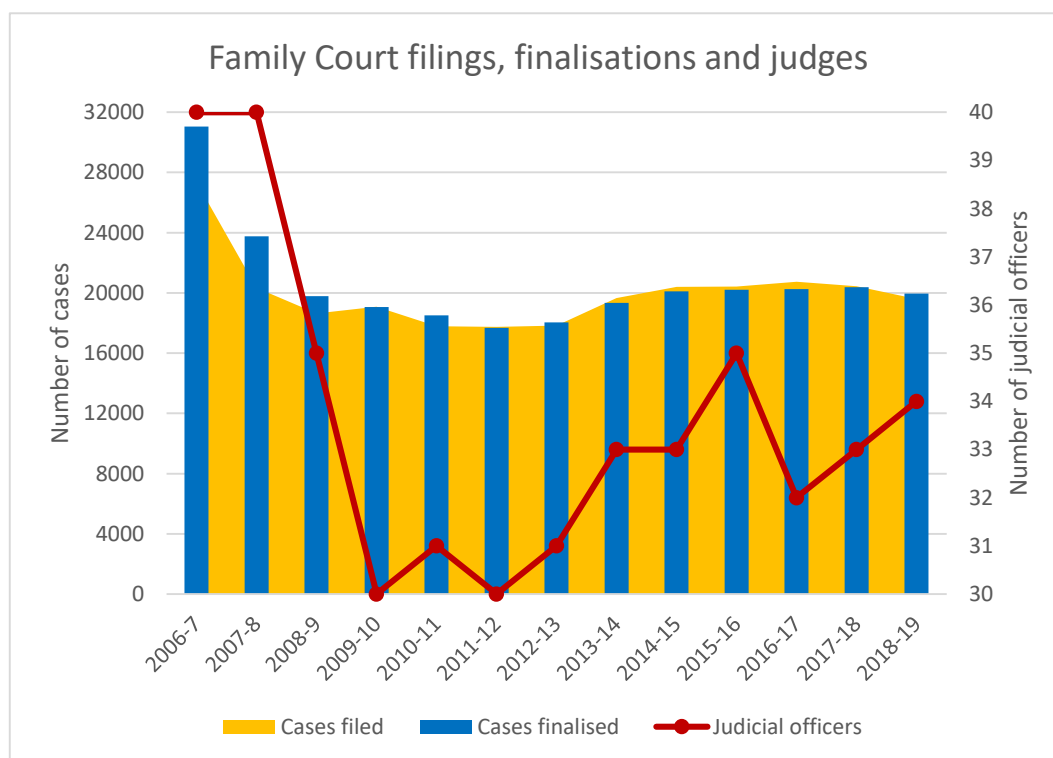
C. The role of a properly resourced family law system in protecting survivors of domestic violence

8. It is undeniable that the timely and just resolution of family law matters promotes the health, safety and well-being of survivors of family violence. State and Commonwealth Courts, family law support services, Legal Aid and the legal assistance sector are frontline services that provide essential assistance and protection to survivors. These services must be recognised, resourced and funded as essential services at all times, to both function properly in ordinary times and to meet the pressures and demands of crises when these occur.
9. Without properly resourced, funded and accessible Courts, victims of family violence are left without a means to seek protection, enforce their rights and safety, and hold perpetrators to account.
10. The Courts, Legal Aid and legal assistance providers were already over-worked, chronically under-funded and severely under-resourced before the pandemic struck. Despite best efforts, this has inevitably impacted upon their ability to respond swiftly to community need.
11. The Association appreciates the significant budgetary pressures facing the Government at this time. However, the cost of inaction is greater. In addition to the compelling health, welfare and safety imperatives to act, domestic violence has dire financial consequences, costing the economy an estimated \$22 billion in 2015-16.⁹ Further, there is a direct causal link between resourcing and the timeliness and quality of justice delivered by the Courts.
12. Failing to invest in the family law system is a false economy and only creates additional, unacceptable social and financial pressures on the Courts and our community.
13. This chapter addresses the:
 - a. chronic under-funding and under-resourcing of the family law system by successive governments of both persuasions;
 - b. business case for funding legal assistance and Legal Aid;
 - c. importance of properly funding the cross-examination of parties scheme;
 - d. ramifications of under-resourcing on the implementation of the *National Plan to Reduce Violence against Women and their Children 2010-2022* (**National Plan**); and
 - e. impact of crises on family violence.
14. As the Australian Government continues to collect information regarding the economic and fiscal impacts of the ongoing pandemic, in the lead up to the October Budget, attention must continue to be given to the impacts of family violence and additional funding allocated as required to address emerging need in 2020-21 and sustained over the forward estimates.

⁹ KMPG, *The Cost of Violence Against Women and their Children in Australia* (2016).

a Chronic under-funding and under-resourcing of the family law system by successive governments

15. The family law system and its Courts are a critical piece of social justice infrastructure that has been neglected, by successive governments for decades, despite their important role in protecting children and families impacted by domestic violence, in concert with State Courts. At the core of so many of the issues confronted by the system is a chronic and sustained lack of proper funding and resources for the Family Court and the Federal Circuit Court, and a mismanagement of those resources. This includes a failure to appoint and maintain sufficient, appropriately experienced judicial officers and associated staff and insufficient funding to maintain the counselling and assessment services previously provided by the Courts.
16. Failing to invest in the system has produced unacceptable delays and costs that directly impact on the accessibility and quality of justice for survivors of family violence. Well before the COVID-19 pandemic, the Family Court and Federal Circuit Court were each already facing backlogs of more than a year's worth of cases.¹⁰ As of November 2019, Judges in the Federal Circuit Court had "workloads of anywhere up to 600 cases on a docket"^{11, 12}
17. The Productivity Commission's *Report on Government Services*, released in January 2020, reported that the backlog of all pending non-appeal applications in the Family Court has grown from 4,997 to 6,720 (34 percent) since 2012-13, while the backlog of all pending applications in the Federal Circuit Court has grown from 31,067 to 50,791 (63 percent).¹³



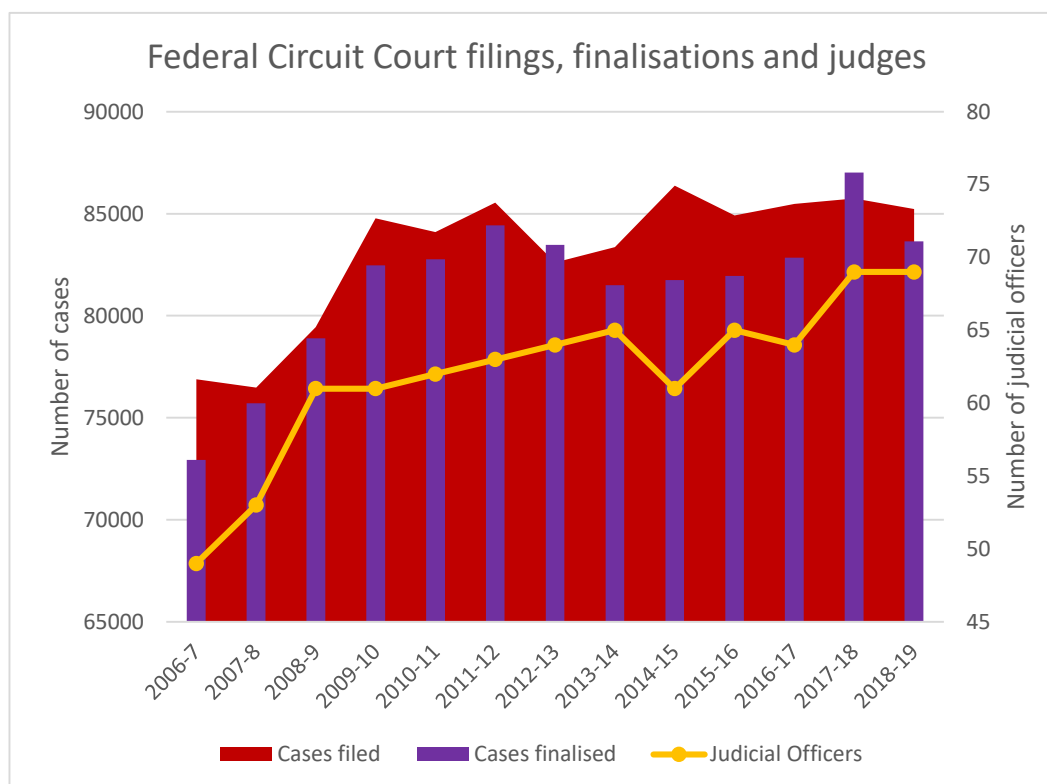
¹⁰ Nicola Berkovic, 'Courts reject questions over delays and judges', *The Australian* (online) 23 October 2019, citing Family Court and Federal Circuit Court *Annual Reports 2018-19* (2019).

¹¹ A docket is the list of active cases before the Court that a Judge is managing and will eventually hear and decide.

¹² Chief Justice Alstergren, quoted in Tony Keim, 'A family (court) affair', *Proctor* (November 2019) 29.

¹³ Australian Productivity Commission, 'Part C – Justice', *Report on Government Services 2020*, table 7A.21.

18. Despite achieving a clearance rate of 102 percent in 2018-19,¹⁴ and finalising more cases than were filed during the year,¹⁵ the Family Court had a backlog of 2,979 cases.¹⁶
19. The backlog in the Federal Circuit Court increased from 17,088 cases in 2017-18 to 17,478 cases in 2018-19.¹⁷ Further, the Federal Circuit Court disposed of 62 percent of final order applications within a year, falling significantly short of its target of 90 percent.¹⁸



20. In addition to the strain of its family law work, 11 percent of the Federal Circuit Court's workload comprises other general federal law.¹⁹ Concerningly the number of migration cases filed continued to rise for the fourth year, up from 5,312 in 2017-18 to 5,591 in 2018-19.²⁰ In late February 2020, the Federal Circuit Court had 11,000 pending migration cases to manage,²¹ in addition to the family and general law matters. During 2018-2019 only 3,000 out of the 6,000 migration law filings were able to be resolved by the Federal Circuit Court.²² The backlog of migration matters in the Federal Circuit Court is likely to increase due to the pandemic.

¹⁴ Family Court of Australia, *Annual Report 2018-19* (2019) 5, 16.

¹⁵ Ibid, 19.

¹⁶ Ibid, 17.

¹⁷ Federal Circuit Court of Australia, *Annual Report 2018-19* (Cth) 30.

¹⁸ Ibid, 27.

¹⁹ Ibid, 30.

²⁰ Ibid, 42.

²¹ Law Council of Australia President, Pauline Wright, cited in Joe Kelly and Rosie Lewis, 'Migration case load crushing Federal Circuit Court' *The Australian* (online), 5 March 2020, <<https://www.theaustralian.com.au/nation/politics/migration-case-load-crushing-federal-circuit-court/news-story/68e4048e134d91e25319e4f337496>>.

²² Ibid.

21. It is the Government's responsibility to resource and properly fund service providers and the Courts who assist families who have experienced domestic violence.
22. The Government stated in May 2018 that the national median time to trial had increased from 10.8 months to 15.2 months in the Federal Circuit Court (an increase of 40.7%), and from 11.5 months to 17 months in the Family Court (47.8%),²³ from 2012-13 to 2016-17.²⁴ During that time there had been an increase of just 2.73 percent, or \$6.724 million, in the operating appropriation provided to the Federal Court, Federal Circuit Court and the Family Court together from 2013-14 to 2017-18.²⁵ From 30 June 2013 to 19 January 2018, only two additional judicial officers were added to each of the Federal Circuit Court and the Family Court.²⁶
23. Real recurrent expenditure in the Family Court has almost halved, from \$101,940,000 in 2012-13 to \$57,689,000 in 2018-19. Real recurrent expenditure in the Federal Circuit Court increased from \$113,486,000 in 2012-13 to \$154,942,000 in 2018-19.²⁷
24. At 30 June 2019, there were 69 Judges in the Federal Circuit Court including the Chief Judge²⁸ and 34 Family Court Judges.²⁹ The Federal Circuit Court has now been without a separate dedicated Chief Judge since December 2018.
25. The number of Judges available to hear matters directly affects disposition rates. There has been a significant decrease in the number of judicial officers in the Family Court over the last 14 years, which has severely reduced the Court's capacity to manage its workload. Two Judges have recently retired from the Sydney Registry of the Family Court. These Judges have not yet been replaced and there has been no indication from the Government as to if and when this will occur. These positions are already funded and should not incur any additional cost to fill.
26. The reduction in the number of judicial officers is exacerbated by the appointment of Judges who do not, whether in whole or part, hear and determine proceedings, particularly in the trial division.³⁰

²³ Attorney-General for Australia, 'Court Reforms to help families save time and costs in family law disputes' (Media release, 30 May 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/Court-Reforms-to-help-families-save-time-and-costs-in-family-law-disputes.aspx>>.

²⁴ *Question Number and Title: AE18-014 - Family Court of Australia trends*, Senate Standing Committee On Legal and Constitutional Affairs, Additional Estimates 2017-18 (February 2018).

²⁵ Federal Court of Australia, *Question on Notice AE18-018 - Family Court of Australia trends*, Senate Standing Committee On Legal and Constitutional Affairs, Attorney-General's Portfolio, Additional Estimates 2017-18 (February 2018).

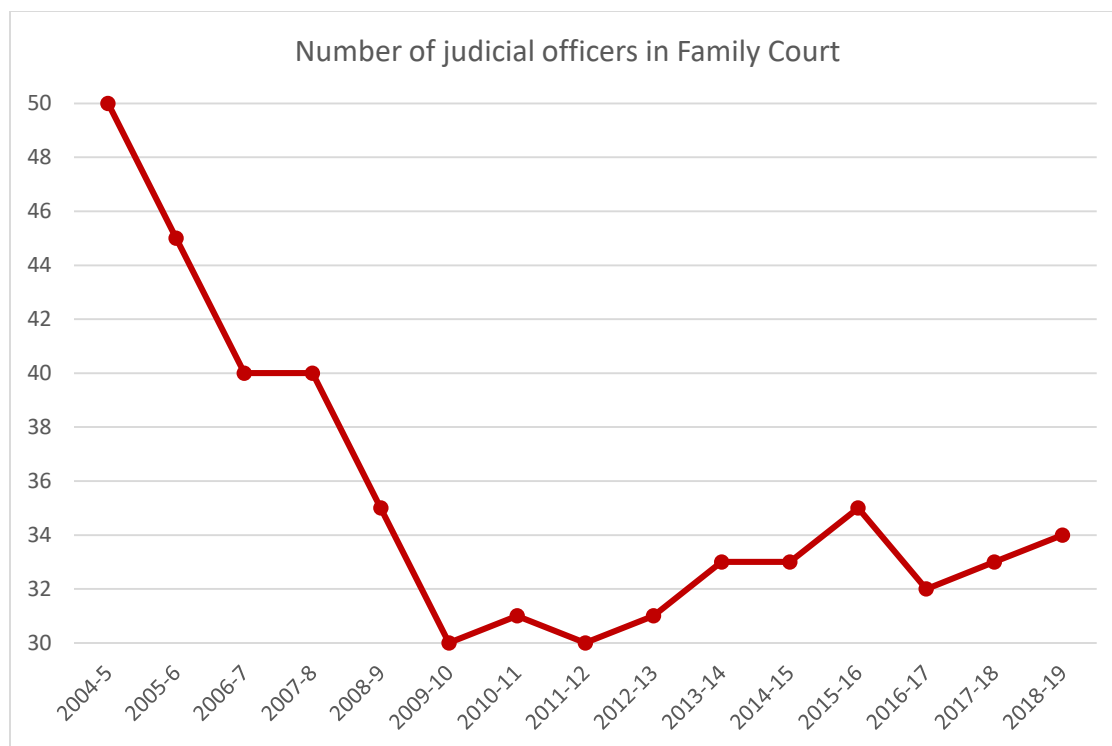
²⁶ Federal Court of Australia, *Question on Notice AE18-015 – Number of Family Court of Australia and family law circuit court judges employed*, Senate Standing Committee On Legal and Constitutional Affairs, Attorney-General's Portfolio, Additional Estimates 2017-18 (February 2018).

²⁷ Australian Productivity Commission, 'Part C – Justice', *Report on Government Services 2020*.

²⁸ Federal Circuit Court of Australia, *List of Judges* (2019) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/judges-senior-staff/judges>>.

²⁹ Family Court of Australia, *Annual Report 2018-19* (2019) 4.

³⁰ For example in 2013 Justice Jennifer Coate was appointed to the Family Court and almost immediately assigned on a full-time basis to the Child Abuse Royal Commission: see Prime Minister, 'Government formally establishes royal commission' (Media Statement, 11 January 2013) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2164343/upload_binary/2164343.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2164343%22>.



Data source: Family Court Annual Reports

27. A repeated failure over more than a decade to promptly replace retiring Judges has contributed to increased workloads for other Judges, put pressure on already crowded lists and cascaded increased disposition times over many years.³¹ The Courts have consistently warned of, comprehensively recorded and clearly tracked the adverse, ongoing impacts of delayed and insufficient judicial appointments on court backlogs through annual reporting over the last fourteen years.³²
28. Resourcing was identified as an area in need of urgent reform by the House of Representatives 2017 Inquiry. The Committee recommended that “the Australian Government considers the current backlog in the federal family Courts and allocates additional resources to address this situation as a matter of priority”.³³ Further, the Family Court advised in 2018 that:³⁴

current resourcing limits the capacity of the Court to hear matters more quickly. **The Court acknowledges that it is unacceptable for matters involving family violence to be maintained in the family law system for a long period of time, as this increases the risk of conflict between parties.** (emphasis added)
29. It is disappointing that despite Parliament’s awareness of the issue, and the Government’s first-hand knowledge of the impact that increasing funding, judicial and support staff has in reducing

³¹ Family Court of Australia, *Annual Report 2008-09* (Commonwealth of Australia, 2009), 4.

³² See, eg, Family Court of Australia, *Annual Report 2008-09* (Commonwealth of Australia, 2009), 4, 35; Family Court of Australia, *Annual Report 2009-10* (Commonwealth of Australia, 2010), 12, 41; Family Court of Australia, *Annual Report 2010-11* (Commonwealth of Australia, 2011) 46, 51; Family Court of Australia, *Annual Report 2011-12* (Commonwealth, 2012), 50.

³³ House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (2017), Recommendation 31, [8.92].

³⁴ Family Court of Australia, Submission 44 to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*, (2017) 4.

family court backlogs, sufficient resources have not been provided to the Courts to address their workload or delays. It is also extremely concerning that whilst a large proportion of family law matters allege family violence, the Courts are not properly resourced to effectively and appropriately manage their caseloads. It is unacceptable that matters with a presence of family violence are being delayed and family breakdown issues are being prolonged.

30. Legal Aid NSW has warned that:³⁵

Such delays present barriers to the early identification of family violence, and the delivery of appropriate legal and non-legal responses. Legal Aid NSW is concerned that many families with complex needs have been waiting for judicial determinations for excessive periods of time due to a shortage of Judges. While these families wait, disputes often become more entrenched and risk issues can be heightened. Delay also increases the pressure on judicial officers and lawyers in terms of volume of work, which in turn decreases the likelihood of appropriate and comprehensive judicial responses to family violence. Reducing delay would allow for earlier findings of fact in relation to family violence to be made by the court.

31. Despite best efforts, the challenges faced by judicial officers struggling to meet these caseloads adversely affect the quality of outcomes delivered for parents and children.
32. Judges perform this important work in a difficult, high-pressure environment that carries the risk of physical danger to themselves and their families, as well as the gravity of knowing that their decisions, especially regarding children, could in some instances provoke extreme responses resulting in violence to a child or a party, or in some tragic cases death. This working environment is not safe or sustainable, for either the Judges or the survivors appearing before them.
33. In February 2019 a Federal Circuit Court Judge sitting in Newcastle highlighted this concern in a judgment. The Judge adjourned an application concerning the welfare of five children, the youngest of whom was four, for six months in circumstances where there were serious allegations of family violence, criminal proceedings pending against a parent, a parent with several serious diagnosed mental health conditions and the allegation that the children were at serious risk. The Judge observed:³⁶

it is regrettable that the court's calendar is as heavily listed as it presently is. I do not consider 28 August 2019 to be an entirely appropriate date for the further hearing of this interim application. The regrettable reality is that these children require more attention than this court can give them at this time given the sheer state of the listings at this time, a matter which should by now be a matter of public record. The fact is that, on the latest numbers I have, my docket consists of 563 cases, each of which has its own significance, each of which has its own urgency.

34. The practical, wellbeing and financial consequences of these delays are numerous and profound for the parties involved. There are also broader costs and impacts to the community, resulting from the consequences of family breakdowns not being determined in a timely manner.
35. The consequences of delay include increasing complexity of cases over the period spent waiting for trial, as the lives of children and their parents continue to change and financial positions change.

³⁵ Legal Aid NSW, Submission 90 to House of Representatives Standing Committee on Social Policy and Legal Affairs, *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*, (2017) 12.

³⁶ *Munson and Munson* [2019] FCCA 670 (20 February 2019), [10] (Betts J).

If the proceedings involve allegations of abuse, violence and risk, the determination of those allegations become all the more difficult with the passage of time. Cases are not simply dormant while awaiting trial – interim determinations are often required to be made in this period with an increasing and compounding effect on delay, where Judges have to devote time to holding the lives of children and families together until a final hearing date can become available.

36. Delays also materially increase both costs in providing the services necessary to address the ongoing needs of parties and children whilst awaiting a determination and the costs, including legal costs, incurred by parties to address their difficulties whilst awaiting a hearing. There is a further risk to victims of family violence if the Courts can be used as a tool for abusers to control and intimidate their ex-partners, perpetrate financial abuse³⁷ and weaponise the custody of children. This is dangerous and against the best interests of children who are subject to family breakdown.
37. Adequate resourcing of the Courts to deal with the consequences of delay would have the single greatest impact moving people through the court system in a safer, fairer and more timely manner, and reducing costs for families. The Association recommends that the Committee advocate to Parliament for a significant increase in funding and resources, including additional judicial officers, to assist in overcoming significant backlogs and case management and better support survivors of family violence.
38. Whilst the Association recognises the discrete funding initiatives announced by Government,³⁸ such initiatives fail to acknowledge or address the sustained reduction and inadequacy in recurrent expenditure on the core services of the Courts. These initiatives do not provide an answer to the serial cuts to funding, and consequently services, that have been imposed upon the Courts and do not permit the Courts to maintain, let alone strengthen, the resources necessary to deliver its core services to the Australian community. In some instances, stand-alone initiatives actually divert resources otherwise allocated to the delivery of core services to the support of such initiatives, at the expense of the ability to maintain core services. The Association is unaware of any business case being advanced as to the merits of the initiatives, any consultation with stakeholders (including the legal profession) as to the utility and benefits of these initiatives, or of any consideration of the impact of such initiatives on the core operations of the Court.
39. By way of example, in the case of the property pilot and property mediation pilots,³⁹ such expenditure is unlikely to advance the protection afforded to victims of family violence. To the contrary, without a sustained and proper commitment to ensuring that victims are able to receive proper advice and representation, such diversions may well leave victims more vulnerable and exposed. Funding to conduct a pilot for the establishment of a systemic approach to identifying and managing family safety risks and for family violence training is laudable and much needed, but of limited utility if once identified the Courts lack the resources to then deal with the identified issues in a timely and appropriate manner.

³⁷ Jonathan Hair, 'Ex-partners use finances and court systems to continue abuse: report', *ABC News* (online) 7 March 2018 <<https://www.abc.net.au/news/2018-03-07/womens-legal-service-victoria-financial-abuse-report/9522344>>.

³⁸ See evidence to Senate Legal and Constitutional Affairs Committee, *Senate Estimates*, Canberra, 3 March 2020, 60 (Mr Gifford).

³⁹ Ibid, 60-1 (Mr Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department).

b The business case for funding specialist legal assistance and Legal Aid

40. In 2018 the former Chief Justice of the Family Court, the Honourable John Pascoe AC CVO, confirmed that “many of the difficulties apparent with the system, and particularly with the Family Court, can be solved by an injection of funds, and particularly into legal aid”.⁴⁰
41. Access to legal services is amongst the many challenges faced by survivors of domestic, family and sexual abuse. Equal and fair access to the law is undermined by the reality that, without Legal Aid or legal assistance, many people are not able to afford legal representation in criminal, civil or family law matters. The Senate acknowledged in May 2018 that while 14 percent of Australia’s population live below the poverty line, just six percent would actually qualify for Legal Aid under the contemporary tests imposed due to a chronic lack of resourcing.⁴¹ Legal Aid had been progressively cut by successive Federal Governments of both political persuasions, to the point where Commonwealth funding had reached its lowest level in more than two decades.⁴²
42. In May 2020 the NSW and Federal Governments announced \$21 million in funding for family violence services, including to increase staff at Legal Aid’s NSW Domestic Violence hotline and improve service capacity at the Women’s Domestic Violence Court Advocacy Services.⁴³
43. The Association acknowledges the Federal Government’s May funding announcement of \$63.3 million to support frontline legal services in response to further pressures placed on legal assistance providers arising from the COVID-19 pandemic, including \$20 million to address domestic violence.⁴⁴ In June, the Federal Government announced that the National Legal Assistance Partnership 2020-25 will distribute over \$2 billion in funding for Commonwealth assisted legal services, with Legal Aid Commissions receiving \$1.2 billion, Domestic Violence Units/Health Justice Partnerships \$51 million and Family Advocacy and Support Services \$20 million.⁴⁵
44. While this funding is very welcome and urgently needed, such investment must be proactive and ongoing to ensure the justice system and those who perform essential services within it are best equipped to respond to and support victims of family violence at all times, including during crises.
45. This must include adequate, sustained funding for specialised legal assistance providers, such as First Nations’ Legal Services, Women’s Legal Services, family law support services and family violence service providers. The Association urges the Committee to advocate for the Government

⁴⁰ Family Court of Australia, Submission to the ALRC by the Honourable John Pascoe AC CVO, Chief Justice of the Family Court of Australia (18 May 2018) [8].

⁴¹ Commonwealth, *Parliamentary Debates*, Senate, 10 May 2018, 2868 (Senator Griff, South Australia), cited in Law Council of Australia, ‘Senate calls for legal aid funding increase post Budget’ (Media Release, 10 May 2018) <<https://www.lawcouncil.asn.au/media/media-releases/senate-calls-for-legal-aid-funding-increase-post-budget>>.

⁴² Ibid

⁴³ Ministers Speakman and Ruston, ‘COVID-19: Funding to boost domestic violence support’ (Media Release, 26 May 2020) <<https://www.nsw.liberal.org.au/COVID-19-FUNDING-TO-BOOST-DOMESTIC-VIOLENCE-SUPPORT>>.

⁴⁴ Commonwealth Attorney-General, the Hon Christian Porter MP, ‘Funding boost to ensure struggling Australians can get legal assistance’ (Media Release, 6 May 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/funding-boost-ensure-struggling-australians-can-get-legal-assistance-6-may-2020>>.

⁴⁵ Commonwealth Attorney-General, the Hon Christian Porter MP, ‘\$2 billion partnership to deliver legal assistance services for Australians’ (Media Release, 30 June 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/2-billion-partnership-deliver-legal-assistance-services-australians-30-june-2020>>.

to commit to and maintain a baseline of funding for emergency domestic violence services, determined in consultation with stakeholders including service providers.

46. Chronic under-funding of legal aid and legal assistance in family law has meant that already complex and emotionally-fraught matters are made more difficult by high rates of unrepresented litigants. During 2018-19, the volume of cases in the Family Court in which neither party had representation more than tripled during that year from 4% to 14%, while the proportion of cases in which at least one party was represented was 15%.⁴⁶
47. Most litigants who are unrepresented cannot afford legal representation.⁴⁷ Dewar, Smith and Banks' 2000 *Litigants in person in the Family Court of Australia* research study identified that unrepresented litigants have a wide range of needs and assistance, including:⁴⁸
 - a. Information, including about relevant support services, court procedures and stages of the litigation process;
 - b. Advice, for example on form-filling, court etiquette, preparation of court documents, formation of legal argument and the rules of evidence; and
 - c. Emotional and practical support.

For these reasons, cases involving one or more parties without legal representation take significantly longer to conduct properly and justly.

48. For any litigant, appearing without representation is intimidating, time-intensive, imposes significant stress and emotional strain, and may carry a financial cost if a person is required to take time off work to attend court. These pressures are compounded for survivors of family violence who may be placed at greater risk of harm through exposure to re-traumatisation or further abuse at the hands of their perpetrator through behaviour or signaling in a courtroom.
49. In addition, Women's Legal Services Australia has previously noted that "it is common for a victim-survivor to not report family violence", including because of:⁴⁹

concerns that reporting the violence can lead to further risk of harm (from the perpetrator directly but also further trauma from participating in the family law system itself), feelings of shame and convictions of not being believed, as well as cultural and/or language barriers to reporting and fear or lack of trust in legal systems for some groups of victim-survivors, including Aboriginal and Torres Strait Islander or culturally and linguistically diverse (CALD) victim-survivors.
50. The Association recognises the importance of addressing how family violence and abuse affects people from diverse cultural backgrounds, including First Nations People, and encourages the Committee to engage with relevant and appropriate stakeholder groups. It is critical to ensure that specialised, culturally competent legal assistance is properly resourced and readily accessible for all people experiencing family violence.

⁴⁶ Family Court of Australia, *Annual Report 2018-19* (2019) 25.

⁴⁷ John Dewar, Barry Smith, Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 1.

⁴⁸ Ibid.

⁴⁹ Women's Legal Services Australia, *Submission 22*, Legal and Constitutional Affairs Committee's Inquiry into the Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018 (2018) 6.

51. The Association recognises the importance of supporting First Nations led specialist legal advice, representation and other assistance services. The ALRC Report outlined evidence that the presence of Indigenous Liaison Officers improved “access to family law justice” for First Nations people”.⁵⁰ The Association encourages the Committee to advocate to the Government to adopt Recommendation 45 of the ALRC Report, which states that the Government “should ensure the availability of Indigenous Liaison Officers in court registries where they are required”.
- c Importance of properly funding the cross-examination of parties scheme*
52. The Association also recommends that the Inquiry consider the operation, resourcing and funding of the family violence and cross-examination of parties scheme (**the Scheme**), which came into effect last year. The Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (Cth) (**the Cross-Examination Bill**) was introduced to the Parliament in June 2018 without any funding commitment and before negotiations had been concluded with National Legal Aid. The Cross-Examination Bill introduced a new section 102NA to the Family Law Act 1975 (Cth), which was intended to provide mandatory protections for victims of family violence by prohibiting direct cross-examination in certain cases. Under the amendment, if relevant circumstances of family violence apply, a party intending to personally cross-examine the other party may be restrained by Order from doing so. If such an Order is made, the cross-examination must be conducted by a legal practitioner acting on behalf of the examining party (regardless of whether examination is being conducted by the alleged perpetrator or alleged victim).
 53. The Scheme can only operate effectively if it is adequately funded and resourced. The Cross-Examination Bill was passed in December 2018 and the new section 102NA and the Scheme commenced from 10 September 2019. Just three months after its commencement, the Government had to make an urgent \$2 million funding injection, through the Mid-Year Economic and Fiscal Outlook, to prop up the Scheme during 2019-20 alone, National Legal Aid having advised the Courts that the funding allocation had already been exhausted. Another \$1.2 million funding injection was urgently required in February, after Forrest J noted in a judgment that in Brisbane registries alone, more than five listed trials in the Family Court and more than 30 listed trials in the Federal Circuit Court had been directly impacted by notice from Legal Aid Queensland that funding under the scheme was not available.⁵¹
 54. In March 2020, Departmental officials told Senate Estimates that the original appropriated budgeted for the Scheme was based on an expectation of receiving just 192 applications this year.⁵² As at 31 January 2020, 431 applications had been received since the Scheme commenced – more than double the modelled number.⁵³ The additional \$3.1 million that had been allocated is insufficient to meet outstanding need, or to set the Scheme up for success. It represents two one-

⁵⁰ ALRC Report, 50.

⁵¹ See Vanessa Marsh, ‘DV victims failed by Federal Court funding shortfall’, The Courier Mail (online), 28 February 2020; see also Law Council of Australia, ‘Legal funding welcome but underscores crisis’ (Media Release, 28 February 2020).

⁵² Evidence to Senate Legal and Constitutional Affairs Committee, *Senate Estimates*, Canberra, 3 March 2020, 57 (Ms Alex Mathews, Assistant Secretary, Family Safety Branch, Families and Legal System Division).

⁵³ Ibid.

off investments in the financial year 2019-20 only. This significant underfunding of the Scheme must be addressed as an urgent priority to support victims of family violence.

d Ramifications of under-resourcing on the implementation of the National Plan

55. Unless the funding and structural issues identified in this submission are addressed, these will continue to impede progress towards the objectives and strategies contained in the National Plan.
56. In 2009 the National Council to Reduce Violence Against Women and Their Children released its report *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021*.⁵⁴ The Australian Government released its National Plan in February 2011. The National Plan identified six outcomes to be achieved by its conclusion in 2022. Each outcome is compromised by several strategies.
57. The Association appreciates the policy rationale behind the National Plan and the importance of encouraging a holistic and consistent approach to this issue across jurisdictions. However, the Association is concerned that a number of the strategic priorities contained in the National Plan have been hindered by successive governments' failures to properly resource and fund the services required to secure their effective implementation. These include, but are not limited to:
 - Strategy 4.1: Enhance the first point of contact to identify and respond to needs;
 - Strategy 4.2: Support specialist domestic violence and sexual assault services to deliver responses that meet needs;
 - Strategy 4.3: Support mainstream services to identify and respond to needs;
 - Strategy 5.1: Improve access to justice for women and their children;
 - Strategy 5.2: Strengthen leadership across justice systems;
 - Strategy 5.3: Justice systems work better together and with other systems.
58. The Association considers that this Inquiry is well-placed to advocate to the Parliament for significant resourcing and structural reform to support the National Plan.
59. The Association acknowledges the importance of data in driving meaningful policy reform. However, data concerning the qualitative experiences of survivors of family violence in engaging with services is just as crucial as quantitative data on services and statistics in determining the effectiveness of programs and support services. The Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Federal Circuit and Family Court of Australia Bill 2018 (Cth) has illustrated the significant shortcomings of relying on statistical analysis alone to determine policies concerning access to justice, as this provides an incomplete picture.
60. Any reform, including future iterations of the National Plan and the deferred 2020-21 Budget must be informed by qualitative data, especially as quantitative evidence may be unreliable during crises involving isolation or dislocation of victims from critical services.

⁵⁴ (2009) < http://www.nasasv.org.au/National_Plan/The_Plan.pdf>.

e The impact of crises on family violence

61. The prevalence of domestic violence against women and their children in Australia has meant it has already been viewed as a “national emergency”⁵⁵ for years. Crises can escalate the seriousness of violence and risk for people in situations of existing domestic violence as well as trigger domestic violence in new cases.⁵⁶ While the COVID-19 pandemic has been unprecedented, it has been estimated that Australians have a “1 in 6 estimated lifetime exposure”⁵⁷ to natural disasters, which are also reported to increase the prevalence and severity of family violence in communities.
62. The 2019-20 bushfires and the pandemic have exacerbated pre-existing challenges of resourcing and demand within Australia’s legal system and federal Courts and reinforced the importance of securing adequate, ongoing funding for services for survivors of family violence. Ensuring the community, including those at risk of domestic violence, can continue to access the Courts to protect their safety and rights in times of uncertainty and disruption is essential.
63. Studies have shown a significant increase in the incidence of family violence during and following crises and post-disaster recovery.⁵⁸ For example, one study found a 98% increase in violence against women as measured from before and after Hurricane Katrina.⁵⁹ Research by Women’s Health Goulburn North East following the Black Saturday bushfires in Victoria in 2009 likewise evidenced an increase in domestic violence in bushfire affected communities.⁶⁰
64. During the 2019-20 bushfire season, family violence service providers in NSW reported increased assaults in regions severely impacted by the fires.⁶¹ This placed strain on front line services responding during and following the fires, including legal support groups such as Legal Aid and Women’s Legal Services.⁶² In January, the then Chief Executive of Domestic Violence NSW, Joanne Yates, noted reports of an “uptick” in family violence in bushfire affected areas during the 2019-20 bushfire season, explaining that domestic violence is “Domestic violence is not a one-off incident. It’s a pattern of behaviour, and under stress those patterns can intensify...”⁶³
65. The UN has declared domestic violence in the context of the COVID-19 pandemic a “shadow pandemic”.⁶⁴ It is difficult to ascertain the scale of impact for many reasons, including that a

⁵⁵ Ursula Malone and Juanita Phillips, ‘Domestic violence of epidemic proportions a ‘national emergency’: campaign groups’, *ABC News* (online), 5 May 2014, <<https://www.abc.net.au/news/2014-05-05/domestic-violence-reaches-epidemic-proportions/5426214>>.

⁵⁶ Debra Parkinson and Claire Zara, ‘The hidden disaster: domestic violence in the aftermath of natural disaster’ (2013) 28(2) *Australian Journal of Emergency Management* <<https://ajem.infoservices.com.au/items/AJEM-28-02-09#>>.

⁵⁷ Women’s Health Goulburn North East, ‘The way he tells it...’ *Relationships after Black Saturday* (2011) 1.

⁵⁸ See, eg, R Maguire, D Bozin, G Mortimer, ‘Domestic violence will spike in the bushfire aftermath, and governments can no longer ignore it’, *The Conversation* (online) 18 November 2019 <<http://theconversation.com/domestic-violence-will-spike-in-the-bushfire-aftermath-and-governments-can-no-longer-ignore-it-127018>>.

⁵⁹ Ibid, citing Schumacher, Coffey, Norris, Tracy, Clements and Galea, ‘Intimate partner violence and Hurricane Katrina: Predictors and associated mental health outcomes’ (2010) 25(5) *Violence Vict.* 588, 588-603.

⁶⁰ Parkinson and Zara, above n 56, citing Women’s Health Goulburn North East, above n 57.

⁶¹ See, eg, Yoni Bashan, ‘Bushfires: Agencies report post-natural disaster spike in domestic violence incidents’, *The Australian* (online), 16 January 2020 <<https://www.theaustralian.com.au/nation/politics/bushfires-agencies-report-postnatural-disaster-spike-in-domestic-violence-incidents/news-story/ea822344afac37cb4796ff3e4735759b>>.

⁶² See, eg, Maguire, Bozin, Mortimer, above n 58.

⁶³ Quoted in Bashan, above n 61.

⁶⁴ UN Women, ‘Violence against women and girls: the shadow pandemic’, (Media Release, 6 April 2020) <<https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic>>.

number of people exposed to family violence may not currently be able to safely access support services due to public health restrictions or isolation. Anecdotal reports of increased escalation of family violence in Australia surfaced early.⁶⁵ Over four weeks in March and April, the number of urgent applications filed increased 39 percent in the Family Court and 23 percent in the Federal Circuit Court.⁶⁶ The Courts responded on 26 April by establishing a COVID-19 list.⁶⁷ Urgent parenting disputes arising out of the crisis are dealt with on this list and matters on the list are required to be assessed and referred to a judge within 72 hours. This has placed strain on the Courts and judicial officers, who are already under significant pressure and crippling workloads.

66. Failing to be alert to and address family violence in both proactive and reactive emergency planning and responses puts survivors of family violence at risk. Parkinson and Zara noted that “Emergency management can play a part in preventing domestic violence after disaster by attending to it in planning, response and recovery stages”.⁶⁸
67. Women’s Health Goulburn North East recommended that: targeted funding should be provided to emergency management agencies involved in disasters to upgrade policies, practices and provide training in family violence recognition, response and reporting; family violence services should be “a visible and engaged part of disaster recovery”; and funding for these services and women’s groups should be increased when demand increases post-disaster.⁶⁹ The Association reiterates these and further recommends that Governments should plan and budget for the downstream justice impacts and demands on legal services including Courts. Although difficult to empirically quantify, these impacts must nonetheless be anticipated.
68. While platforms like Teams and Zoom have enabled some court hearings to continue remotely during lockdowns and social distancing requirements, the use of such technology has raised important considerations as to whether it is in the interests of justice and the parties for all matters to proceed through video-conferencing. Technology must not be used in matters where it would undermine the integrity of processes such as giving evidence or cross-examination. For children or survivors of family violence giving evidence from home, there are risks that the witness may be influenced by who they think may be listening in, or be subjected to duress by someone else present in the room off-camera. How clearly a witness’s facial expressions are visible due to the quality of the equipment or video connection can impact on how credibly their testimony is received.
69. The pandemic has also underscored the importance of securing adequate Legal Aid and legal assistance funding to assist vulnerable people including survivors of family violence. It is difficult for virtual hearings to be conducted effectively if litigants are self-represented, including because they may not be able to access sufficient technology, and virtual hearings compound communication difficulties, especially if assistance is required from an interpreter.

⁶⁵ See, eg, Julie Baird, ‘Domestic abuse advocates warn of an increase in violence amongst coronavirus crisis’, *ABC News* (online), 20 March 2020 <<https://www.abc.net.au/news/2020-03-20/domestic-violence-spike-amid-coronavirus-crisis/12074726?nw=0>>.

⁶⁶ Family Court, ‘The courts launch COVID-19 list to deal with urgent parenting dispute’ (Media Release, 26 April 2020) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr260420>>.

⁶⁷ Ibid.

⁶⁸ Parkinson and Zara, above n 56.

⁶⁹ Women’s Health Goulburn North East, above n 57.

70. The importance of ensuring emergency responses specifically address family violence has been recently illustrated in the risks posed by e-witnessing and e-signature arrangements during COVID-19. Many jurisdictions have introduced temporary measures to allow e-witnessing and e-signature of legal documents previously required to have been witnessed or signed in person.⁷⁰ Providing continuity in the service of witnessing documents is important to the justice system and to allow individuals to continue to manage their affairs during the pandemic. These provisions have enabled urgent protections to be obtained for some survivors of family violence, which would not have been possible otherwise.
71. However, these provisions contain inherent risks which must be balanced by careful safeguards to prevent abuse and any unintended consequences. Before COVID-19, in-person requirements for witnessing or signature were considered important safeguards, including against fraud, duress or undue influence. The Association is concerned about the possibility for vulnerable people in situations of domestic violence to be coerced into e-witnessing or e-signing significant documents during the pandemic. This could include a person being pressured into e-signing or e-witnessing a document under duress from an abuser in the room off-camera. Organisations, such as banks, may not be able to discern signs of duress including facial cues and body language as readily, as video-conferencing technologies can make it more difficult for a person's features to be seen clearly, particularly if internet coverage/bandwidth is insufficient. This may also give rise to fraud or unauthorised action as intimate partner abusers may be aware of their partner's personal details, security questions and able to access ID documents such as a passport or driver's licence.
72. The protection of wet-ink requirements should only be departed from as a last resort where in-person signature is not safe or practicable. The Association recommends that further consideration be given to protecting survivors of family violence from duress and financial abuse in this context. These could include a possible requirement for a signatory or testator to identify all persons present in a room (including off camera), a prohibition on obscuring a background during a videoconference or a requirement to retain a video record of a videoconference involving signing/witnessing of a document. Any emergency measures should be repealed at the earliest opportunity. If governments consider such measures have merit on a more permanent basis, these should be introduced through primary – not secondary – legislation to ensure these receive the benefit of full parliamentary scrutiny and consultation with all relevant stakeholders.

⁷⁰ See, eg, *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Cth); *Coronavirus Economic Response Omnibus (Measures No. 2) Act 2020* (Cth) Sch 5; *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW).

D The importance of specialist services, including a stand-alone Family Court, in dealing appropriately with family violence

73. The alarming prevalence of family violence in the system makes specialisation critical to promote safe engagement for survivors with the Courts and the justice system, from the time a matter is filed, through appropriate triage, active case management and expedited resolution.
74. In 2010 the ALRC and NSW Law Reform Commission advised that “the specialisation of key individuals and institutions is crucial to improving the interaction’ of the different legal frameworks governing family violence in Australia”.⁷¹ The 2016 Report by the Victorian Royal Commission into family violence identified specialists in family violence as critical because “there is no single pathway into the family violence system”.⁷²
75. Justice services operate on the front line in responding to violence, alongside police and support services. It is very difficult for victims of family violence and children at risk to access support and resources to stay safe, including to enforce their legal rights, when the system is fragmented.
76. A specialist stand-alone family court is important to ensure specialist knowledge and training for judicial officers, registrars and court staff to equip them to identify and manage risk, and protect children and victims in need of the Courts’ assistance. Importantly, a specialist court consists of more than just its Judges. It also includes support services, resources and processes. It is also important to provide specialised court infrastructure to support children and families experiencing violence, and to coordinate and locate legal and non-legal support services. Currently, the Family Court is a part of a holistic, specialist system of interrelated and co-located services and resources. When properly resourced, the Family Court has excelled at the provision and application of specialist conciliation and assessment services. Registrars and family consultants, when properly resourced and deployed, are an integral part of case management, particularly the early identification, narrowing and resolution of issues.
77. The Amended Merger Bills would give effect to a proposal originally announced by the Government in April 2018 to abolish the stand-alone, specialist Family Court as we know it and collapse the Family Court into the generalist, overworked and under-resourced Federal Circuit Court. Although current Judges of the Family Court would be transferred to ‘Division 1’ of the merged court under the proposal, the Amended Merger Bills would nonetheless result in the abolition a stand-alone specialist, multi-disciplinary court ecosystem dedicated exclusively to family law matters, to the detriment of those in need of its services including victims of family violence. Departing from a stand-alone, specialist family court model with co-located legal and non-legal support services, as the merger entails, is contrary to the advice of experts and research and is not in the best interests of survivors of family violence in need of family law assistance.
78. This section of the submission examines two characteristics of the existing Family Court model – its specialist nature and its independent, stand-alone structure – and the importance of retaining both, which cannot happen under the proposed merger.

⁷¹ Quoted in Australian Law Reform Commission, *Review of the family law system* (Report No 135, 2019), [4.83].

⁷² Royal Commission into Family Violence, *Summary and recommendations* (2016) No 132 Session 2014-16, 19.

a Why is specialisation important?

79. Family law is factually and legally complex, emotionally-charged and produces life-altering consequences for families and children. It is the area of law by which most people will come into contact with the justice system.⁷³
80. The Family Court currently hears “the most complex and difficult family law matters”, including “matters involving allegations of family violence and/or child abuse; questions of international family law (relating to the Hague 1980 Child Abduction Convention and/or 1996 Child Protection Convention); applications related to special medical procedures (such as stage two treatment for gender dysphoria in children); and complex property matters including those involving accrued jurisdiction and third parties”.⁷⁴
81. Judges working in this area not only require specialist technical knowledge, legal reasoning, fact finding and analytical skills, they also require highly effective communication and interpersonal skills and experience in social dynamics. One of the Family Court’s most admired features is the fact that only those who “by reason of training, experience and personality”⁷⁵ are suited to deal with family law cases are appointed as its Judges. By contrast, Federal Circuit Court Judges need not satisfy that same requirement.⁷⁶
82. This was acknowledged by the House of Representatives 2017 Inquiry, which stated that:⁷⁷

Under the *Family Law Act*, Judges cannot be appointed to the Family Court unless they are deemed suitable to preside over family law matters ‘by reason of training, experience and personality’. However, Judges appointed to the Federal Circuit Court do not need to meet the same requirements because the Court exercises jurisdiction in general federal law matters, despite the fact that 87 percent of the total family law workload is heard in that court.
83. The Council of Single Mothers and their Children told the Senate Legal and Constitutional Affairs Legislation Committee in July 2018 that:⁷⁸

Many of the most disconcerting stories we hear occur in the Federal Circuit Courts where issues of family violence are disregarded in comments from the Bench, or in interactions with lawyers who sometimes advise clients against raising concerns or even, refuse to raise them. While the training of judicial officers may seem beyond the scope of this committee in relation to this legislation, we nevertheless recommend this be considered for inclusion and/or referred to the Family Law System Review. The behaviours of Judges and other court officials that is based on knowledge about the impacts of family violence, beliefs and personal judgements, is key in

⁷³ Justice Abella, ‘The Challenge of Change’, (1998) Speech to the 8th National Family Law Conference, Hobart Tasmania, 25 October 1998, 2-3.

⁷⁴ Federal Court of Australia, *Corporate Plan 2017-18* (2017) 18
<http://www.fedcourt.gov.au/__data/assets/pdf_file/0006/45366/Corporate-Plan-2017-18.pdf>.

⁷⁵ *Family Law Act 1975* (Cth) s 22(2)(b).

⁷⁶ Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (House of Representatives, 2017) [8.21], citing Professor Patrick Parkinson AM, Private Capacity, *Committee Hansard*, Canberra, 17 October 2017, 1.

⁷⁷ House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (2017) 266, [8.21] (citations omitted).

⁷⁸ Council of Single Mothers and their Children, Submission 6 to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Family Law Amendment (Family Violence and Cross-examination of parties) Bill 2018* (2018), 2.

legislation such as that proposed, where judicial discretion and a lawyers' interpretation and representation are critical to decisions and fair hearings.

84. The House of Representatives 2017 Inquiry recommended an increase in the specialisation of Judges undertaking family law work.⁷⁹ Former Chief Justice of the Family Court, Elizabeth Evatt AC, warned in 2019 that:⁸⁰

the proposed merger of the Family Court and the Federal Court is likely to undermine the integrity of the Family Court and lead to undesirable outcomes for the parties. It is inconsistent with the original aims of the Family Court, which was established as a specialist Court. Section 22 (1) (b) of the Family Law Act 1975 provides that persons may be appointed as Judges of the Court if "by reason of training, experience and personality, the person is a suitable person to deal with matters of family law". This provision recognises that the jurisdiction of the Court, while operating in a legal framework, involves issues of relationships and the welfare of children which require consideration of wider issues than strictly legal ones. Experience has confirmed that judicial appointments to the Family Court are most successful when made from those with experience and training in family law matters, including issues of family violence. **With increasing numbers of cases in which issues of family violence and child abuse are raised, there is an even greater need today for family law jurisdiction to be vested exclusively in specialised judges who do not exercise any unrelated jurisdiction.** (emphasis added)

85. The Attorney-General is right to say that "fundamental structural reform is an absolute necessary condition to further improvements" to the family law system,⁸¹ however, the Association urges the Government to give further consideration to alternate models of reform as the merger will not solve any of the problems confronting the system.
86. The experiment of sharing jurisdiction between and running family law matters in two separate federal Courts – with separate rules and procedures – has failed because of:
- a. successive governments' failures to invest properly in the court system;
 - b. successive governments' failures to commit to the proper management of the Courts, including by the appointment of a full-time Chief Judge of each of the Courts and the consistent appointment of Judges properly experienced and suited to determining family law issues; and
 - c. a failure of the Courts to provide a comprehensive and consistent approach to case management.
87. To overcome these issues, the Association proposed in July 2018 the creation of a 'Family Court 2.0' to bring Judges currently hearing family law matters in, and the jurisdiction currently exercised by, the Federal Circuit Court into a second, lower division within the specialist, stand-alone Family Court.⁸² This structural model has been in force for many years in the state of Western Australia,

⁷⁹ See *ibid*, [8.76] – [8.84] and recommendations 27-29.

⁸⁰ Elizabeth Evatt AC, *Submission 96*, Joint Select Committee on Australia's Family Law System (December 2019).

⁸¹ The Hon Christian Porter MP, *Transcript ABC TV – Insiders*, 10 June 2018, page 4
<<https://www.attorneygeneral.gov.au/Media/Pages/ABC-TV-Insiders-10-June-2018.aspx>>.

⁸² New South Wales Bar Association, *Time to talk about a Family Court of Australia 2.0* (2018)
<https://nswbar.asn.au/docs/mediareleasedocs/Family_Court_MR2.pdf>.

and was recommended by the 2008 *Future Governance Options for Federal Family Law Courts in Australia* report by Des Semples (the **Semples Report**).⁸³ The Association's Family Court 2.0 model has subsequently been endorsed by stakeholders including Women's Legal Services Australia and the Law Council of Australia.⁸⁴ The Association's model does not, of itself, involve any greater revenue implications than the Government's proposal.

88. The Government's merger proposal did not pass the 45th Parliament and has been strenuously opposed by stakeholders including the legal profession, Women's Legal Services Australia, Community Legal Centres and National Aboriginal and Torres Strait Islander Legal Services. One of the key reasons for this consistent opposition is that the merger will result in the loss of specialisation from the family law system which is critical to protect the safety and wellbeing of children, victims of family violence and families at their most vulnerable. Unlike the Government's proposal to merge the Family Court into the generalist Federal Circuit Court, the Family Court 2.0 model would have the significant advantage of promoting safety for children and adults by preserving access to services of a specialist Family Court.
89. For more than forty years, the Family Court of Australia has been a premier legal institution, a specialist superior court admired by other family law jurisdictions around the world for its innovative management of "the most complex and difficult family law matters".⁸⁵ It is important to be clear about what is meant by a specialist family court and what that entails.
90. The Family Court was established as a "specialist multi-disciplinary court, incorporating the creation of an in-house counselling section staffed by psychologists and social workers with child welfare expertise, and the requirement to place the interests of children at the forefront of parenting disputes. This was followed by the establishment of mediation as a fundamental part of the system, and provision for less adversarial trial proceedings in child-related proceedings."⁸⁶
91. A family law system that values and operates on specialisation provides a space for the community to use expert assistance, which is crucial in circumstances of domestic and family violence.
92. The strongest protection for children, families and victims of family violence is to maintain a stand-alone, specialist family court involving a holistic, specialist system of interrelated and co-located services and resources, as was intended when the Family Court was originally created. The family law system must move to consolidate and strengthen, not undermine, specialisation.
93. A well-resourced family law system is not limited to the provision of government funding. The implementation of resources is crucial to an effective family court which places the safety and welfare of survivors of domestic violence at its forefront.

⁸³ Des Semples, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (2008) <<https://www.ag.gov.au/LegalSystem/Courts/Documents/court-reform-sembles-report.PDF>>.

⁸⁴ Women's Legal Services Australia, Submission No 18 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Federal Circuit and Family Court of Australia Bill 2018* (Cth) (2018) 7; Law Council of Australia, Submission No 52 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Federal Circuit and Family Court of Australia Bill 2018* (Cth) (2018) 7, recommendation 4(d).

⁸⁵ Federal Court of Australia, *Corporate Plan 2017-18* (2017) 18.

⁸⁶ Australian Law Reform Commission, *Review of the family law system* (Report No 135, 2019) [1.12].

b Why should the Family Court stand alone?

94. The Association has consistently warned that the merger proposal would mean the end of the Family Court as a stand-alone, specialist court. By virtue of its very nature, the merger proposal would result in the court ceasing to exist as a separate, stand-alone entity and being merged into a generalist court.
95. In 1974, the Senate Standing Committee on Constitutional and Legal Affairs considering the Family Law Bill 1974 (Cth) “emphasised the need for a federal court of record which could deal *exclusively* with family law matters”⁸⁷ (emphasis added). Further, in 2000, former Chief Justice of the Family Court, the Hon Alastair Nicholson and Margaret Harrison noted:⁸⁸

The relative paucity still of specialist family courts around the world prompts queries about their strengths and weaknesses and the will of governments for their establishment. There are obvious arguments for and against such courts. **It is undoubtedly bewildering, costly and inefficient to deliver fragmented services through a plethora of courts, tribunals and social welfare agencies...** It is also apparent, as occurred before the establishment of the Family Court, that in a generalist jurisdiction many judges and magistrates do not like family law work and will either hear these matters last or avoid them. A divisional structure is a slight improvement, but judges working in the family law area tend to be transferred into other areas, or a rotation system is employed which has the effect of removing the best family law judicial officers after they have attained competence in the area. Because some senior judges and magistrates in a generalist court regard family law as less important than other areas of their jurisdiction, family law tends to suffer when there are budget cuts and workload increases. **Moreover, experience in Australia and overseas suggests that where a family court is a division of a generalist court, or where family law cases are simply assigned to judges or magistrates in a generalist court, the quality of performance suffers greatly.**

96. This issue was addressed more recently by the former Chief Justice of the Family Court, Elizabeth Evatt AC, in evidence to the Joint Select Committee inquiry into Australia’s Family Law System in July.⁸⁹ Ms Evatt explained that the original aims of the Family Court:⁹⁰

were to set up a freestanding court with full jurisdiction in all family law matters. It was intended originally to be a two-tier court so that there would be judges dealing with the more complex issues and judges at a lower level dealing with the more straightforward matters. The idea of a freestanding court was that the judges appointed to the court would have experience and training to deal with family law matters. However, the original intent wasn't fully implemented and, in the end, quite a lot of family law matters were dealt with at lower levels in the state courts and then eventually in the Federal Circuit Court. **But I believe it's imperative now to re-establish**

⁸⁷ The Hon Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, ‘Family Law and the Family Court of Australia: Experiences of the First 25 Years’ (2000) 24(3) *Melbourne University Law Review* 756, citing Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parl Paper No 133, 1974) 10 [33] <https://nla.gov.au/nla.obj-840875983/view?partId=nla.obj-842436336#page/n21/mode/lup>.

⁸⁸ The Hon Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, ‘Family Law and the Family Court of Australia: Experiences of the First 25 Years’ (2000) 24(3) *Melbourne University Law Review* 756.

⁸⁹ Evidence to the Joint Select Committee Inquiry into Australia’s Family Law System, video-conference, 22 July 2020, 4 (Ms Evatt AC).

⁹⁰ *Ibid*, 1.

the idea of a two-tier Family Court with judges which deal only with matters of family law. I think that would strengthen the court and its operations. There shouldn't be any diminution of the specialisation, which I think is for the benefit of families when they come into dispute. Indeed, I think the delays which occur now are partly the result of split jurisdiction. The other thing is that a single two-tier court was intended to have qualified and trained counsellors who could help the parties resolve their problems in regard to children. At the present time there are insufficient specialised court counsellors, and that leads to endless delays for parties in getting their matters dealt with by the court. (emphasis added)

97. The former Chief Justice submitted that “The Family Court should be converted into a two-tiered court, so its lower tier deals with the matters that are now under the jurisdiction of the Circuit Court”⁹¹ and stated her full support for the Association’s Family Court 2.0 proposal as a mechanism to achieve this.⁹²
98. The Association recommends that the Amended Merger Bills should not be passed and a specialist, stand-alone and properly resourced Family Court should be maintained in Australia to continue to provide specialist assistance to survivors of family violence.

c *Inconsistency between state and federal governments’ responses to domestic violence*

99. There have been more than 50 inquiries relating to discrete aspects of the family law system since the *Family Law Act 1975* (Cth) was enacted.⁹³ In addition to this Inquiry, there are two ongoing inquiries by Commonwealth parliamentary committees relating to the family law system.⁹⁴ The Association acknowledges the work of these preceding inquiries and encourages the Committee to consider and build upon their recommendations, particularly those yet to be actioned.
100. For example, the Federal Government is yet to respond to the 60 recommendations of the landmark “root and branch” inquiry by the ALRC into the family law system, commissioned by former Attorney-General Senator the Hon George Brandis QC. The Association encourages this Committee to carefully consider and engage with the ALRC’s recommendations.
101. In particular, the 2019 ALRC Report identified the risks that poor coordination between State and Commonwealth court and support systems pose for victims of family violence. The ALRC Report’s first recommendation proposed that while the power to make laws in relation to family law matters should remain with the Commonwealth, decision-making should be undertaken by Courts at a State and Territory level. This recommendation purports to close the “jurisdictional gap”⁹⁵ between state and territory child protection, family violence jurisdiction and law enforcement, and Commonwealth family law jurisdiction, and ensure children and victims of family violence do not slip through the cracks between systems.

⁹¹ Ibid, 2.

⁹² Ibid, 4.

⁹³ See, eg, comprehensive list outlined in Australian Law Reform Commission, *Review of the Family Law System* (2018) [2.38] – [2.92].

⁹⁴ Joint Select Committee inquiry into Australia’s Family Law System; Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2019 (Cth).

⁹⁵ See ALRC Report, chapter 4.

102. The Law Council of Australia has indicated that the “ALRC’s recommendation 1 deserves careful investigation and widespread consultation, including with the community, the Courts, family violence service providers and the legal profession”. In the meantime, the Law Council of Australia has called for urgent action to implement the ALRC’s second and third recommendations that the Australian Government should work with state and territory governments to:
- “develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between the family law, family violence, and child protection systems...”; and
 - “consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders made under state and territory child protection legislation”.
103. The Association agrees and considers the merger proposal should be abandoned in favour of careful consideration of other proposals, including the ALRC’s Recommendation 1, the model proposed by the Semple Report and the Association’s Family Court 2.0. The Association has consistently advocated for a holistic approach to family law reform. If the family law system continues to operate in a reactionary capacity towards domestic violence, with minimal communication between police and other institutions, the consequences will be dire for all Australians.

Conclusion

104. The family law system when properly funded and resourced is an important protection for those at risk of family violence. Holistic approaches to annual budgeting and emergency planning that include the justice system are critical to best support survivors of family violence at all times.
105. Thank you again for the opportunity for the Association to make a submission to this Inquiry. The Association would be pleased to assist the Committee with any questions it may have. If you would like any further information, or to discuss this submission, please contact the Association’s Director of Policy and Public Affairs, [REDACTED] via [REDACTED]