



SUBMISSION | NEW SOUTH WALES  
**BAR ASSOCIATION**

2020-21 Pre-Budget Submission to Treasury

4 February 2020

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## 1. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Federal Government for the opportunity to make submissions to Treasury on priorities for the 2020-21 Budget.
2. There is a direct correlation between investing in Australia's justice system and the timeliness and quality of justice the system and its courts deliver.
3. Not investing in the justice system and legal assistance is a false economy. Increased funding and resourcing of Legal Aid, legal assistance and Australia's family law system must be a key priority in the 2020-21 Budget to improve access to affordable and timely justice for adults, children and families.
4. The Association acknowledges the devastating personal and financial cost of the ongoing bushfire crisis for many Australians. The Association appreciates that immediate crisis management, support and the recovery effort rightly require priority funding and will place unanticipated pressure on budget forecasts.
5. Nevertheless, the Association urges the Government and Treasury not to postpone investment in the priorities outlined in this submission, as many of the legal assistance services and justice infrastructure considered will also be impacted by, and face increased demand in the wake of, the bushfire crisis. The Association calls for investment in Legal Aid and the legal assistance sector at this critical time.
6. Studies have shown a significant increase in the incidence of family violence during and following post-disaster recovery. There have already been calls for increased funding of front line services responding to family violence following the fires, including for legal support groups such as Legal Aid and Women's Legal Services.<sup>1</sup> This in turn will inevitably lead to needs in the family law sector.
7. Many justice services and legal assistance providers around Australia have offered pro bono assistance to victims of the bushfire crisis. As this submission outlines, however, these services are already struggling with limited resources and are themselves in desperate need of funding relief. These pressures will become more acute as the recovery effort and rebuild continues through 2020-21 and beyond. In addition to funding immediate recovery services for the bushfires, the Association encourages the Government to prioritise funding and investment in related justice sectors.
8. Accordingly, this submission outlines the business case for:
  - a. further funding of Legal Aid and legal assistance;
  - b. resourcing the family law system, prioritising, consolidating and resourcing a specialist, stand-alone family court; and
  - c. increased funding of the Family Violence and Cross-examination of Parties Scheme.

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<sup>1</sup> 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>>.

## 2. Recommendations

9. The Association recommends that as an immediate priority the 2020-21 Budget:
- a. Increase funding for Legal Aid and legal assistance in 2020-21 and over the forward estimates;
  - b. Retain legal assistance for Aboriginal and Torres Strait Islander Peoples as a standalone, independent Commonwealth funding program;
  - c. Increase funding and resourcing of the family law system in 2020-21 and over the forward estimates, including to consider and engage with recommendations of the Australian Law Reform Commission's (**ALRC**) landmark review of the family law system (such as recommendations to overcome any jurisdictional gaps and improve information sharing between state-based child protection and family violence prevention, and Commonwealth family jurisdiction);
  - d. Maintain and adequately fund a specialist, stand-alone and properly resourced Family Court in Australia to continue to provide specialist assistance to children, families and survivors of family violence;
  - e. Fund the appointment of additional judicial officers, including specialist family law judges, to reflect the expansion and meet the workload of the family law courts;
  - f. Secure sufficient ongoing funding for the Family Violence and Cross-examination of Parties Scheme to protect vulnerable witnesses under the recently commenced *Family Law Act 1975* (Cth) s 102NA.

### 3. The business case for further funding of Legal Aid and legal assistance

#### *Introduction*

10. Underfunding legal assistance continues to adversely impact on access to justice and the quality of justice in Australia.
11. Equal and fair access to the law is undermined by the reality that, without Legal Aid, many people are not able to afford legal representation in criminal, civil or family law matters. This affects victims and witnesses as well as clients, and places further pressure on already overstretched court systems.
12. Ongoing, sufficient funding must be secured for this important system. In particular, the Commonwealth Government must take its share of responsibility for the current Legal Aid crisis as a 50:50 partner with State Governments, a commitment it has failed for many years to keep.
13. Federal funding is falling hundreds of millions of dollars short of what was required to meet demand prior to the bushfire crisis. The 2020-21 Budget represents an opportunity to invest in this critical justice infrastructure that serves and impacts upon the whole community.

#### *The extent of underfunding*

14. Legal aid has been progressively cut by successive Federal Governments of both political persuasions, to the point where Commonwealth funding last year reached its lowest level in more than two decades.<sup>2</sup>
15. The Federal Government's contribution to legal aid funding has dropped from 55 per cent in 1996-1997 to 32 per cent in 2017-2018.<sup>3</sup> Twenty years ago, the Federal Government contributed \$11.57 per capita.<sup>4</sup> In 2017-18 that contribution was \$8.40.<sup>5</sup> The contribution is estimated to drop further to \$7.78 per capita in 2019-20.<sup>6</sup>
16. While the Association welcomed the NSW Government's announcement in November 2019 of an \$88 million increase in Legal Aid funding staggered over four years, it warned that this funding falls significantly short of what is required to sustain appropriate levels of funding in 2019-20 and over the forward estimates.
17. The \$88 million was only about a third of what Legal Aid NSW advised was desperately needed. Although a step in the right direction and long overdue, it must be followed and supplemented by further Federal funding to improve justice.
18. The Association acknowledges the Federal Government's recent commitment in the Mid-Year Economic and Fiscal Outlook (**MYEFO**):

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<sup>2</sup> 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>>.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

The Government will provide an additional \$23.8 million over three years from 2020-21, including ongoing funding as part of the single mechanism for Commonwealth legal assistance funding. This includes \$15.3 million in additional funding for the delivery of frontline legal services to vulnerable Australians with legal needs. This additional funding is contingent on it being matched by the states and territories. The measure also provides the states and territories with \$8.5 million for administration costs associated with the single national mechanism, and achieves savings of \$1.7 million over three years from 2020-21 from Commonwealth administrative costs. This measure builds on the 2019-20 Budget measure titled Single National Mechanism for Commonwealth Legal Assistance that provided \$1.2 billion over three years from 2020-21 for the single mechanism for Commonwealth legal assistance funding.

19. Whilst urgently needed, this funding is conditional and insufficient to address unmet need.
20. The Law Council of Australia has advocated for an annual total increase of a minimum \$310 million in Commonwealth legal assistance funding.<sup>7</sup> The Productivity Commission has recommended that an extra \$200 million a year<sup>8</sup> be allocated to address the funding shortfall for civil legal assistance alone.
21. The Association is also concerned that the MYEFO funding announcement is linked to the Federal Government's proposal to create a single funding mechanism for legal assistance services.
22. The legal profession opposes the proposed mainstreaming of funding Aboriginal and Torres Strait Islander Legal Services (**ATSILS**), consistent with the recommendation by the 2019 independent review of the Indigenous Legal Assistance Program that:<sup>9</sup>

To facilitate a sustainable, community-controlled Indigenous legal assistance sector, Commonwealth Government funding should continue to be delivered through a standalone, specific purpose funding program with minimum five-year funding terms.
23. The Association submits that legal support for Aboriginal and Torres Strait Islander Peoples should remain a standalone, independent Commonwealth funding program to allow ATSILS to continue to provide specialist, culturally appropriate and accessible legal services.<sup>10</sup>
24. The Co-Chair of Change the Record and the National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**), Cheryl Axelby, has warned that the single funding mechanism would mean that Aboriginal and Torres Strait Islander Legal Services “will no longer be able

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<sup>7</sup> Law Council of Australia, ‘Lives are being destroyed’ – legal assistance funding needs urgent review, huge budget boost’ (Media Release, 7 March 2019) <<https://www.lawcouncil.asn.au/media/media-releases/lives-are-being-destroyed-legal-assistance-funding-needs-urgent-review-huge-budget-boost>>; see also Law Council of Australia, *The Justice Project – Final Report* (August 2018) [2.1] <[https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20\\_%20Final%20Report%20in%20full.pdf](https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf)>.

<sup>8</sup> Productivity Commission Inquiry Report, *Access to Justice Arrangements*, Report No 72, (5 September 2014).

<sup>9</sup> Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program 2015-2020* (2019) 16 <<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Documents/Review-of-the-ILAP.PDF>>.

<sup>10</sup> Change the Record, ‘New petition from Change the Record calls for next government to retain independence of Indigenous Legal Assistance Program’ (Media Release, 16 April 2019) <<https://changetherecord.org.au/blog/news/new-petition-from-change-the-record-calls-for-next-government-to-retain-independence-of-indigenous-legal-assistance-program>>; Arthur Moses SC, ‘It took decades to build an effective Indigenous legal network – now it’s under threat’, *Sydney Morning Herald* (online) 26 August 2019 <<https://www.lawcouncil.asn.au/media/news/opinion-piece-it-took-decades-to-build-an-effective-indigenous-legal-network-now-it-s-under-threat>>.

to guarantee culturally safe legal services with control going to states and territories”, with “a devastating impact on our communities”.<sup>11</sup>

25. As ATISLS are currently community-controlled preferred providers of legal services for Aboriginal and Torres Strait Islander Peoples, community control of funding remains essential to the provision of culturally safe and trusted services.
26. Dismantling an independent funding stream for ATISLS will undermine efforts to continue to reduce the unique disadvantages affecting Aboriginal and Torres Strait Islander Peoples and is inconsistent with the principle of self-determination.
27. Establishing a single national mechanism would also have the effect of placing the burden on state and territory governments to negotiate with ATISLS, which has previously been a Commonwealth responsibility.
28. Immediate, additional and ongoing Commonwealth funding for legal assistance and legal aid is essential to ensure the administration of justice is equitable, sustainable and efficient.
29. As the volume of legal aid work and length of court delays continue to grow, ensuring adequate funding of legal aid fees would have a substantial impact on efficiencies in the justice system.
30. The current subsidisation of the justice system by the legal profession regrettably continues and comes at a great personal and financial cost to barristers who have continued to represent clients in legal aid matters. Once unpaid hours and overheads are taken into account, some barristers undertaking legal aid matters find themselves working for around half of the minimum wage. Many barristers have found this unsustainable, leading to a reduction in the number of those in the profession willing to undertake the work.
31. The current system, even taking into account the recent funding announcement at State level, is unsustainable. There was no increase in the amount paid to NSW private practitioners by Legal Aid since 2007, not even indexation for CPI increases until 2012. In 2012 there was a modest reduction in rates due to a reclassification of fee levels undertaken by Legal Aid NSW. Despite this, NSW barristers undertaking legal aid work have seen at least a 20 per cent reduction in fees in real terms over the twelve-year period from 2007. This will not be rectified by the recent funding announcement at State level.
32. Without appropriate levels of funding, it is financially unsustainable for many barristers to be able to do what is necessary to undertake legal aid work in terms of properly preparing their clients’ cases and satisfying their professional obligations in this regard.
33. The impact of the issue on the administration of justice was exemplified by Fagan J’s judgment in *R v Munshizada; R v Danishyar; R v Baines (No 2)* last year.<sup>12</sup> In that matter his Honour vacated the date for a four-month murder trial as a direct result of the inability of the accused to obtain defence counsel in a trial where Legal Aid fee scales would apply. In the course of the judgment his Honour said that:<sup>13</sup>

Inability to secure the services of trial counsel at Legal Aid rates on reasonable notice for a long trial is a problem that requires urgent attention to enable this Court to do its work. Remedial measures might include increasing current rates, expanding the number of public defenders, prioritising the work of public defenders to cases that are

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<sup>11</sup> Ibid.

<sup>12</sup> [2019] NSWSC 834.

<sup>13</sup> Ibid, [40] (Fagan J).



difficult to place with the private Bar or a combination of these. Representation of the accused by competent counsel is not only a requirement of a fair trial at law but is also essential to efficiency. Competent defence counsel contribute significantly to shortening trials, thus saving public expense and reducing the burden of long cases upon juries.

34. His Honour noted that the Legal Aid Senior Criminal Law Solicitor in the Grants Division of Legal Aid NSW had “provided a straightforward economic explanation” for the inability to secure counsel.<sup>14</sup> This included that while barristers “take on larger and longer legally-aided matters because of their commitment to justice”, they “cannot base their practice exclusively on legally-aided briefs otherwise they will not generate sufficient income to meet their overheads, chambers fees and generate sufficient income for their personal commitments...”<sup>15</sup>
35. His Honour summarised the evidence of the solicitor that “counsel’s fees payable by Legal Aid are insufficient to secure representation for accused persons by professionals of the required standing and ability”.<sup>16</sup> His Honour accepted that this ‘systemic explanation’ corroborated the evidence of the solicitors in the trial that the lack of representation was beyond the control of the accused.
36. Regrettably, this is not the only serious trial date that has had to be vacated because of the difficulty in securing counsel or securing a sufficient grant of legal aid. The Association is concerned that these circumstances have become more frequent and will continue to have long term implications for the delivery of justice.
37. Without an urgent and substantive increase in legal aid rates for counsel, important criminal trials may proceed with either no representation or inadequate representation. Alternatively, trials may be delayed with negative effects for parties, victims of crime and the courts.
38. There are real and prescient issues confronting solicitors and barristers, particularly junior counsel at the private bar in New South Wales, who accept briefs to appear in District and Supreme Court trials when funded by Legal Aid NSW. Until the NSW Attorney General’s announcement last year, day rates of \$987 plus GST for junior counsel have remained unchanged since May 2007, save that the day rate in the Supreme Court was adjusted from \$1,142 plus GST to \$1,150 plus GST upon the commencement of the ‘Complex Crime Panel’ for barristers during the period under consideration – that is, an increase of \$8 per day, or expressed as a percentage – 0.7 per cent. In contrast, the NSW Attorney General’s rate for junior counsel appearing for the state in civil cases, as at 1 August 2019, is \$285 per hour, with a daily maximum of \$2,140 plus GST.
39. The cumulative level of inflation (Consumer Price Index) from the financial year ending 30 June 2007 to the financial year ending 30 June 2019 is 28.9 per cent with an annual average increase in inflation of 2.3 per cent.
40. Thus, in real terms (taking into account the effect of inflation), there has been a substantial decrease in remuneration of counsel, which is unacceptable and can no longer be accepted by the NSW Bar. Many of the Association’s members, including young and newly admitted barristers, who undertake legal aid work are doing stressful trials in difficult matters including

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<sup>14</sup> Ibid, [29] (Fagan J).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid, [31] (Fagan J).



historical sexual assault cases without proper funding or support. This places enormous pressure on these barristers and their families. Practitioners should be fairly paid for undertaking such important work in the justice system.

41. The consequences of inadequate pay to barristers undertaking legal aid work were the subject of a detailed study by the Victorian Bar and PricewaterhouseCoopers in April 2008.<sup>17</sup> The report's findings included that:<sup>18</sup>
- a. fees paid by Victoria Legal Aid to barristers in criminal cases fell significantly below:
    - i. increases in CPI;
    - ii. remuneration paid by prosecuting agencies to police prosecutors and Crown prosecutors; and
    - iii. remuneration paid to government and private lawyers in other areas of law;
  - b. Victoria Legal Aid funded barristers' real take home pay was the lowest compared to similar professions, at the most 60 per cent of the mean salary, at each experience level;
  - c. Victoria Legal Aid funded barristers' real take home pay had fallen by 20-32 per cent over the past 10-15 years to 2008, while other professions increased 15 per cent during the same period;
  - d. during 2001-02, Australian barristers undertook 289,100 hours of legal aid work at reduced or no fees, personally bearing part of the cost of providing access to justice. Practitioners who were subsidising the criminal justice system by offering their time at a significant discount to market, may withdraw their support once they feel that their contribution outweighs any potential benefit that they may be receiving;
  - e. barristers who undertake 90 per cent or more criminal work had been declining in number over the three years leading up to 2008;
  - f. deficiencies or unevenness in access to justice resulted in less than socially optimal outcomes and serves to perpetuate social disparity; and
  - g. the level of sufficiently experienced barristers taking up causes funded by legal aid will continue to decline.
42. Other flow-on effects can include wrongful incarceration, loss of confidence in the justice system, increases in appeals, and aborted trials and retrials. Many criminal cases require a high level of specialisation, experience and commitment. The Legal Aid system needs to be able to brief the appropriately skilled barristers to perform this work. Without this, the result is an inefficient allocation of resources and sub-optimal justice outcomes that do not align with the principles of a fair and high quality justice system. Over-stretched, inexperienced or under-funded barristers impact upon the efficiency and effectiveness of the court systems.

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<sup>17</sup> PricewaterhouseCoopers and Victorian Bar, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* (April 2008).

<sup>18</sup> Ibid, 3, 7, 18,

43. One of the conclusions reached in the PriceWaterhouseCoopers study is that the criminal justice system needs appropriate funding to attract and retain criminal barristers with the necessary commitment and experience.
44. The results of the review speak with equal force as to the troubling situation and inevitable consequences for the criminal justice system in NSW, which has worsened in recent years. Significant numbers of senior and experienced counsel have previously undertaken legal aid work in order to ensure that the justice system continues to operate. However, the government can no longer assume that the Bar, in NSW or any other state, will continue to subsidise Australia's justice systems at great personal and financial cost. This is simply not sustainable.
45. The level of delay experienced in the criminal justice system in New South Wales is disturbing. As at June 2019, the District Court Criminal caseload was 1,617 criminal trials and 1,088 sentencing matters were outstanding.
46. In May 2019, BOCSAR released its NSW Criminal Courts Statistics 2018 report.<sup>19</sup> Its key findings were that:
- In 2018, NSW criminal courts finalised 346,745 charges against 140,080 defendants. That is 15,559 more defendants than in 2014 (up 12.5%);
  - In the NSW District Court, median days from arrest to finalisation rose 26% from 437 days in 2014 to 550 days in 2018.
47. The levels of delay experienced in criminal proceedings in the NSW District Court can be expected to continue, if not be exacerbated, unless the under-funding is remedied. The early guilty plea reforms which have now been implemented will likely fail in their objective to clear up the District Court caseload unless accused are represented by experienced counsel who are properly funded to deal with cases from the start to the finish of a matter. The delay in cases impacts not only on the accused but victims and witnesses who anxiously await a trial. Indeed, in some cases, the delay may impact on a successful prosecution because the memory of witnesses may fade.
48. The justice system is significantly enhanced when those involved in the system are represented by counsel who are able to assist the Court to deal with matters fairly and efficiently. This will reduce delays and save money in the system.
49. These issues are not confined only to the provision of legal assistance in criminal law matters. Pressures and under-funding of Legal Aid also impacts adversely on the availability of assistance in civil and family law matters. Chapters IV and V of this submission respectively consider the impact of under-funding of Legal Aid and legal assistance on family law and on the Family Violence and Cross-examination of Parties Scheme, which commenced operation in 2019.

### *Recommendations*

50. In conclusion, the Senate acknowledged in May 2018 that while 14 per cent of Australia's population live below the poverty line, just six per cent would actually qualify for Legal Aid under the current tests imposed due to a chronic lack of resourcing.<sup>20</sup>

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<sup>19</sup> Next update (2019) was due to be released in December 2019.

<sup>20</sup> Ibid.

51. The legal assistance sector – including Legal Aid – urgently requires a sustained and significant increase in ongoing funding in partnership with state and territory governments, to secure ongoing access in civil, criminal and family matters.
52. Accordingly, the Association recommends increased funding of both Legal Aid and legal assistance in 2020-21 and over the forward estimates as an immediate priority of the 2020-21 Budget.
53. The Association also recommends retaining legal assistance for Aboriginal and Torres Strait Islander Peoples as a standalone, independent Commonwealth funding program.

## 4. The business case for resourcing the family law system and a specialist, stand-alone family court

### *Introduction*

54. The family law system and its courts are a critical piece of social justice infrastructure that has been neglected, under-funded and under-resourced for decades.
55. More Australians will have contact with the family law system than perhaps any other part of our justice system. The family law system must therefore be recognised - and funded - as an essential specialised service on which so many Australians rely.
56. The majority of family law matters do not go to court. However, the courts provide an important function in the community by offering a critical service for the most intractable matters that cannot otherwise be resolved. It is not possible to justly resolve matters by non-litigious means unless this can occur in the context and shadow of a well-functioning and properly funded court system that stands ready to provide timely justice if required.
57. The *Family Law Act 1975* (Cth) was ground-breaking legislation that advanced the rights of and protections for separating families. One important aspect of the reforms of 1975 was the creation of the specialist, stand-alone Family Court of Australia (**the Family Court**) and its counselling and assessment services. The emphasis of the legislation, and the operation of the Family Court, has always been to promote the non-litigious resolution of issues for families in this most difficult of circumstances wherever possible.
58. Both the *Family Law Act 1975* (Cth) and the Family Court have been lauded internationally. The law, procedures and practices have been adopted and emulated in many jurisdictions from Singapore to Canada. Yet it is widely acknowledged by court users, the legal profession, the Government and judiciary alike that this once world-leading family law system is not currently serving the best interests of children and families in Australia as well as it could or should.
59. 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 of Australia (**Federal Circuit Court**), and a mismanagement of those resources. This includes a failure to appoint and maintain sufficient and appropriately experienced judicial officers and associated staff and insufficient funding to maintain the counselling and assessment services previously provided by the courts.
60. Failing to invest in the system has produced unacceptable delays and costs that directly impact on the accessibility and quality of justice. Some families are having to wait up to three years,<sup>21</sup> or longer, to have their family law disputes resolved. Broader costs and impacts to the community also result from family breakdowns not being determined in a timely manner.
61. Underfunding legal assistance has meant a significant number of parties cannot afford legal representation in family law matters and appear by necessity unrepresented in court.

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<sup>21</sup> Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018, [53]; Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2019, [59].

62. These factors have contributed to crippling judicial workloads. Both courts now have backlogs of more than a year's worth of cases.<sup>22</sup> In the Federal Circuit Court, most Judges have between 300 and 500 cases in their docket<sup>23</sup> at any one time,<sup>24</sup> and some even more.
63. 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. The challenges also pose a threat to the work, health and safety of those Judges. This issue is particularly acute in the Federal Circuit Court where Judges are not required to meet the same statutory requirement of specialisation as Judges of the Family Court under the *Family Law Act 1975* (Cth) s 22(2)(b).
64. The 2020-21 Budget provides an opportunity to make a meaningful improvement to the system that need not involve complicated, costly or lengthy reform. The Association recommends that the 2020-21 Budget:
- Increase funding for resourcing of the family law system in 2020-21 and over the forward estimates, including to consider and engage with recommendations of the ALRC's landmark review of the family law system, such as recommendations to overcome any jurisdictional gaps and improve information sharing between state-based child protection and family violence prevention, and Commonwealth family jurisdiction;
  - Maintain and properly fund a specialist, stand-alone and properly resourced Family Court in Australia to continue to provide specialist assistance to children, families and survivors of family violence;
  - Fund the appointment of additional judicial officers, including specialist family law judges, to reflect the expansion and meet the workload of the family law courts.

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<sup>22</sup> Nicola Berkovic, 'Courts reject questions over delays and judges', *The Australian* (online) <<https://www.theaustralian.com.au/business/legal-affairs/courts-reject-questions-over-delays-and-judges/news-story/5fb824b60764a3b65d92e1a6e1c41f62>>, citing Family Court and Federal Circuit Court *Annual Reports 2018-19* (2019).

<sup>23</sup> A docket is the list of active cases before the Court that a Judge is managing and will eventually hear and decide.

<sup>24</sup> Federal Circuit Court, *Annual Report 2018-19* (2019) 3.

### *The state of delays*

65. There is a direct causal link between resourcing and the timeliness and quality of justice delivered by the courts.
66. 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”.<sup>25</sup>
67. The current Chief Justice of the Family Court and Chief Judge of the Federal Circuit Court confirmed in 2019 “there’s no doubt there is a need for further resources”.<sup>26</sup>
68. Budgeting for the family law system is admittedly complicated by the fact that efficiency statistics, raw data sets and disposition rates are not reliable measures of the success of the system. Considerable caution must be attached to reliance upon statistics produced as to the performance of courts generally and in the family law sector. Published numbers of case completions are often skewed by the inclusion of uncontested proceedings (orders made by consent) and divorce completions which are uncomplicated and take up little of the Court’s resources. Decision-makers must consult with and listen carefully to the concerns and experiences of stakeholders including court users, the judiciary and the legal profession in order to gauge the quality of justice that the system delivers.
69. Nevertheless, the latest annual reports of both courts paint a concerning picture of a system under significant strain. Despite achieving a clearance rate of 102 per cent in 2018-19,<sup>27</sup> and finalising more cases than were filed during the year,<sup>28</sup> the Family Court has a backlog of 2,979 pending final orders applications.<sup>29</sup>
70. The Productivity Commission’s *Report on Government Services*, released on 29 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).<sup>30</sup>

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<sup>25</sup> Family Court of Australia, *Submission by the Honourable John Pascoe AC CVO, Chief Justice of the Family Court of Australia* (18 May 2018) [8] <[https://www.alrc.gov.au/sites/default/files/subs/family-law\\_-68.\\_family\\_court\\_of\\_australia\\_-\\_submission\\_revised\\_redacted\\_version\\_14.06.18.pdf](https://www.alrc.gov.au/sites/default/files/subs/family-law_-68._family_court_of_australia_-_submission_revised_redacted_version_14.06.18.pdf)>.

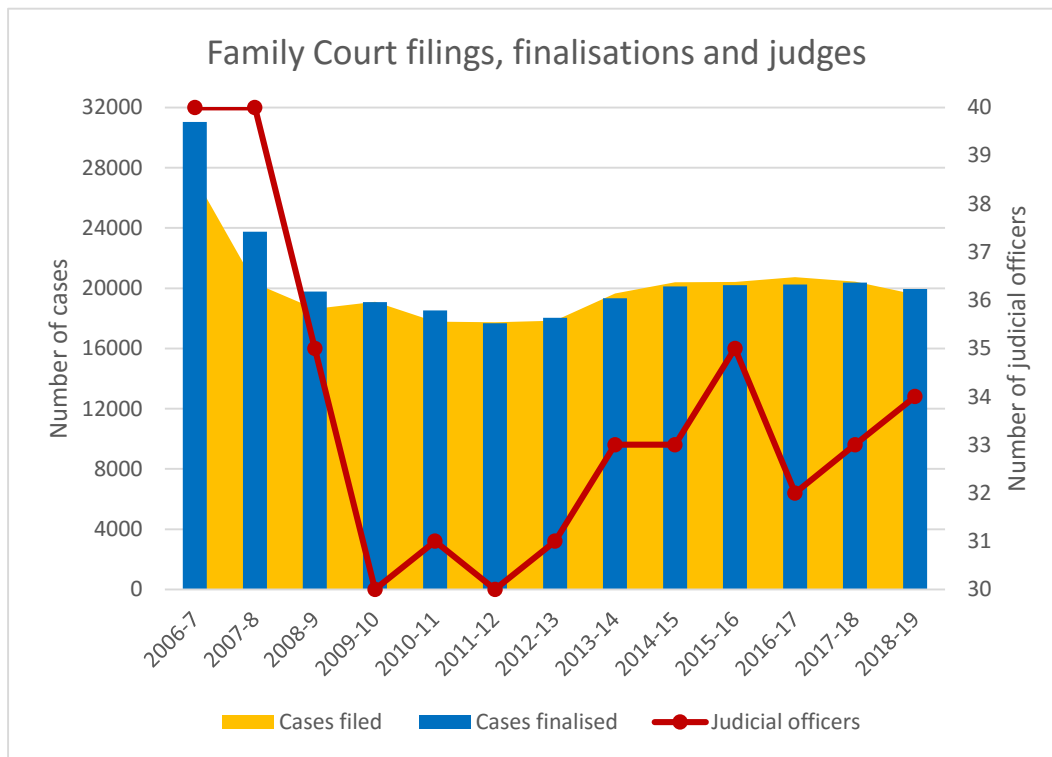
<sup>26</sup> Quoted in Nicola Berkovic, ‘Family law reform: Priority for next Australian government’, *The Australian* (online) 23 April 2019 <<https://www.theaustralian.com.au/inquirer/family-law-reform-priority-for-next-australian-government/news-story/93af28df3bbe0c6f67b1e69910c7a0a2>>.

<sup>27</sup> Family Court of Australia, *Annual Report 2018-19* (2019) 5, 16 <<http://www.familycourt.gov.au/wps/wcm/connect/291d785a-91aa-474f-b7b2-092b4315e7aa/19376+Family+Court+of+Australia+Annual+Report+2018-19-low-res.pdf?MOD=AJPERES&CVID=>>>.

<sup>28</sup> *Ibid*, 19.

<sup>29</sup> *Ibid*, 17.

<sup>30</sup> Australian Productivity Commission, ‘Part C – Justice’, *Report on Government Services 2020*, table 7A.21.



71. The backlog in the Federal Circuit Court increased from 17,088 in 2017-18 to 17,478 pending family law final orders applications in 2018-19.<sup>31</sup> 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.<sup>32</sup>
72. In addition to the strain of its family law work, 11 percent of the Federal Circuit Court's workload comprises other general federal law.<sup>33</sup> 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.<sup>34</sup> The Annual Report noted:<sup>35</sup>

there has been a significant increase (5 per cent) in the migration workload during the reporting period. Migration represents the largest jurisdiction in the Court's general federal law defended hearing list. The increase is placing pressure on judicial resources.

<sup>31</sup> Federal Circuit Court of Australia, *Annual Report 2018-19* (Cth) 30  
<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/7e7fd944-b9df-429b-8d99-55be84591898/19375+Federal+Circuit+Court+of+Australia+Annual+Report+2018-19-low-res.pdf?MOD=AJPERES&CVID=>>.

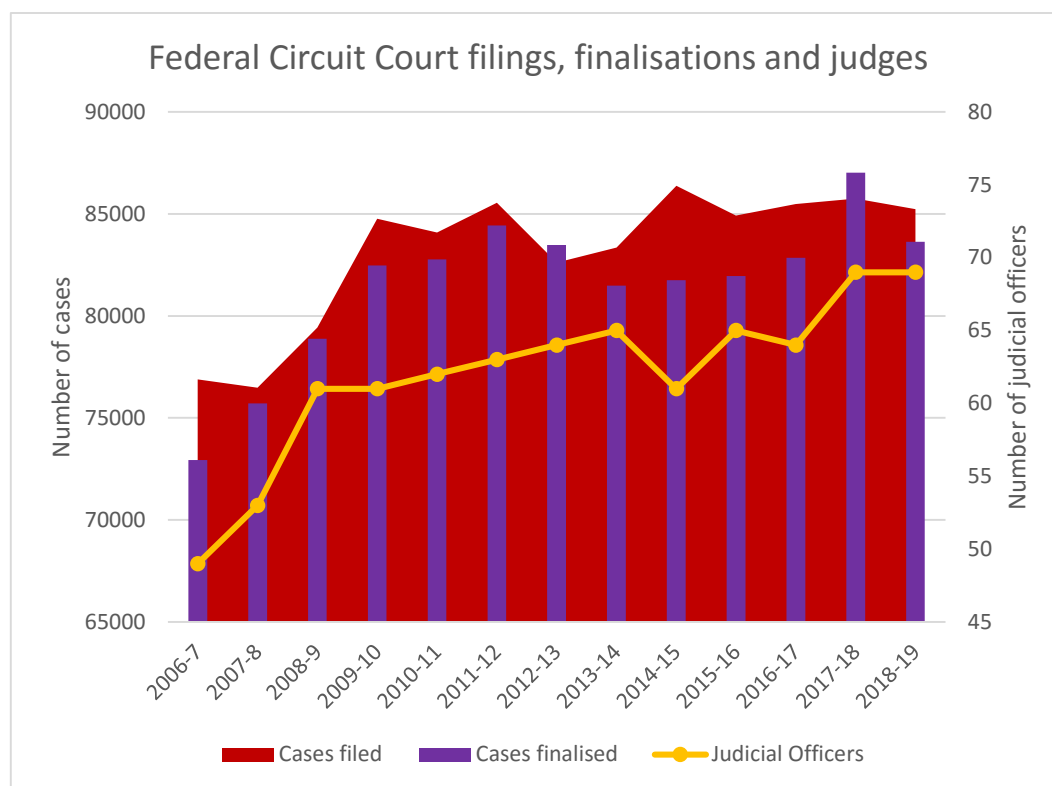
<sup>32</sup> *Ibid*, 27.

<sup>33</sup> *Ibid*, 30.

<sup>34</sup> *Ibid*, 42.

<sup>35</sup> *Ibid*, 42.





### *Under-resourcing and under-funding of the system*

73. Lack of resources was a key issue raised by witnesses before the Senate Legal and Constitutional Affairs Committee's 2018 inquiry into the Government's merger proposal. Then Committee Chair, Senator the Hon Ian Macdonald, admitted:<sup>36</sup>

We all know that more resources are needed. We didn't need this committee and this hearing to work that out. Every witness who's come before us has intimated that...

74. 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%),<sup>37</sup> from 2012-13 to 2016-17.<sup>38</sup>
75. 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.<sup>39</sup>

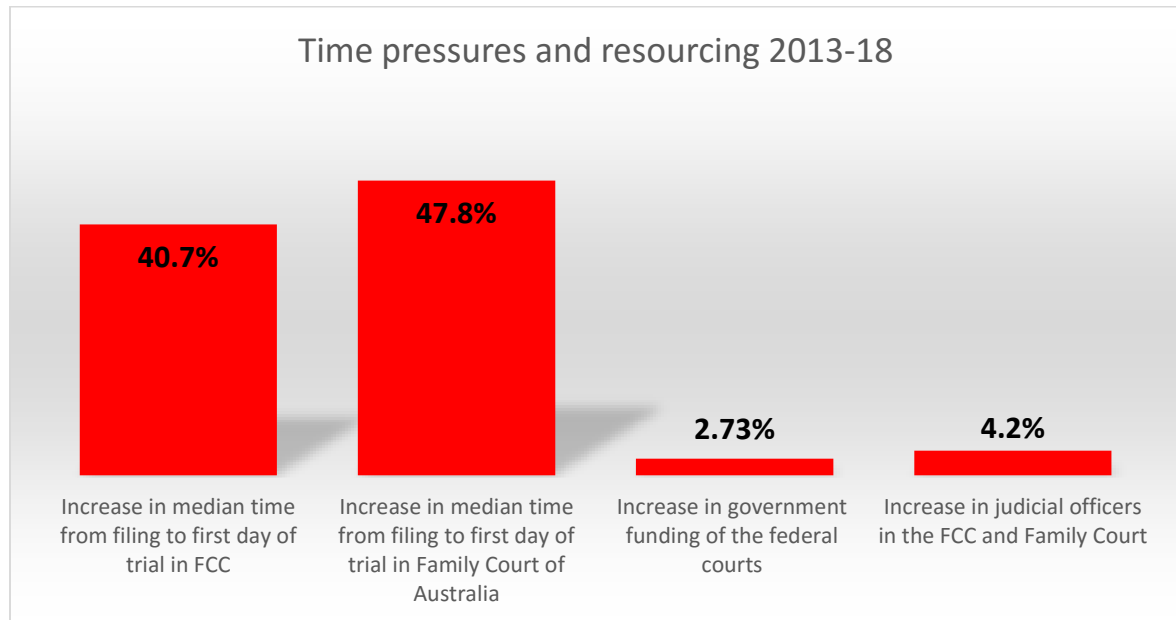
<sup>36</sup> Senator Macdonald, Sydney Public Hearing of the Legal and Constitutional Affairs Legislation Committee's Inquiry into the FCFCA Bills, 12 December 2018, 20.

<sup>37</sup> 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>>.

<sup>38</sup> *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).

<sup>39</sup> 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).

76. 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,<sup>40</sup> bringing the total to 66 FCC Judges and 33 Family Court Judges, representing a total increase of 4.2 percent.



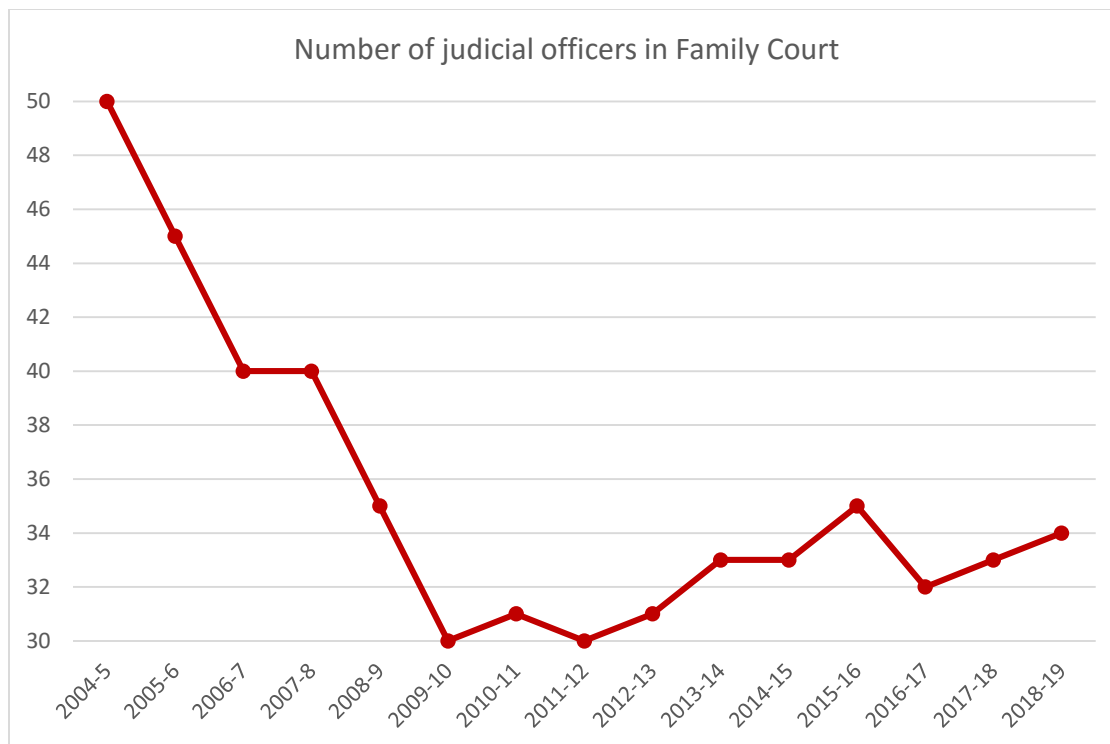
77. At 30 June 2019, there were 69 Judges in the Federal Circuit Court including the Chief Judge<sup>41</sup> and 34 Family Court Judges.<sup>42</sup>
78. The number of Judges available to hear matters directly affects disposition rates. There has been a significant decrease in the number of judicial officers in the Family Court over the last fourteen years, which has severely reduced the Court's capacity to manage its workload.
79. 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.<sup>43</sup>

<sup>40</sup> 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).

<sup>41</sup> Federal Circuit Court of Australia, *List of Judges* (2019) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/judges-senior-staff/judges>>.

<sup>42</sup> Family Court of Australia, *Annual Report 2018-19* (2019) 4.

<sup>43</sup> 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](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*

80. Further, 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.<sup>44</sup>
81. The Courts have consistently warned of, comprehensively recorded and clearly and transparently tracked the adverse, ongoing impacts of delayed and insufficient judicial appointments on court backlogs through annual reporting over the last fourteen years.<sup>45</sup>
82. In December 2017, Opposition Members noted in their additional comments to the House of Representatives Standing Committee on Social Policy and Legal Affairs' Report into *A better family law system to support and protect those affected by family violence* (**House of Representatives 2017 Inquiry**) that:<sup>46</sup>

<sup>44</sup> Family Court of Australia, *Annual Report 2008-09* (Commonwealth of Australia, 2009), 4  
[http://www.familycourt.gov.au/wps/wcm/connect/2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf/2008-2009+Annual+Report.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf-lRyQwWz](http://www.familycourt.gov.au/wps/wcm/connect/2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf/2008-2009+Annual+Report.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf-lRyQwWz).

<sup>45</sup> See, eg, Family Court of Australia, *Annual Report 2008-09* (Commonwealth of Australia, 2009), 4, 35  
[http://www.familycourt.gov.au/wps/wcm/connect/2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf/2008-2009+Annual+Report.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf-lRyQwWz](http://www.familycourt.gov.au/wps/wcm/connect/2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf/2008-2009+Annual+Report.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf-lRyQwWz); Family Court of Australia, *Annual Report 2009-10* (Commonwealth of Australia, 2010), 12, 41  
[http://www.familycourt.gov.au/wps/wcm/connect/2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf/2008-2009+Annual+Report.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf-lRyQwWz](http://www.familycourt.gov.au/wps/wcm/connect/2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf/2008-2009+Annual+Report.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf-lRyQwWz); Family Court of Australia, *Annual Report 2010-11* (Commonwealth of Australia, 2011) 46, 51  
<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/annual-reports/archived-annual-reports/2010-11-annual-report>; Family Court of Australia, *Annual Report 2011-12* (Commonwealth of Australia, 2012), 50.

<sup>46</sup> 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) 370.

Delays in replacing Judges in a timely manner have caused additional backlogs in the Family Court and the Federal Circuit Court. It is completely unacceptable that it took 560 days to replace a Sydney Family Court Judge, more than twelve months to replace a Brisbane Family Court Judge, and more than seven months to replace a Federal Circuit Court Judge in Newcastle. These delays are continuing to cause harm to families and children across Australia. The family law system and support services should be properly resourced to ensure Australian families have timely access to justice so they can move on with their lives safely.

Such delays demonstrate the loss, which can never be recovered even if a Judge is replaced, of more than three years of Judge time, in addition to the Judge time lost in the period prior to a Judge's retirement as they use up leave and clear dockets.

83. The Secretary of the Attorney-General's Department, Mr Moraitis PSM, told Senate Estimates in February 2018 that "It's clear that, if we had more resources, we would deploy more Judges..."<sup>47</sup> and "In an ideal world, I'd love to see more funding for the courts..."<sup>48</sup>
84. The Attorney-General has previously acknowledged the critical nexus between funding, judicial resourcing and reducing backlogs in family law matters,<sup>49</sup> and deployed funding increases to clear case backlogs and reduce waiting times in the Family Court of Western Australia.<sup>50</sup>
85. The House of Representatives 2017 Inquiry 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".<sup>51</sup>
86. Further, the Family Court advised in 2018 that:<sup>52</sup>

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.
87. The 2020-21 Budget provides a crucial opportunity to reduce family court backlogs and improve the timeliness and quality of justice families experience by providing a significant resource and funding injection, and long-term commitment.

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<sup>47</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee – Additional Estimates, Parliament of Australia, Canberra, 27 February 2018, 80 (Mr Chris Moraitis, Secretary – Attorney-General's Department Executive).

<sup>48</sup> Ibid.

<sup>49</sup> See Attorney General of Western Australia, 'State budget 2012-13: Supporting our Community – Family Court funding boost' (Media Statement, 23 May 2012) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2012/05/State-Budget-2012-13-Supporting-our-Community---Family-Court-funding-boost.aspx>>.

<sup>50</sup> Ibid.

<sup>51</sup> 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].

<sup>52</sup> 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.

88. Concerningly, the Attorney-General has stated that further funding will not be invested in the system unless the Government's proposal to merge the specialist Family Court into the Federal Circuit Court is passed by the Parliament.<sup>53</sup>
89. It is not appropriate for Australian families to be held hostage by the Government by making additional funding contingent on passage of the merger proposal. This funding should be made available to the system immediately.

#### *Delays experienced by litigants*

90. Failing to invest in the system has produced, and continues to produce, unacceptable delays and costs that directly impact on the accessibility and quality of justice. The single most significant driver of legal costs in family law is delay in having matters proceed through the courts.
91. In April 2019 the Chief Justice reportedly advised that in some court locations more than 50 per cent of cases were older than one year, and 25 per cent more than three years old.<sup>54</sup>
92. 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, new partners and children often become involved and financial positions change. 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. While awaiting trial, interim determinations are often required to be made with a compounding effect on delay, where Judges have to devote time to holding the lives of children and families together until a final hearing date is available.
93. Regrettably, stories of cases that have been in the system, including those the subject of appeal and retrial, for over five years are not uncommon.
94. 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:<sup>55</sup>

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

<sup>53</sup> See 'Pauline Hanson pushes parliamentary family law probe', *The Australian* (online), 17 July 2019 <<https://www.theaustralian.com.au/nation/politics/pauline-hanson-pushes-parliamentary-family-law-probe/news-story/e812d04856077187c8feb9ab0413714d>>; Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2019, 7 (Christian Porter, Attorney-General).

<sup>54</sup> Nicola Berkovic, 'Courts reject questions over delays and judges', *The Australian* (online) <<https://www.theaustralian.com.au/business/legal-affairs/courts-reject-questions-over-delays-and-judges/news-story/5fb824b60764a3b65d92e1a6e1c41f62>>.

<sup>55</sup> *Munson and Munson* [2019] FCCA 670 (20 February 2019), [10] (Betts J).

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.

95. The practical and financial consequences of these delays are 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.
96. Adequate resourcing of the courts would have the single greatest impact on reducing legal costs for families. Importantly, it would benefit children and parents by moving them fairly and quickly through the Court system.
97. Excluding lawyers or disincentivising legal assistance is not the answer.
98. The experience of courts, and of many clients, is that involving competent, ethical legal representation invariably assists parties to achieve a negotiated outcome or, in the comparatively rare cases that require judicial determination, assists the courts in the efficient conduct of those matters.
99. Access to ethical, competent legal representation is critically important to ensure the best interests of children are able to be served by the courts.

#### *Legal assistance and self-represented litigants*

100. Many family law litigants are not involved in litigation by choice – they are left with no other course to protect the interests of their children and themselves following family breakdown.
101. The limited Legal Aid in family law has meant that already complex and emotionally-fraught matters are made more difficult by high rates of unrepresented litigants. Most litigants who are unrepresented cannot afford legal representation.<sup>56</sup>
102. According to the Family Court's *Annual Report 2018-19*, the volume of cases 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%.<sup>57</sup>
103. Expanding the provision and availability of Legal Aid and legal assistance must be considered as part of any policy proposal to reduce delays and achieve efficiencies in the family law system.
104. 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:<sup>58</sup>
  - 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.
105. It is widely recognised that unrepresented litigants require more assistance and support from the courts,<sup>59</sup> which means cases necessarily take longer to determine fairly. One Judge

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<sup>56</sup> John Dewar, Barry Smith, Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 1.

<sup>57</sup> Family Court of Australia, *Annual Report 2018-19* (2019) 25.

<sup>58</sup> *Ibid*, 1.

<sup>59</sup> *Ibid*, 3.

surveyed in the Report remarked, after a very full duty list, that collectively the time taken for nine matters involving self-represented litigants would have been reduced by more than three hours - half the time - had they been represented.<sup>60</sup>

#### *Numbers of judicial officers and judicial workloads*

106. The impacts of this chronically overworked and under-resourced system are primarily borne by children and families already at their most vulnerable, and by judicial officers faced with unsustainable and crippling workloads.
107. In the Federal Circuit Court, some Judges now have up to 500 cases or more in their docket at any one time.<sup>61</sup> 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.
108. Legal Aid NSW has warned that:<sup>62</sup>

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.
109. The challenges also pose a threat to the work, health and safety of those Judges. This issue is particularly acute in the Federal Circuit Court where Judges are not required to meet the same statutory requirement of specialisation as Judges of the Family Court under section 22(2)(b) of the *Family Law Act 1975* (Cth).
110. 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, and should be urgently addressed in the 2020-21 Budget.

#### *Consolidating a specialist, stand-alone Family Court*

111. The family law system contributes immeasurable social and economic value to our society. However, sharing jurisdiction between and running family law matters in two separate federal courts – with separate rules and procedures – is not working. This is 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

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<sup>60</sup> Ibid, 51.

<sup>61</sup> Federal Circuit Court, *Annual Report 2018-19* (2019) 3.

<sup>62</sup> 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.



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.
112. To overcome these issues, the Association proposed in July 2018 the creation of a 'Family Court 2.0' to bring Judges currently hearing family court matters in, and the jurisdiction currently exercised by, the Federal Circuit Court into a second, lower division within the specialist, stand-alone Family Court.<sup>63</sup>
  113. This structural model has been in force for many years in the state of Western Australia, and was recommended by Des Semple's 2008 *Future Governance Options for Federal Family Law Courts in Australia* report.<sup>64</sup> 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.<sup>65</sup>
  114. 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. The Government's merger proposal did not pass the 45<sup>th</sup> 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. The Government has reintroduced an amended version of the merger proposal into the House of Representatives (**the Amended Merger Bills**).<sup>66</sup>
  115. The Amended Merger Bills are the subject of inquiry by the Senate Legal and Constitutional Affairs Committee. The Association holds serious concerns with the Amended Merger Bills and will make submissions to the Committee in due course.
  116. In summary, one of the key reasons for consistent opposition to the proposal 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. Folding a stand-alone specialist court into a generalist court that is already overburdened and under-resourced is inconsistent with the advice of expert reports and research which is urging a trend towards specialisation to keep victims of family violence safe.<sup>67</sup>

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<sup>63</sup> 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](https://nswbar.asn.au/docs/mediareleasedocs/Family_Court_MR2.pdf)>.

<sup>64</sup> Des Semple, *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-semble-report.PDF>>.

<sup>65</sup> 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).

<sup>66</sup> See Federal Circuit and Family Court of Australia Bill 2019 (Cth) and accompanying transitional amendment bill.

<sup>67</sup> See Australian Law Reform Commission, *Review of the family law system* (Report No 135, 2019), [4.83].

117. Almost 70% of matters before the Commonwealth family courts involve allegations of family violence.<sup>68</sup> The family law system must move to bolster, not undermine, specialisation in this critical area.
118. The Association's model does not, of itself, involve any greater revenue implications than the Government's proposal.
119. The Association recommends that consolidating and maintaining a properly funded specialist, stand-alone family court must be a priority in the 2020-21 Budget to best serve and protect vulnerable children, families and survivors of family violence.

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<sup>68</sup> Women's Legal Services Australia, *Safety first in family law* (2019) <[www.wlsa.org.au/campaigns/safety\\_first\\_in\\_family\\_law](http://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].

## 5. The business case for increased funding of the Family Violence and Cross-examination of Parties Scheme

120. The recent commencement of the Family Violence and Cross-examination of Parties Scheme (**the Scheme**) without sufficient funding illustrates the adverse impacts that occur for victims of family violence, legal assistance providers and the Courts when adequate resourcing is not provided to the family law system.
121. The Scheme requires significant further funding in 2020-21 and over the forward estimates to ensure it can operate effectively and justly.
122. 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.
123. Cross-examination serves an important role in testing evidence presented to the courts. The Cross-Examination Bill introduced a new section 102NA to the *Family Law Act 1975* (Cth), intended to provide mandatory protections for victims of family violence by prohibiting direct cross-examination in certain cases.<sup>69</sup> 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 the examination is being conducted by the alleged perpetrator or the alleged victim).
124. Funding the Scheme is crucial to ensure alleged victims and alleged perpetrators alike could access legal assistance, otherwise they would be denied the opportunity to cross-examine a witness.
125. At the time of introduction, the Cross-Examination Bill's Explanatory Memorandum stated that:<sup>70</sup>

There are no direct financial implications from implementing the measures in the Bill. The Australian Government is working with National Legal Aid to determine the impacts that are expected to result from the measures in the Bill and ensure that adequate funding is available.
126. Stakeholders including the Association, National Legal Aid and the Law Council of Australia, raised concerns that the Scheme would not be able to achieve its intended purpose and would adversely impact upon access to justice unless properly resourced and funded. National Legal Aid made clear that the Scheme was not able to be funded from the existing legal aid resources. The Scheme's successful operation therefore required the provision of additional funding for legal aid and legal assistance providers, as well as the family law system and courts.
127. Further, the Association and other stakeholders warned that the Reforms would impose a burden on already over-stretched court resources and contribute to further delays in

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<sup>69</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* (Report, August 2018) [2.5].

<sup>70</sup> Explanatory Memorandum, Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (Cth), [13].

proceedings,<sup>71</sup> and that wider reform should be undertaken in relation to legal assistance and the family law system.<sup>72</sup>

128. The Cross-Examination Bill was the subject of an inquiry by the Senate Legal and Constitutional Affairs Committee. The Committee acknowledged that:<sup>73</sup>

A common concern across a number of submissions was that the requirement to use a legal representative for cross-examination could result in some individuals 'falling between the cracks' of the proposed new arrangement. In particular, submitters expressed concern that parties who do not qualify for legal assistance, but also cannot afford private legal representation, would be denied the opportunity to cross-examine a witness...

National Legal Aid submitted that, without appropriate funding and resourcing for the proposed measures, the bill's provisions could disempower many self-represented litigants who may be unable to access Legal Aid or afford private representation...

Some submitters raised concerns that parties who were unable to access legal assistance or engage private legal representation could experience procedural unfairness due to their inability to conduct cross-examination of the other party. (citations omitted)

129. In August 2018 the Committee found that:<sup>74</sup>

there should be a commitment to additional funding for Legal Aid before the bill is put to a vote in the Senate, including the amount, timeline for distribution and method of distribution; and in any additional funding for Legal Aid that is announced, the government make clear the eligibility of litigants who do not meet regular eligibility requirements but could not otherwise afford a private lawyer.

130. In November 2018 the Government announced that \$7 million would be provided over three years to legal aid commissions to administer the Scheme and provide legal representation to parties subject to the ban.<sup>75</sup> It was unclear how the \$7 million was to be distributed across the three years. The Department anticipated this would provide representation in more than 134 final hearings per year in the family law Courts.<sup>76</sup>

131. The Cross-Examination Bill was passed in December 2018 and the Scheme commenced from 10 September 2019.<sup>77</sup> Under the Scheme, parties must apply directly to the relevant legal aid

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<sup>71</sup> Ibid, [2.28]; citing Law Council of Australia, *Submission 26*, 10.

<sup>72</sup> Ibid, [2.35]; citing Dr Tracey Booth, Miranda Kaye & Dr Jane Wangmann, *Submission 2*, 2; Council of Single Mothers and their Children, *Submission 6*, 5; Mr Michael Kearney SC, Chair, Family Law Committee, New South Wales Bar Association, Committee Hansard, 1 August 2018, p 17–18.

<sup>73</sup> Ibid, [2.7] – [2.9], [2.16]; citing Rape & Domestic Violence Services Australia, *Submission 7*, 3; Australian Bar Association, *Submission 25*, 3; National Legal Aid, *Submission 29*, 6; The ACT Bar Association & ACT Law Society, *Submission 15*, 4–5.

<sup>74</sup> Ibid, [2.54] – [2.56].

<sup>75</sup> Attorney-General's Department, *Fact Sheet - Women's Economic Security Package: Family Violence and Cross-examination of Parties Scheme* (November 2018); see also Attorney-General's Department, *Fact Sheet - Supporting women to recover financially after separation* (2018).

<sup>76</sup> Ibid.

<sup>77</sup> Attorney-General's Department, *Family Violence allegations in family law proceedings info sheet* <<https://www.ag.gov.au/FamiliesAndMarriage/Families/Documents/Family-violence-allegations-in-family-law-proceedings-info-sheet.pdf>>.

commission for legal assistance. Once approved, the matter is allocated to a practitioner member of the family law panel.

132. Just three months after the Scheme's commencement, the Government has had to make an urgent \$2 million funding injection, through the MYEFO, to prop up the Scheme in 2019-20 alone, after funding for this year had already been exhausted.<sup>78</sup>
133. This \$2 million is insufficient to meet outstanding need or set the Scheme up for success. The \$2 million represents a one-off investment in the current financial year 2019-20 only. No further funding has been committed over the forward estimates to support the Scheme. This must be urgently addressed in the 2020-21 Budget and the forward estimates.
134. More generally, the Cross-Examination Bill demonstrates the importance of accurately budgeting for and allocating adequate resources to support legislative change to the justice system before a bill is introduced to Parliament to ensure its effective implementation.

### *Conclusion*

135. In conclusion, thank you again for the opportunity for the Association to make a submission on priorities for the 2020-21 Budget. This Submission is informed by the insight and expertise of the Association's Legal Aid, First Nations and Family Law Committees and the experiences of our members.
136. If the Association can be of further assistance, our contact at first instance is the Association's Director of Policy and Public Affairs, Elizabeth Pearson, on 02 9232 4055 or at [epearson@nswbar.asn.au](mailto:epearson@nswbar.asn.au).

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<sup>78</sup> Australian Treasury, *Mid-Year Economic Fiscal Outlook 2019-20* (December 2019) 199.