SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Joint Select Committee on Australia's Family Law System

18 December 2019

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 2,400 barristers who principally practice in NSW. Currently, more than 185 of our members report practising 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 and the experiences of our members in the NSW registries of the family law courts. If you would like any further information regarding this submission, our contact is the Association's Director of Policy and Public Affairs, Elizabeth Pearson, on 02 9232 4055 or at epearson@nswbar.asn.au at first instance.

Contents

1. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Joint Select Committee (**the Committee**) for the opportunity to make this submission on Australia's family law system. The Association would be happy to answer any questions the Committee may have.

2. In 1975 the Federal Parliament fundamentally altered the way family law issues were determined in Australia. 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.

3. 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.

4. 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. Why is this so? And how can this Inquiry lead reform to improve outcomes for those in need of the system's services and protection?

5. There is understandably much frustration with the current state of Australia's family law system. The Association recognises the Committee's intention to ensure the Inquiry is not a "talkfest" or report without action but an avenue to drive long-lasting reform to benefit children, families and survivors of family violence.

6. The Association believes the path to reform need not be complicated, costly or lengthy. Instead, the solution requires two commitments from the Parliament:

    a. First, a commitment to resourcing parts of the family law system that work well when adequately funded and resourced but have been starved by successive governments of the support they require to function effectively;

    b. Second, a commitment to implementing improvements identified by stakeholders, and supported by landmark research, to strengthen a stand-alone specialist family court to promptly and appropriately resolve matters including those involving family law, family violence and safety.

7. Accordingly, this submission details the case for resourcing the family law system and consolidating a stand-alone specialist family court.

Committing to resourcing the family law system

8. 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. More Australians will have contact with the 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.

9. 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.

10. 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.

11. 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,[1] 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.

12. 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.

13. These factors have contributed to crippling judicial workloads. Both courts now have backlogs of more than a year's worth of cases.[2] In the Federal Circuit Court, most Judges have between 300 and 500 cases in their docket[3] at any one time,[4] and some even more.

14. 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 section 22(2)(b) of the *Family Law Act 1975* (Cth).

---

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

2 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).

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

4 Federal Circuit Court, *Annual Report 2018-19* (2019) 3.

Committing to implementing improvements

15. The family law system contributes immeasurable social and economic value to our society. However, there is a principal area where the system would benefit from urgent improvement to promote the safety and best interests of children and families through the consolidation of a stand-alone specialist family court with holistic oversight and jurisdiction.

16. The experiment of sharing jurisdiction between and running family law matters in two separate federal courts – with separate rules and procedures – has failed. It 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.

17. 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.[5] This structural model has been in force for many years in the state of Western Australia, and was recommended by the 2008 *Future Governance Options for Federal Family Law Courts in Australia* report by Des Semple (**the Semple Report**).[6] 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. The Association's model does not, of itself, involve any greater revenue implications than the Government's proposal.

18. 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.

19. 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.

---

5 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>.

6 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-semple-report.PDF>.

20. Concerningly, the Attorney-General has stated that further funding will not be invested in the system unless the Government's merger proposal is passed.[7]

21. Almost 70% of matters before the Commonwealth family courts involve allegations of family violence.[8] Our system must move to bolster, not undermine, specialisation in this critical area.

22. Governments have failed to do what is needed to improve the system: provide adequate funding, sufficient resourcing and a coherent structure to stop children and victims of family violence from falling through the cracks.

23. Holistic reform to bolster a stand-alone specialist family court - and funding to properly resource it - is urgently needed.

24. The Inquiry offers an opportunity for the Committee to present to Parliament a blueprint for meaningful, evidence-based reform to consolidate specialisation in the family law system to keep children and families safe, reduce unacceptable delays and costs, and improve justice.

25. Importantly, there is blueprint readily available that is achievable, pragmatic, safe and supported by the first hand expertise of those who work in the system every day. This submission outlines that blueprint and makes five recommendations.

2. Recommendations

26. The Association recommends that the Committee advocate to Parliament to:

    a. Properly fund and resource the family law system, and commit to doing so on an ongoing basis;

    b. Maintain 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;

    c. 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;

    d. Oppose the reintroduction of the Government's merger proposal; and

    e. Carefully consider and engage with the recommendations of the Australian Law Reform Commission's (**ALRC**) landmark review of the family law system, including recommendations to overcome any jurisdictional gaps and improve information sharing between state-based child protection and family violence prevention, and Commonwealth family jurisdiction.

---

7 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).

8 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].

3. The case for resourcing the system

27. 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.

28. There is a direct causal link between resourcing and the timeliness and quality of justice delivered by the courts.

29. 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".[9]

30. The current Chief Justice of the Family Court and Chief Judge of the Federal Circuit Court said in April 2019 that "There is no doubt that there are unacceptable delays in both courts and an unacceptable backlog… there's no doubt there is a need for further resources". [10]

31. 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.

32. Nevertheless, the latest annual reports of both courts paint a concerning picture of a system under significant strain.

33. Despite achieving a clearance rate of 102 per cent in 2018-19,[11] and finalising more cases than were filed during the year,[12] the Family Court has a backlog of 2,979 cases.[13]

---

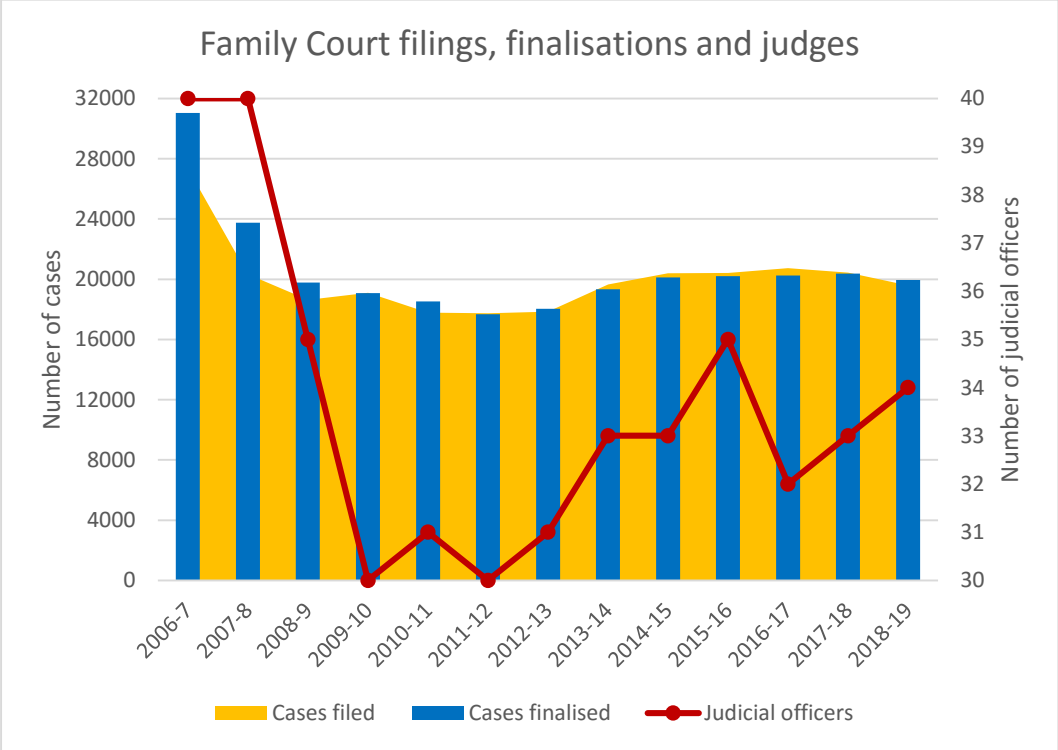
9 Family Court of Australia, *Submission by the Honourable John Pascoe AC CVO, Chief Justice of the Family Court of Australia* (18 May 2018) [8] <https://www.alrc.gov.au/sites/default/files/subs/family-law_-68._family_court_of_australia_-_submission_revised_redacted_version_14.06.18.pdf>.

10 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>.

11 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=>.

12 Ibid, 19.

13 Ibid, 17.

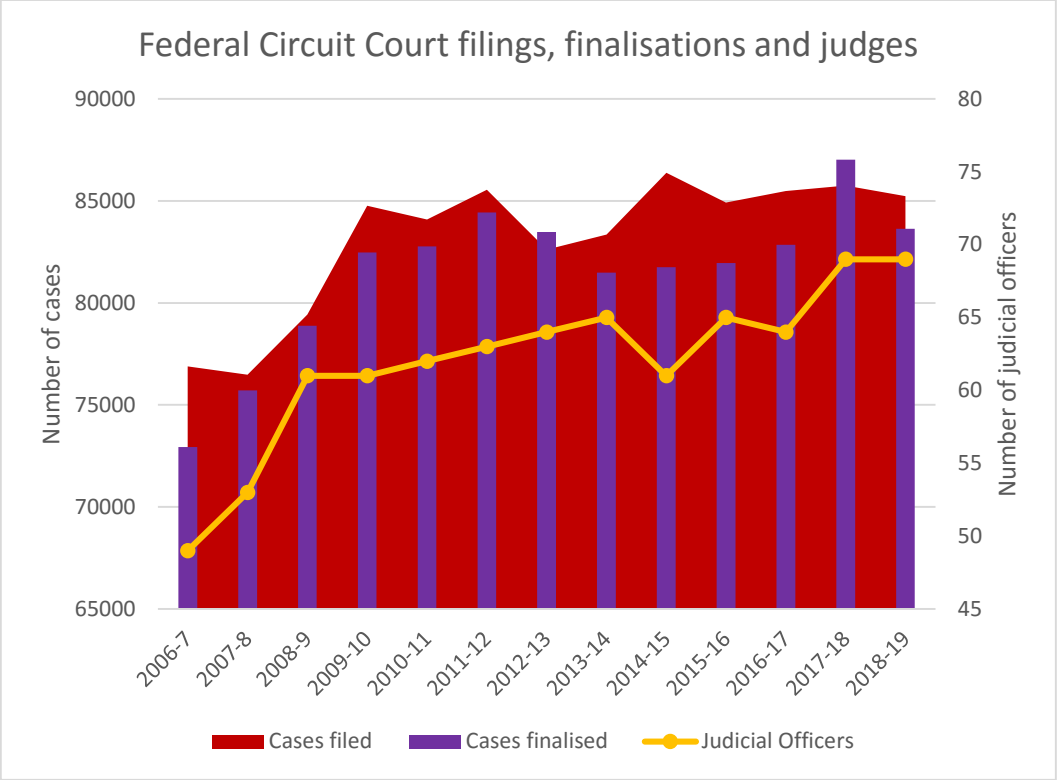


34. The backlog in the Federal Circuit Court increased from 17,088 cases in 2017-18 to 17,478 cases in 2018-19.[14] Further, the Federal Circuit Court disposed of 62 percent of final order applications within a year, falling significantly short of its target of 90 percent.[15]

35. In addition to the strain of its family law work, 11 percent of the Federal Circuit Court's workload comprises other general federal law.[16] 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.[17] The Annual Report noted:[18]

> 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.

[14] 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=>.
[15] Ibid, 27.
[16] Ibid, 30.
[17] Ibid, 42.
[18] Ibid, 42.



36. This chapter address the following issues:

    a. The extent of under-resourcing and under-funding of the system;

    b. Delays experienced by litigants;

    c. Legal assistance and self-represented litigants;

    d. Pressures facing judicial officers.

Under-resourcing and under-funding of the system

37. 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 that:[19]

> 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…

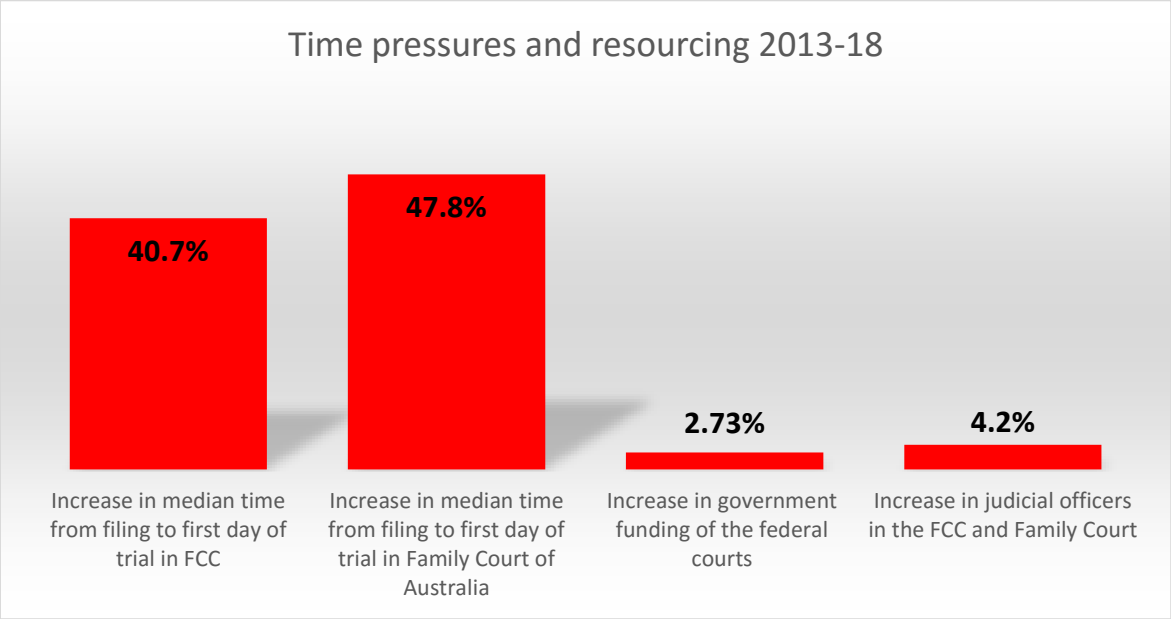
38. The Government stated in May 2018 that the national median time to trial had increased from 10.8 months to 15.2 months in the Federal Circuit Court (an

[19] Senator Macdonald, Sydney Public Hearing of the Legal and Constitutional Affairs Legislation Committee's Inquiry into the FCFCA Bills, 12 December 2018, 20.

increase of 40.7%), and from 11.5 months to 17 months in the Family Court (47.8%),[20] from 2012-13 to 2016-17.[21]

39. 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.[22]

40. 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 of Australia,[23] bringing the total to 66 FCC Judges and 33 Family Court Judges, representing a total increase of 4.2 percent.



41. At 30 June 2019, there were 69 Judges in the Federal Circuit Court including the Chief Judge[24] and 34 Family Court Judges.[25]

42. 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

---

20 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>.

21 *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).

22 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).

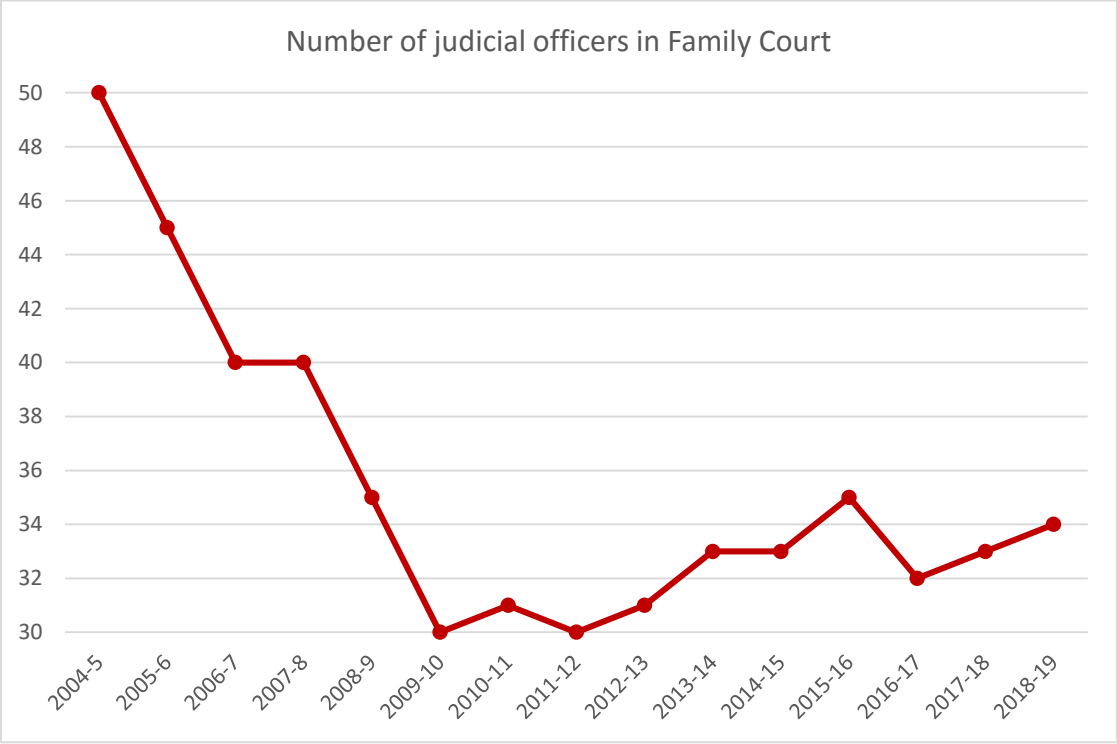
23 Federal Court of Australia, *Question on Notice AE18-015 – Number of Family Court of Australia and family law circuit court judges employed*, Senate Standing Committee On Legal and Constitutional Affairs, Attorney-General's Portfolio, Additional Estimates 2017-18 (February 2018).

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

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

Family Court over the last fourteen years, which has severely reduced the Court's capacity to manage its workload.

43. 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.[26]



Data source: Family Court Annual Reports

44. 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.[27]

45. 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.[28]

---

[26] 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>.

[27] 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>.

[28] 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>; 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-

46. 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:[29]

> 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.

The delays set out in the above quote 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 their dockets.

47. 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 in the daytime, and in the evenings if it suits people to have evening sessions,"[30] and added that "In an ideal world, I'd love to see more funding for the courts…"[31]

48. In October 2018 Mr Soden told Senate Estimates "We would dearly like to recruit more human resources to be deployed to the family law jurisdiction managed by the present Family Court and the Federal Circuit Court and possibly the new court that is proposed".[32]

49. The Attorney-General has previously acknowledged the critical nexus between funding, judicial resourcing and reducing backlogs in family law matters. In 2012, when Attorney General for Western Australia, he announced a commitment of $1.2 million in the 2012-13 State Budget to fund a new magistrate and support staff to

---

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.

29 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.

30 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).

31 Ibid.

32 Evidence to Senate Legal and Constitutional Affairs Legislation Committee – Supplementary Budget Estimates, Parliament of Australia, Canberra, 23 October 2018, 44 (Mr Warwick Soden, Chief Executive Officer and Principal Registrar).

reduce waiting times and case backlogs in the Family Court of Western Australia.[33] The Attorney General's Press Release of 23 May 2012 stated as follows:[34]

> The funding increase will help to clear a backlog of existing cases and reduce the time separating de facto couples wait for a court hearing.
>
> Attorney General Christian Porter said he acknowledged community concern about the delays experienced by many couples, married or de facto, who were waiting for the Family Court to hear their cases.
>
> "This additional funding will reduce the time, and hence the distress, couples face when waiting for a court hearing," Mr Porter said.

50. 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".[35]

51. Further, the Family Court advised in 2018 that:[36]

> In terms of the amount of time that matters take to come on for hearing, it must be noted that 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.

52. It is disappointing, therefore, 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 family court backlogs, sufficient resources have not been provided to the courts to address their workload or delays.

53. It is also extremely concerning that the Attorney-General has stated further funding will not be invested in the system unless the Government's merger proposal is passed.[37] Services to the Australian public should not be held hostage subject to the passage of any legislation but especially not legislation that has been comprehensively opposed as harmful and bad policy.

54. The Association recommends that the Committee advocate to Parliament for a significant increase in both funding and resources, including additional judicial officers and, where appropriate, registrars, to assist in overcoming significant backlogs and case management. As outlined above, delays are a result of under-

---

33 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>.

34 Ibid.

35 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].

36 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.

37 See, eg, '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>.

resourcing of the courts. There are simply not enough courts and Judges to hear cases as and when they need to be heard. No structural change of any form can overcome this issue.

Delays experienced by litigants

55. 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.

56. The single most significant driver of legal costs in family law is delay in having matters proceed through the courts.

57. It is the lived experience of the Association's members that Judges are increasingly unable to deal with the crushing workloads imposed upon them in an acceptably timely way.

58. Some families are having to wait up to three years,[38] or longer, to have their family law disputes resolved. 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.[39]

59. In the Sydney Registry of the Family Court it is the common experience of practitioners that the time from the commencement of proceedings to trial - whether for property, parenting orders, or both - is in the vicinity of three and often more years. Delays are approaching that in the Federal Circuit Court. In Parramatta the delays, in real terms, are similar now to Sydney in both courts.

60. 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. 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.

61. 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.

62. In Newcastle several leading family law firms advise clients to expect at least two years' delay from commencement of proceedings until hearing. It is difficult for the

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

[39] 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>.

Court to accommodate urgent interim hearings for children due to the crushing workload of the Judges.

63. 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:[40]

> 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.

64. The practical 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.

65. It is clearly apparent to any person who visits a Family or Federal Circuit Court room on a busy judicial duty list day, when often 20 or sometimes more matters are listed for consideration of some aspect of the case, that there are simply not enough resources allocated to the system. Judges are frustrated and regularly apologise to parties for an inability to give them a hearing date within a year or two or more. Recently a senior Judge in the Family Court told parties who had an intractable dispute concerning their children, which had been in the Court system for about three years, that they may never get a hearing date the way things were going in his Court. The impact such an exchange had on that family is hard to imagine but it certainly included a concern about ongoing costs.

Interim Hearings

66. The delay in achieving, in particular, final parenting orders necessitates in many cases an application for interim orders. Such applications, because they are only for "interim" or temporary orders to cover the situation until a full hearing can be conducted are customarily dealt with in a truncated[41] hearing which involves:

    a. a consideration of affidavit evidence (which is often expansive in particular where there are allegations of family violence);

[40] *Munson and Munson* [2019] FCCA 670 (20 February 2019), [10] (Betts J).
[41] A rule of thumb adopted by the Courts is that such hearing should take no more than two hours including the Judge's reading time.

b. other evidence adduced by way of documents brought to court under subpoenas issued at the request of the parties; and

c. consideration of limited submissions made by the parties' legal representatives, or by the parties themselves if self- represented.

67. There is limited scope in such cases for the Court to consider and determine factual disputes and thus, often, to make satisfactory, or any meaningful findings, on issues such as the risk to children posed by one or more proposals of the parties.

68. It is often said that courts determining interim arrangements for children, or in respect of families' financial circumstances, are "putting a band-aid" on the often raw and tumultuous issues that confront families especially shortly after a separation and before they have had the chance to achieve a place from which they can negotiate an outcome (which anecdotally occurs in over 90% of cases) or the opportunity for a final judicial determination.

69. However, because of the delay in achieving a final hearing, the stakes in an interim application are high. Orders made on an interim basis can prevail for years.

70. This unfortunate outcome has, in turn, the following cascading consequences in many cases:

a. A great deal of legal work is involved in gathering evidence for the interim hearing – more than might be required if the imposed orders were truly for a short term ie months rather than years;

b. The application of the truncated hearing model to the determination of long term arrangements results in a higher level of dissatisfaction with the process which in turn can and often do lead to;

c. Appeals from interim determinations, which can be expensive; or

d. Place families under even greater strain escalating the conflict, which in turn can lead to them requiring a greater level of support from lawyers, health and allied health or other professionals. It also involves engaging these professionals to deal with the ongoing domestic dispute to a greater degree than would otherwise be necessary or desirable.

71. The obvious consequence of any, or all, of these outcomes is of course greater expense to the parties.

72. Added to the problem of delay is the fact that very often, because of a lack of resources, the Court is unable to deal with parties' interim applications on the day that they are listed before the Court.

73. It is not uncommon for parties to engage their lawyers to prepare for and appear in an interim application only to be told on the day that the Court does not have the Judge time available (or indeed any Judge time at all) to deal with the matter and they will have to come back on some other occasion; much of the expense is thus wasted as it is inevitable that representatives will need to be engaged again and often conduct further preparation as circumstances change over time.

74. There are a large number of cases that come before the Court on multiple occasions before they are dealt with.

75. Some interim applications are assigned to a list to be called on at short notice – sometimes as little as 36 hours. In that event there is limited scope to ensure continuity of representation and the engagement of alternative advocates can add another element of cost as the new representative needs to prepare afresh.

76. Solicitors and barristers are well aware of the potential for such outcomes and consequently advise and warn clients of the risk of disappointment, frustration and waste of clients' limited resources.

77. Moreover, the vast majority of lawyers genuinely attempt to resolve interim disputes so as to avoid this outcome. Despite this there are, and will always be, many disputes that are not amenable to resolution at that early and raw stage of family breakdown and outcomes which are negotiated in a context where there is no cost effective or timely access to curial determination, and borne out of a sense of desperation or frustration, are often unsatisfactory and break down, only to start the cycle again.

78. There is another sad but inevitable consequence of interim orders being in place for long periods as a consequence of delay. The circumstances of the parties and children can and often do change in material ways whilst matters are languishing in Court lists waiting for a hearing. Often this necessitates multiple interim applications.

79. For example, when children are very young at the time of their parents' separation, arrangements that are in the children's best interests when the matter is first brought to Court for interim orders may be very different when they reach school age. Such cases are common.

80. Similarly, in financial cases families' circumstances often change (usually for the worse) as a consequence of delay in achieving final orders. This necessitates multiple applications for interim relief.

81. Even where changing circumstances do not give rise to further formal applications to the Court, they nonetheless give rise to a necessity for parties to engage with their lawyers over a long period of time. This adds to the cost of the matter.

Overlisting

82. Because judicial resources are so scarce, procedures are put in place to ensure that the most is made of a Judge's time wherever possible.

83. However, the nature of litigation is that cases listed to be heard or actually commence sometimes cannot continue, for various common reasons. Sometimes it is because the parties have agreed to settle. There are many reasons why cases that have been incapable of settlement settle "on the steps of the court". Not the least of which is the fact that, often, an aspect of the case is revealed that was previously unknown, emerges and persuades one or other of the parties to settle. Sometimes it is because of the effect of the occasion itself. Other times the

involvement of a barrister, or comments made by a Judge, remind the parties of the wisdom of settlement that causes a last minute resolution. Finally, delay will often be to the perceived benefit of one party to the case – when the case is to proceed to trial, that benefit disappears and the matter is able to be resolved.

84. Other cases have to be adjourned for practical reasons such as the inability of a party or witness to participate due to illness.

85. To safeguard against a waste of judicial time a procedure known as "overlisting" is often invoked. It is a process whereby the court lists for hearing more work than can actually be done so that if a case stops for any reason another one is ready to take its place without loss of judicial time, which is in short supply.

86. If, however, the first case listed does proceed, the others, sometimes up to three overlisted cases, do not get dealt with. As a consequence, a great deal of the parties' costs and time are wasted.

87. In a busy regional registry like Newcastle, for example, most final hearings are overlisted. On the same day a number of trials are listed together before the same Judge, but not all of those trials can proceed. Some may settle, some are not ready and are adjourned to another date. Others are marked "not reached" which means they are listed for hearing many months ahead.

88. The time and money spent on preparing these matters for trials that are not reached is often entirely wasted, and further legal fees subsequently incurred to prepare the matter for the next trial date. Issues and evidence may change during the period of adjournment, in which case that evidence needs to be updated, incurring further legal fees. Critically, this produces attendant anxiety and stress for families and children awaiting determinations.

89. Due to the lack of Judges, interim hearings are listed on the same day that matters are listed and overlisted for trial. These can displace trial time, as trial time is used in hearing interim applications and not the final hearings. Trials that are not completed in the allocated time are then adjourned to a further date for completion, rather than encroaching on the allocated time for the next listed case.

90. This is known as a case being "part heard". Part heard cases have all the attendant consequences of having to be updated, recalled and subject to repeating preparation time. Again, this produces further fees and anxiety for parties.

91. The same issues arise and have a particularly adverse effect on many regional families involved in family litigation.

92. For example, the Federal Circuit Court sits on circuit, say one week every two to three months in regional areas such as in New South Wales, Broken Hill, Coffs Harbour, Dubbo, Lismore, Orange, Port Macquarie, Tamworth, Wagga Wagga and Wauchope. Due to a lack of Judges and resources to deal with the cases when they are listed, cases may not be reached and are listed either at the next circuit or taken back to the "home Registry" of Sydney, Parramatta or Newcastle.

93. Judges are so busy hearing cases they often fall behind in delivering their judgments and important written reasons. Judgment writing is the pivotal activity of Judges and an onerous task. Significant delay may require cases to be "re-

opened" to deal with changes to facts and arrangements in relation to children or property.

94. Adequate resourcing of the courts to deal with the consequences of delay would have the single greatest impact on reducing legal costs for families.

95. It would also benefit children and parents by moving them fairly and quickly through the Court system.

96. Excluding lawyers or disincentivising legal assistance is not the answer.

97. 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 Court in the efficient conduct of those matters.

98. Access to ethical, competent legal representation is critically important to ensure the best interests of children are able to be served by the Court.

99. As outlined below, 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.

Legal assistance and self-represented litigants

100. It must be recognised that the majority of family law matters do not go to court. 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. 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.[42] 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.[43] Twenty years ago, the Federal Government contributed $11.57 per capita.[44] In 2017-18 that contribution was $8.40.[45] The contribution is estimated to drop further to $7.78 per capita in 2019-20.[46]

102. 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.[47]

---

42 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>.

43 Ibid.

44 Ibid.

45 Ibid.

46 Ibid.

47 Ibid.

103. The lack of 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.[48]

104. Consideration must also be given to legal assistance funding, including funding of community legal centres, women's legal services and National Aboriginal and Torres Strait Islander Legal Services, as an increase in access to legal assistance is likely to reduce delays and thus costs across the board.

105. 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%.[49]

106. The experience of the Bar and indeed of the judiciary[50] is that cases involving one or more parties without legal representation take significantly longer to conduct properly and justly.

107. 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.

108. 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:[51]

    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.

109. Dewar, Smith and Banks' Report concluded that self-represented litigants "consume more Court resources than represented parties"[52] and reported amongst those consulted "almost unanimous agreement that *so long as they remain in the system* those matters [involving a self-represented litigant] are more demanding of the time of judicial officers and registry staff, and can be wasteful of the time of the other party and their legal advisers".[53]

110. One Judge surveyed in preparation of Dewar, Smith and Banks' Report remarked at the time, after a very full duty list, that collectively the time taken for nine

---

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

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

50 In a Presentation in NSW in 2011 Entitled "The Challenge of the Self Represented Litigant viewed from the Bar and the Bench" Justice Forrest of the Family Court cited a number of examples of cases taking vastly longer to conduct due to the lack of representation caused by the lack of access to Legal Aid including a case set down for 21 days that took 60 days with a self-represented applicant

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

52 John Dewar, Barry Smith, Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 3.

53 Ibid, 2.

matters involving self-represented litigants would have been reduced by more than three hours, or half the time, if they had been represented.[54]

111. Therefore, it is widely recognised that unrepresented litigants require more assistance and support from the courts, which means cases necessarily take longer to determine fairly.

112. Investing in legal assistance results also in an overall reduction of the monetary and social cost of the Family Law System.

113. As the Family Court noted in its 2018-19 Annual Report:[55]

> The Court monitors the proportion of unrepresented litigants as one measure of the complexity of its caseload. Unrepresented litigants present a layer of complexity because they need more assistance to navigate the Court system and require additional help and guidance to abide by the Family Law Rules and procedures.

114. The layer of complexity added by self-represented litigants means that a disproportionate amount of Court resources are taken up in dealing with parties who appear without the assistance of a lawyer.

115. Whilst there are some people who choose to represent themselves, most have no choice as they cannot afford representation and do not qualify for legal aid. It has long been understood that there is a clear link between the lack of access to legal aid and the incidence of self-represented litigants.[56]

116. The Australian Productivity Commission has therefore recommended that $200 million in funding be provided to legal assistance services per annum, and that this "should continue as an interim arrangement until sufficient data can be collected to better inform funding of legal assistance services".[57]

Numbers of judicial officers and judicial workloads

117. 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.

118. In the Federal Circuit Court, some Judges now have up to 500 cases or more in their docket at any one time.[58] 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.

---

54 Ibid, 51.
55 Ibid, 25.
56 See, eg, Access to Justice Taskforce Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) <https://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf>.
57 Productivity Commission, 'Eligibility for legal aid and the cost of extending it', *Access to Justice Arrangements – Inquiry Report* (2014) 1017 <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-appendixh.pdf>.
58 Federal Circuit Court, *Annual Report 2018-19* (2019) 3.

119. The Family Court has explained that:[59]

> There are many factors that affect the time to get to trial, such as the complexity of the issues, matters pending in other courts, and the availability of judicial resources.

120. Legal Aid NSW has warned that:[60]

> 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.

121. 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).

122. 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.

123. The features of family law work mean that the family law courts need judicial officers who have a wide experience of social dynamics, highly developed communication skills and the ability to work in a stressful environment, as well as the traditional legal skills of fact finding, analysis, judgment writing, case management and courtroom skills.

124. The unique environment in which judicial officers in the family law courts operate requires them to do much more than merely finding the facts and applying the law. The subject matter is highly contested, often over many factual issues. Findings of fact are often made more difficult by the absence of contemporaneous written records. The emotional intensity between the litigants often complicates, to an extreme degree, the fact finding and in parenting cases the attainment of an order in the best interests of the child without destroying the relationship between the parents. In children's cases particularly, there is a real tension between the procedural processes and expeditious outcomes and a risk that the subject matter of a dispute, the children, can be permanently damaged by the conflict between their parents and even by the court process itself, the demands of justice and

---

[59] *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).

[60] 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.

unavoidable delay. Contested issues in parenting cases can range over the entire length of a marriage.

125. In property applications, similar complications apply. The litigants are not strangers, as they ordinarily are in civil litigation. They are often antagonistic towards each other, carrying a range of emotions in consequence of the breakdown of the marriage. This often manifests itself in behaviour which adds to the complexity of the litigation and often involves third parties who are related to one of the parties to the marriage.

126. There are complexities of modern family life in Australia. Judges must have a knowledge of many aspects of the law, including that relevant to corporations, equity principles and complex valuation principles and family law property proceedings typically involve family businesses operated though trading companies, trustee companies and investment companies. Family wealth is now frequently held in trusts, companies, superannuation, partnerships, joint ventures and businesses. Businesses may be operated as partnerships or with corporate structures where the parties are directors or with third parties.

127. Family law cases are also increasingly international in nature involving the conflict of laws, multiple jurisdictions, issues of forum non conveniens and choice of law. There are issues related to international child abduction, international relocation, international surrogacy, property and assets situated across jurisdictions, financial relief after foreign divorces, as well as issues as to the validity of foreign marriages.

128. Both in parenting and property cases, having applied the facts to the law, the court is still then required to make difficult decisions by the exercise of discretion. After finding the facts and applying the law, the result does not automatically follow. There are still difficult and evaluative decisions to be made to arrive at a decision "in the best interests of the child" in parenting cases, and one that is "just and equitable" in financial cases. This is a difficult exercise of discretion which judicial officers are called upon to carry out every day.

Conclusion

129. The Association therefore recommends that the Committee advocate to Parliament to properly fund and resource the family law system, including legal assistance, and commit to doing so on an ongoing basis over the forward estimates.

4. The case for consolidating a specialist stand-alone Family Court

Introduction

130. The family law system contributes immeasurable social and economic value to our society. However, there is a principal area where the system would benefit from urgent improvement to promote the safety of children and families, through the consolidation of a stand-alone specialist family court with holistic oversight and jurisdiction.

131. The experiment of sharing jurisdiction between and running family law matters in two separate federal courts – with separate rules and procedures – has failed. It 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.

132. To overcome this issue, the Association has proposed 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. This structural model has been in force many years in the state of Western Australia, and was recommended by the Semple Report. 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.[63]

133. The Association suggested that the Family Court can be a gold star institution once again but this would require reform in two key areas:

    1. structural improvement to unify the family law system by creating a single family court; and
    2. a proper funding and resource commitment from government.

134. 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

[63] 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).

advantage of promoting safety for children and adults by preserving access to services of a specialist Family Court.

135. The Government's merger proposal, in the form of the Federal Circuit and Family Court of Australia Bill 2018 (Cth) and an accompanying transitional bill (**the Merger Bills**), did not pass the 45th Parliament. The Merger Bills have been strenuously opposed by stakeholders including the legal profession, Women's Legal Services Australia, Community Legal Services and National Aboriginal and Torres Strait Islander Legal Services because the merger will result in the loss of crucial 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.

136. On the last day of Parliament in 2019, the Government reintroduced an amended version of the merger bills into the House of Representatives (**the Amended Merger Bills**).[64]

137. As almost 70% of matters before the Commonwealth family courts involve allegations of family violence,[65] our system must move to bolster, not undermine, specialisation in this critical area.

138. This part of the submission outlines:

    a. The current structure of the family law courts;

    b. The Association's proposal for a Family Court 2.0;

    c. What is wrong with the Government's merger proposal; and

    d. Why specialisation is important.

Current structure of the family law courts

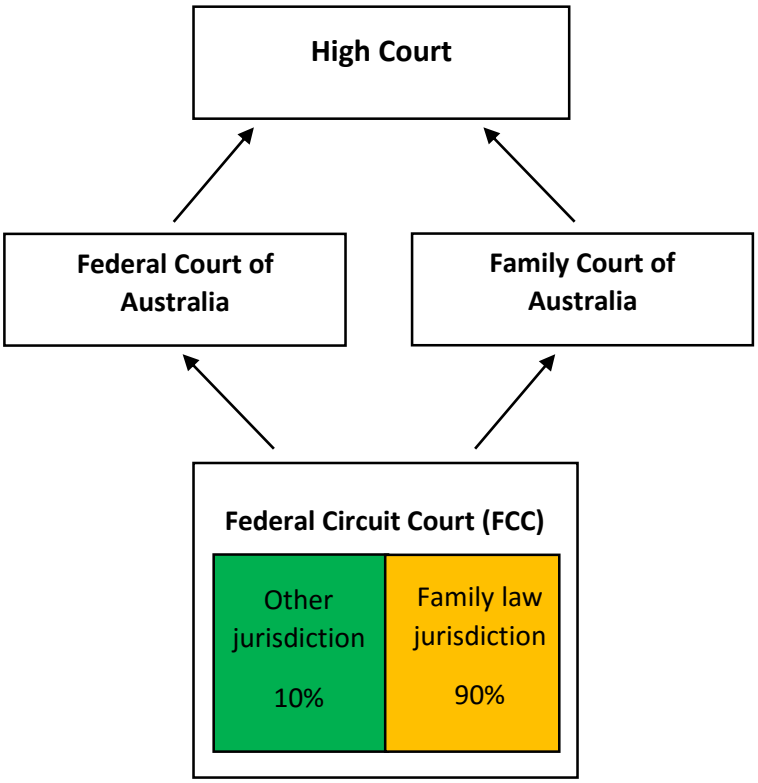
139. The current structure of the Federal Courts and Commonwealth family law jurisdiction is shown below in **Diagram A**.

[64] See Federal Circuit and Family Court of Australia Bill 2019 (Cth) and accompanying transitional amendment bill.

[65] 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].

Diagram A:

Current structure of the Federal



140. In 1975, with the introduction of a no fault divorce regime in Australia, the focus of the courts, community and family law matters changed. It moved from the grounds for divorce to the consequences of breakdown of marriages and after a few years the breakdown of de-facto marriage relationships. This significant change was recognised by the Government in the creation of a specialist court to do the family law work formerly done by State and Territory Supreme Courts. The establishment in Australia in 1976 of a separate superior family court was a novel concept.

141. The Family Court was established as a superior court and a best practice model offering inhouse alternative dispute resolution such as mediation and counselling and court-based dispute resolution.

142. When the Family Law Bill 1974 was introduced into Parliament, the Honourable Gough Whitlam QC MP outlined the following vision for the court's role, with a focus on its hallmark of specialisation:[66]

[66] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974, 4322 (the Prime Minister), quoted in The Hon Mark Dreyfus QC MP, 'Robert McClelland knew the story behind modern families', *The Australian* (online), 19 October 2018 <https://www.theaustralian.com.au/business/legal-affairs/robert-mcclelland-knew-the-story-behind-modern-families/news-story/0f781028b06d03cb6562e5815ea57a71>.

> The essence of the Family Courts is that they will be helping courts. Judges will be specially and carefully selected for their suitability for the work of the court.
>
> There will be attached to the court a specialist staff, notably marriage counsellors and welfare officers, to assist the parties at any stage — and even independently of any proceedings. These courts will therefore be very different from the courts that presently exercise family law jurisdiction.

143. The Federal Circuit Court, initially known as the Federal Magistrates Court of Australia, was established in 1999 to deal with family law matters as well as other federal law matters such as migration, industrial law and bankruptcy. It was set up as an inferior court to deal with matters less complex than the matters dealt with by the Family Court and the Federal Court of Australia.

144. Establishing the Federal Circuit Court as a separate court to the Family Court, rather than a separate division within the Family Court, was criticised at the time and is now widely recognised as a mistake.

145. Since its very inception, there have been concerns over the "waste",[67] "confusion"[68] and "complexities"[69] created by the establishment of a "separate and distinct" third federal court.[70]

146. During the second reading debate of the Federal Magistrates (Consequential Amendments) Bill 1999, then Shadow Attorney-General the Honourable Robert McClelland MP (as he then was) referred to the "massive"[71] delays being experienced in the Family Court system at the time and warned that:[72]

> The magistracy will neither achieve what the government wants — that is, providing greater access to justice — nor remove these horrific delays that exist, particularly in the Family Court…
>
> it is fanciful to suggest that it will have any realistic effect at all on the court lists.[73]

147. Similarly, the Honourable Alastair Nicholson, then Chief Justice of the Family Court, warned in 1999 that:[74]

> [the] fragmentation of [the Family Court's] closely integrated system … will result in a less satisfactory and more expensive service. The potential for public confusion, forum shopping and waste of resources on shuffling matters between courts is high. The funds proposed to be spent on the [new

---

67 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 1999, 11788 (Member for Barton).
68 Ibid.
69 Ibid, 11789.
70 Ibid, 11787.
71 Ibid, 11786
72 Ibid.
73 Ibid, 11787.
74 Quoted in Justice Stephen Thackray, 'The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Forgotten? The David Malcolm Memorial Lecture' (Speech to the University of Notre Dame Australia, School of Law, 27 September 2018), 15.

court] could be used far more effectively by providing Magistrates within the framework of the Family Court of Australia.

148. Two decades later, the experiment of sharing jurisdiction between two federal courts and running family law matters in separate courts with separate rules and procedures has comprehensively failed.

149. The Attorney-General has acknowledged that "In many ways, Family Court Judges have been let down by the confusion and complexity of having two systems operating in one area of law. For example, 1,200 matters are bounced between the two courts annually, wasting money and up to a year of Australian families' time".[75]

150. The Association agrees that there should be "a single entry point, a single set of rules, processes, procedures, [to] ensure that families can move through the entire gambit of the system far simpler and cheaper…".[76]

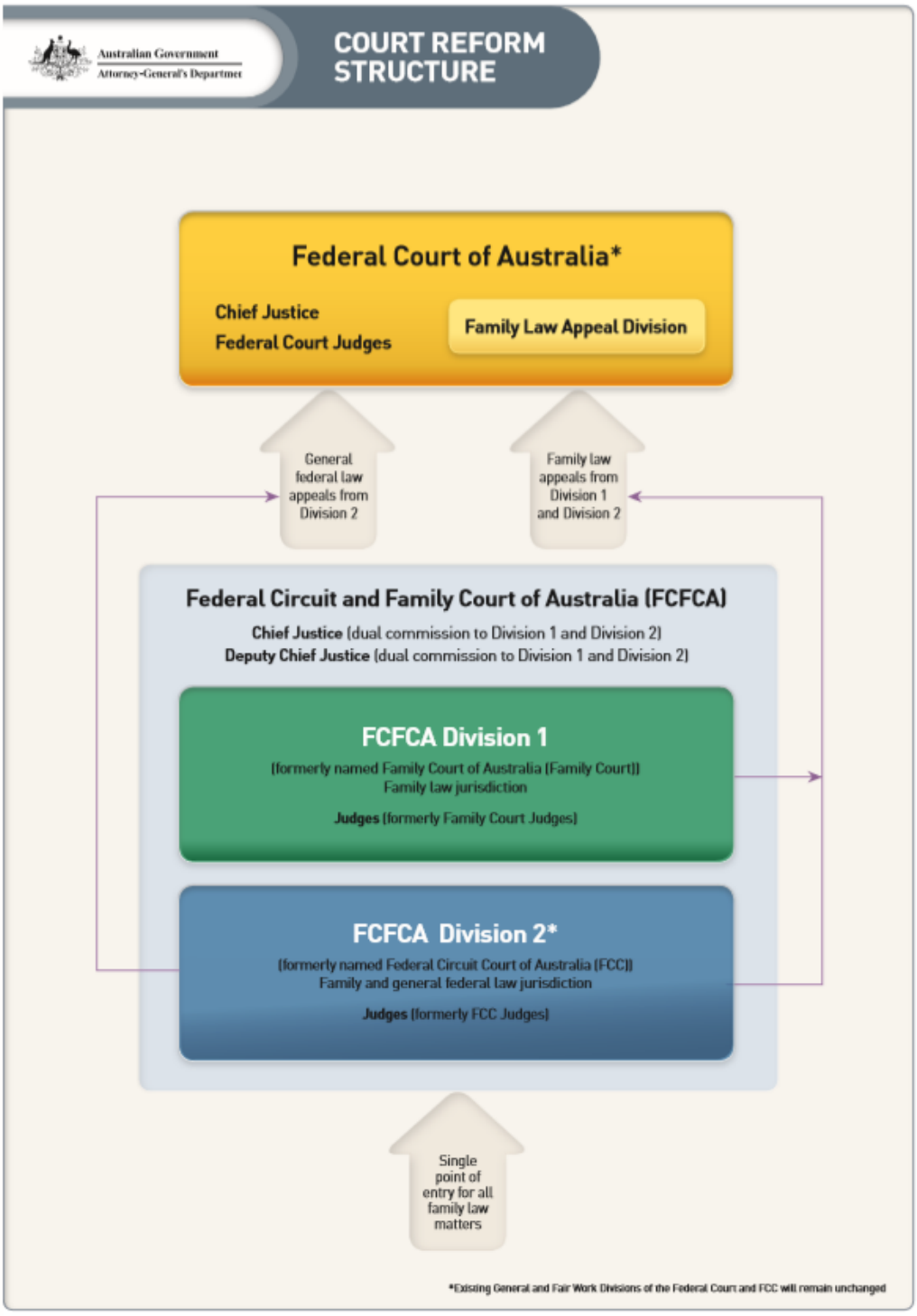
151. However, this end result does not justify the means proposed by the Government through the merger.

152. In April 2018 the Government announced a proposal to merge the Family Court into a division of the generalised lower level Federal Circuit Court and result in the abolition of a stand-alone specialist court as we know it. The Government released a diagram of the merger proposal, shown below in **Diagram B**.

[75] Attorney-General for Australia, the Hon Christian Porter MP, 'Op-Ed – Family Courts reform' (Media Release, 3 August 2018) <https://www.attorneygeneral.gov.au/Media/Pages/Op-ed-family-courts-reform.aspx>.

[76] ABC TV, *Insiders*, 10 June 2018 (Attorney-General for Australia) <https://www.attorneygeneral.gov.au/Media/Pages/ABC-TV-Insiders-10-June-2018.aspx>.

Diagram B: Government's merger proposal



153. In August 2018 the Federal Government introduced the Merger Bills into the 45th Parliament to seek to legislate its merger proposal.

154. After opposition from the legal profession and key stakeholders, the Senate's Legal and Constitutional Affairs Committee inquired into the Merger Bills and recommended substantial amendment. The Merger Bills were not brought on for a vote in the Senate as the Government was unable to secure sufficient support from the Senate Cross-Bench to pass the bills. The Merger Bills lapsed when Parliament was prorogued for the May Election.

155. There was no consultation with the community or the profession over the merger proposal. The merger proposal was devised without the benefit of the ALRC report and in April the Government broke trust with Parliament by inexplicably withholding the ALRC report from Senators who were being pressured to vote on the merger.

156. Following delivery of the ALRC Report, instead of taking the opportunity presented by the ALRC's once in a generation review of the system to look to holistic reform, the Attorney-General committed to reintroducing the flawed merger proposal to the Parliament before Christmas.

157. The Amended Merger Bills were reintroduced on the last sitting day of 2019 and have been referred to the Senate's Legal and Constitutional Affairs Legislation Committee for inquiry by November 2020, one month after this Committee's inquiry is due to conclude. The Association intends to provide detailed submissions in relation to the Amended Merger Bills when the opportunity is afforded to do so. The Association is concerned that the Amended Merger Bills do not make any substantive changes to the original and fundamentally flawed proposal of the Government.

158. Stakeholders, including the Association, are concerned that the Government's proposed restructure will in effect abolish a specialist superior court of record and produce a significant diminution in the quality of the family law justice system.

159. The Association's longstanding position has therefore been to oppose the Government's merger proposal out of concerns including that it will result in the abolition of a specialist, stand-alone family court as we know it and harm children, families and victims of family violence in need of specialist assistance.

160. The Women's Legal Service Queensland has stated publicly that this restructure represents a "move to a generalist court model and away from family law specialisation".[77]

161. There has been widespread agreement amongst the legal profession and domestic violence service providers that the Merger Bills are not the solution and should not be passed.

162. Once in the Federal Circuit and Family Court of Australia, all family court matters will have to compete for judicial resources and court time with other matters of federal jurisdiction, including a growing migration and industrial caseload. There

[77] Women's Legal Service Queensland, (Media Release, 28 June 2018).

is a risk the restructure will impose further significant pressures and more complex and lengthy cases on already over-burdened Federal Circuit Court Judges. This would further increase costs and delays.

163. Former Liberal Senator Ian MacDonald, who chaired the inquiry into the Merger Bills, has conceded the proposal was only a "short term fix".[78] The Association disputes it is even that.

164. Importantly, the merger and the Amended Merger Bills also fail to alleviate the fundamental problems plaguing the system, including the risk of victims of family violence falling through the cracks.

The Association's proposal for a Family Court 2.0

165. Instead, the Association has advocated an alternate model of reform to consolidate federal jurisdiction and maintain a stand-alone specialist superior 'Family Court 2.0' that includes maintaining Family Court Judges in Division 1 and incorporating Federal Circuit Court Judges who currently hear family law matters in Division 2.

166. The Association's 2.0 model reflects the recommendations and model of the 2008 Semple Report. The Semple Report found that:[79]

> Having two independent courts handling largely the same work has created confusion for litigants and legal practitioners who need to choose where to file matters. The confusion appears to be exacerbated by the different names of the Courts and the titles of their judicial officers. In summary, the current framework and arrangements affecting the delivery of family law services across the Courts do not satisfy accepted principles of effective corporate governance…
>
> It recommends that existing Federal Magistrates be offered commissions to the General Division of the Family Court which would become a lower tier of that Court. Existing Family Court Judges would constitute an upper tier of the Family Court. It will be important that new administrative and corporate structures be designed to be responsive to the separate requirements of both judicial levels, including their separate judicial case management processes.

167. The Semple Report claimed its model would achieve the following outcomes:[80]

- improved judicial planning and coordination across all family law services to achieve a better balance of workloads between the two Divisions;
- an improved management structure, with the Chief Justice responsible ultimately for both Divisions;

[78] ABC The Roundtable Program, *Family Court Failure*, 2 June 2019 <https://www.abc.net.au/radionational/programs/the-roundtable/family-court-failure/11169200>.
[79] Semple Report, 8-9.
[80] Ibid, 10-11.

- increased distinction in the level of work being undertaken between the Divisions;
- retention of existing cultures and separate case management procedures for quick and efficient procedures for short and simple cases in the General Division and different procedures for the more complex and appeal cases in the Superior and Appellate Division;
- all judicial officers appointed to the Family Court would have the expertise required to adjudicate on family law matters;
- removal of confusion for litigants with one court responsible for all family law filings;
- a single administration in the court with no duplication of management systems and administrative overheads;
- administrative savings made over time to offset forecast budget deficits in future years;
- necessary resources available for judicial support from other identified registry savings;
- a transparent management process that allocates judicial support resources to both Divisions on the basis of workloads and outputs; and
- allow the existing informal specialisations in the FMC to become formal, overcoming problems of 'family' experts doing general family law work and vice versa.

168. The Semple Report did not recommend, and cannot be understood as justification for, the proposal that:

a. the Family Court should co-exist with the Federal Circuit Court in a parallel division of a new court entity;

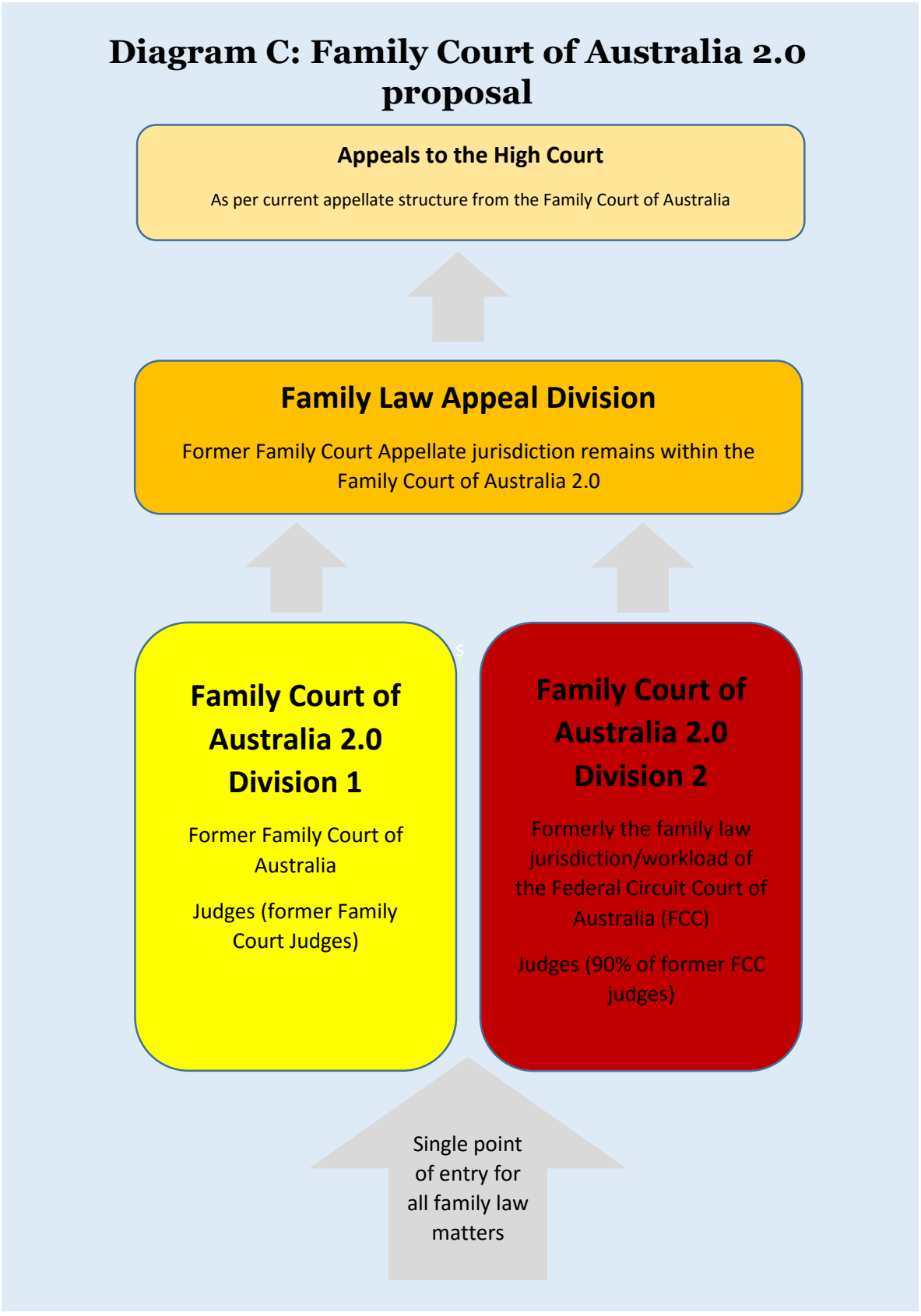
b. a specialist Family Court be abolished altogether; or

c. family law appellate jurisdiction should be removed entirely and relocated in the federal court.

169. The Government has cherry-picked elements from the Semple Report to justify the merger proposal without providing any explanation for rejecting the Report's other key findings or its proposed model for reform.

170. The Association's proposed model of reform reflects the recommendations in the Semple Report to "ensure there was one specialist family law court" and is illustrated below in **Diagram C**.

Diagram C: Family Court of Australia 2.0 proposal



171. There has been widespread public support expressed for the Association's policy position from key stakeholders, including the Law Council and Women's Legal Services Australia. In November 2019, more than 110 organisations signed an Open Letter opposing the merger and reiterating support for the Association's 2.0 model but most importantly calling for informed consultation and consideration of all options.[81]

172. In October 2018 the Attorney-General dismissed the Association's proposal as "radical".[82] That observation is a curious one in circumstances where the proposal is one that not only reflects the Semple recommendations but is a structure that is already in place in the Attorney's home state of Western Australia, and one for which the Attorney was responsible for four years in his role as Attorney General of Western Australia from 2008 to 2012. The Family Court of Western Australia comprises effectively two divisions, of magistrates and Judges, seamlessly operating to determine family law issues in that state.

173. There should be nothing radical about the idea that critical social justice infrastructure, let alone a Chapter III Court, should not be irrevocably altered or abolished without informed consultation and discussion with those who use the court, work in the court and whose lives are irreversibly shaped by its decisions.

174. In 2017, then Attorney-General Brandis said "The government is open to change, if need be, radical change".[83]

175. This Inquiry represents an opportunity for a national discussion to consider whether an alternate reform proposal might be possible to realise the cost and time efficiencies proposed by the Government while retaining a specialised and properly resourced Family Court. This opportunity should not be lightly passed up – family law is too important to fail.

176. The Association's Family Court 2.0 proposal would produce what Australians clearly expect of their legal system: a single specialist family court to address the needs of the country's children.

What is wrong with the Government's merger?

177. The Association holds several concerns with the Amended Merger Bills.

178. First, once in the proposed Federal Circuit and Family Court of Australia, all family court matters will have to compete for judicial resources and court time with other

---

[81] *Open Letter – concerns about proposed family court merger* <http://www.wlsa.org.au/uploads/submission-resources/Letter_to_AG_re_concerns_about_family_court_merger_%28f_021219%29.pdf>.

[82] Attorney-General for Australia, the Hon Christian Porter MP, 'The State of the Nation' (Speech delivered at 18th National Family Law Conference, Brisbane, 3 October 2018) <https://www.attorneygeneral.gov.au/Media/Pages/speech-at-the-opening-plenary-session-the-state-of-the-nation-18th-biennial-national-family-law-conference-3-October-2018.aspx>.

[83] Quoted in Nicola Berkovic, '"Radical" overhaul of commonwealth courts imminent', *The Australian* (online), 23 October 2017 <https://www.theaustralian.com.au/business/legal-affairs/radical-overhaul-of-commonwealth-courts-imminent/news-story/df1695790817f883d83054ebcbc13876>.

matters of federal jurisdiction, including a growing migration caseload. There is a risk the restructure will impose further significant pressures and more complex and lengthy cases on already over-burdened Federal Circuit Court Judges.

179. Second, 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.

180. 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".[84] This was reinforced more recently by the ALRC's review of the family law system.

181. 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.

182. 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, and to coordinate and locate legal and non-legal support services. 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. They provide an invaluable service in the early identification, narrowing and resolution of issues.

183. The proposed merger will see these specialist services and resources diluted or, worse, lost. Together with the skills of specialist Judges, these services and resources do not sit readily in a generalist court and ought not to have to compete with the needs of litigants in a generalist court for resourcing and Judge time.

184. Third, the Amended Merger Bills will undermine specialisation because they seek to recast the requirements for the qualification and experience of Judges appointed to its two divisions – both of which would handle family law matters, albeit of different complexity.

185. Specialist family court Judges are essential to the proper administration of justice. The Family Court currently deals with most difficult and complex family law matters that come before our courts, with direct, life-altering and irreversible consequences for the children and families concerned. One of the Family Court's most admired features is that only those who "by reason of training, experience and personality" are suited to deal with family law cases ought to be appointed as Judges as required by section 22(2)(b) of the *Family Law Act 1975* (Cth).

186. This same requirement does not apply to Federal Circuit Court Judges who hear family law matters and would not apply to Judges in 'Division 2' of a merged court.

187. The Amended Merger Bill appears to propose an unnecessary rewrite of section 22(2)(b) of the *Family Law Act 1975* (Cth) for Judges in Division 1 as follows.

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

Clause 11(2)(b) of the Federal Circuit and Family Court of Australia Bill 2019 (Cth) provides for Division 1 that:

> by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with family law matters, including matters involving family violence

Clause 11 of the Federal Circuit and Family Court of Australia Bill 2018 (Cth) provided for Division 1 that:

> by reason of training, experience and personality, the person is a suitable person to deal with matters of family law.

The new clause 11(2)(b) is consistent with the new Federal Circuit and Family Court of Australia Bill 2019 (Cth) clause 111(2)(b) which provides that:

> by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with the kinds of matters that may be expected to come before the person as a Judge of the Federal Circuit and Family Court of Australia

188. In addition, the above clause means that appointments to Division 2 need not have any experience in family law. The "kinds of matters that may be expected to come before" a Judge of Division 2 include all of those within essentially Federal jurisdiction from immigration to copyright, employment, admiralty etc. Thus, there is no requirement for family law knowledge and experience, let alone any family violence experience or training. This is despite the fact that under the merger proposal Division 2 will be the division in which all matters commence and which will, as a result, be the Court in which all interim proceedings are most likely to be determined together with the bulk of family law matters.

189. The lack of specialisation, coupled with time and resources, has the potential to impact negatively on the quality of outcomes experienced by family law litigants in the merged court. It also continues to place an unfair burden on Federal Circuit Court Judges called to make difficult decisions on these matters under significant time and caseload pressures.

190. The importance of family law specialisation amongst Judges hearing family law matters was recently reinforced in the decision by the Full Court of the Family Court on appeal of a judgment from the Federal Circuit Court in *Rader & Rader and Ors (No. 2)* [2019] FamCAFC 227 (21 November 2019) (***Rader***). Relevantly, the Full Court stated as follows in judgment:

> [2] Prior to the hearing before the primary Judge on 13 September 2019, the children had lived with Mr Rader ("the father") for 11 months, after having previously lived with their mother, Ms Rader ("the mother"). On 13 September 2019, as a result of interim orders made on that day, the children were moved from the father's care to the care of Mr and Ms Haines ("the maternal grandparents") who were given sole parental responsibility for them but who were "not [to] make any non-urgent major long-term decision without consulting each of the parties first and obtaining an order of the Court" (Order 1). Further, the parents were restrained from contacting the children, save that they may spend time with them "in accordance with any

written recommendation of the family therapist … and that recommendation may include both time, place and supervision" (Orders 5 and 6)…

[6] The hearing commenced at 9.41 am on 13 September 2019. After the appearances had been mentioned, the ICL announced that she thought that "this is a difficult matter" and "it's going to be 'which is the best of the bad bunch,' frankly" (Transcript 13 September 2019, p.2 line 44 to p.3 line 2). This comment should not be allowed to pass unnoticed. This was no way to speak about the children's parents….

[24] Although not directly relevant to the appeal, the matter came before the primary Judge again at 8.04 pm that same day. It appears from the transcript that the ICL, and no one else, appeared by telephone. His Honour asked what had happened and was told:

> [X] went in the house, the father closed the door and locked it behind her. She then, at some stage, ran away. I received a text message from the [maternal] grandfather to say that she's back now and [Y] is apparently in the house saying he's not coming out. The father is not doing anything to facilitate them coming out. I have phoned [Suburb D] Police, which is the local police station. They will go down and do a welfare check but they're not able to do anything else …

[26] … a recovery order was made. We do not have the benefit of those reasons for judgment.

[27] The police executed the recovery order in the early hours of the following morning, waking the children and removing them from their beds so that they could pass into the maternal grandparents' care.

[28] It is beyond me to identify any urgency or risk to the children that justified such drastic, peremptory, ex parte action in either seeking the recovery order or in granting it. Both children described their distress at this course and the continued upset it has caused them in detail to Dr B. He saw the children and the parties as described earlier, and in response to the urgent appeal hearing, provided his expert report on 20 November 2019. I shall return to it in due course.

[29] This immediate recovery order should not have been sought or made.

(following the orders and the removal of the children by the police)

[62] … the Court was informed that Y was admitted to hospital at 11.00 pm the night before, as he is considering suicide. The hospital psychiatrist has advised that he will be admitted to the appropriate unit for a few days at least. In the afternoon, when X and Y were alone, Y had told X that he proposed to hang himself. She saw a noose in his room. X managed to talk Y out of it.

(remembering that X is some 14 years and Y some 13 years of age)

191. This case exemplifies the Association's concerns around the importance of background and experience in determining family law matters and the insufficient time and resources that members of the Federal Circuit Court have to properly attend matters. These concerns would be exacerbated by the merger, including the fact that the Amended Merger Bills would see the only right of appeal of this father to be by leave, which is not presently required, to a single Judge.

192. *Rader* is also a significant reminder of the real-life impacts of family court matters on children, with one child in this case contemplating suicide, and the responsibility this places on courts and judicial officers.

193. Fourth, the Amended Merger Bills will effectively remove the specialist appeal division of the Family Court.

194. Contrary to the model proposed by the Federal Circuit and Family Court of Australia Bill 2018, the Amended Merger Bills now provided that the appellate function will be retained within the merged court, rather than transplanted into the Federal Court as was proposed last year.

195. This would mean, however, that the appellate function currently performed by the specialist skills of the Family Court's appeal bench would devolve to all Division 1 Judges, undermining the retention of specialist appellate jurisdiction in a different way.

196. The Explanatory Memorandum states that the Amended Merger Bill will:[85]

> preserve the existing Family Court's appellate jurisdiction in the new FCFC (Division 1)
>
> remove the Appeal Division structure of the Family Court to allow all FCFC (Division 1) Judges to hear family law appeals, both as individual Judges and as members of a Full Court.

197. Currently, the default position is that family law matters appealed from the Federal Circuit Court are heard by appeal bench of the Family Court consisting of three members whereas appeals in respect of the Court's general work are heard by a single Judge only. Under the merger proposal, appeals in family law matters will heard by a single Judge only. This single Judge may be any current Family Court Judge, rather than a member of the current appeal bench.

198. This is inconsistent with the treatment of parenting and financial issues before any other Court, including the Supreme and District Courts and the Federal Court, and does not promote the best justice outcomes.

199. Fifth, the Association does not accept the purported efficiencies it has been claimed the merger will produce. The Association remains concerned it will further increase cost, time and stress for families.

200. The Federal Courts are already managed by a single unified administrative structure as a result of the back of house changes made to the system several years

[85] Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2019 (Cth) [13].

ago. The Federal Court, Family Court and Federal Circuit Court are now managed as one "entity" or "administrative body with a single appropriation" for budgetary purposes,[86] and run in effect by the Federal Court.

201. The six-week desktop review by PWC presented as the original business case for the merger was ultimately discredited and disregarded by the Senate Committee inquiring into the Merger Bills. It is unclear how the Government could continue to claim these efficiencies would be realised now the merger has been reintroduced, since these efficiencies were premised on the mooted changes to the Family Court's appellate jurisdiction which were rightly rejected by the Committee and abandoned by the Government.

202. Sixth, in any event, without a significant funding and resource commitment, there is no rational basis for concluding that the proposed reforms can and will have any impact upon the delays experienced.

203. The Amended Merger Bills propose that ultimately all of the work of the Family Court will be subsumed by the existing Federal Circuit Court which, as outlined above, is simply unable to deal with its existing workload.

204. The Attorney-General stated in his Second Reading Speech on the Amended Merger Bills in December 2019 that:[87]

> The government, as part of this reform, has also committed to providing:
> an extra $4 million in funding to the federal courts to review court rules and assist with implementation of the reforms; and
>
> an extra $3.7 million over the forward estimates for an additional FCFC Judge.
>
> However, while the government is committed to ensuring that the courts are appropriately resourced, it is not a good use of taxpayer funds to simply appoint additional Judges without first addressing the fundamental structural problems that have existed within the courts.

205. While any additional resources are welcome, an investment of $7.7 million, including to fund a single additional Judge, is simply not sufficient to make a serious or sustained impact on the chronically resource-starved courts.

206. In 2018-19, the budget for the Federal Circuit Court was $97 million.[88] Actual expenditure in 2018-19 was $100.9 million.[89]

207. In 2018-19, the budget for the Family Court was $45 million.[90] Actual expenditure was $47 million.[91]

---

86 See Commonwealth, *Attorney-General's Portfolio 2018-19 Portfolio Budget Statement* (2018), 135 [1.1].
87 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2019, 7-9 (Christian Porter, Attorney-General).
88 Federal Circuit Court, *Annual Report 2018-19* (2019) 68, Table A1.1 Outcome 3: Federal Circuit Court of Australia.
89 Ibid.
90 Family Court of Australia, *Annual Report 2018-19* (2019) 62, Table A1.1 Outcome 2: Family Court of Australia.
91 Ibid.

208. The value of the additional funding to be contributed to the merger represents just 5% of the total appropriation of both Courts.

209. Although undoubtedly important initiatives in their own right, more funding has been spent on projects in recent budgets that arguably do not impact on as many Australians so critically as the family law system does:

- $27.5 million to eradicate three species of ants;[92]
- $30.9 million over five years to support the live music industry;[93]
- $48.7 million over four years to commemorate the 250th anniversary of James Cook's voyage to Australia.[94]

210. Further, 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.

211. Failure to significantly invest in the system will simply perpetuate existing pressures and problems in a new structure.

212. The Association is concerned that the Amended Merger Bills will result in an inordinate and unjustifiable increase in the already significant costs incurred by many participants in the court system, in addition to uncertainty and greater delay.

213. In conclusion, the merger proposal will not alleviate any of the pressures. Instead, there is a real risk it will exacerbate these, hurting families and children at their most vulnerable.

Why is specialisation important?

214. 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.[95]

215. 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".[96]

---

92 Maani Truu, 'Federal budget devotes $27.5 million to killing ants', *SBS News* (online), 3 April 2019 <https://www.sbs.com.au/news/federal-budget-devotes-27-5-million-to-killing-ants>.

93 Minister Fifield, 'More live music, more opportunities for Australia's musicians' (Media Release, 30 March 2019) <https://www.minister.communications.gov.au/minister/mitch-fifield/news/more-live-music-more-opportunities-australias-musicians>.

94 Commonwealth, *Budget Measures 2018-19 – Part 2: Expense Measures*, 78 <https://archive.budget.gov.au/2018-19/bp2/bp2.pdf>.

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

96 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>.

216. 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. 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.

217. One of the Family Court's most admired features is the fact that only those who "by reason of training, experience and personality"[97] 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.[98]

218. This was acknowledged by the House of Representatives 2017 Inquiry, which stated that:[99]

> 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 per cent of the total family law workload is heard in that court.

219. The Council of Single Mothers and their Children told the Senate Legal and Constitutional Affairs Legislation Committee in July 2018 that:[100]

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

220. The House of Representatives 2017 Inquiry recommended an increase in the specialisation of Judges undertaking family law work.[101]

---

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

98 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.

99 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).

100 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.

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

221. The Attorney-General is right to say that "fundamental structural reform is an absolute necessary condition to further improvements" to the family law system,[102] the experiment of sharing jurisdiction between two federal courts and running family law matters in separate courts with separate rules and procedures has failed.

222. 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.

223. Chief Judge Alstergren acknowledged that:[103]

> A specialist court and profession provides obvious benefits and allows for a specialist knowledge and the development of specialist jurisprudence…
>
> In my view, there will always be a need for superior level family law Judges to hear complex family law trials and appeals, particularly in parenting cases.

224. Departing from a stand-alone specialist family court model with co-located legal and non-legal support services is contrary to the advice of expert and research.

225. 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".[104] It is important to be clear about what is meant by a specialist family court and what that entails.

226. 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."[105]

227. The alarming prevalence of family violence in the system makes specialisation critical to promote safe engagement for victims with the Courts and our justice system, from the time a matter is filed, through appropriate triage, active case management and expedited resolution.

228. 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".[106] Justice services operate on the front line in responding to violence, alongside police and support services.

---

[102] 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>.

[103] Chief Judge of the Federal Circuit Court of Australia, the Hon Will Alstergren, 'State of the Nation' (Speech delivered at 18th National Family Law Conference, Brisbane, 3 October 2018) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2018/speech-cj-nflc>.

[104] Federal Court of Australia, *Corporate Plan 2017-18* (2017) 18.

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

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

229. It is 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 elements of the system are fragmented.

230. 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.

231. Further, there are consequences for the international recognition and implementation of Australian orders if not made by a superior Court of record, including by way of example in relation to orders for the payment of money and incidents of international child abduction.[107]

232. The Association therefore recommends that the Committee advocate to Parliament to:

- Properly fund and resource the family law system, and commit to doing so on an ongoing basis;
- Maintain 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;
- 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; and
- Oppose the reintroduction of the Government's merger proposal.

[107] See, eg, *Foreign Judgments Act 1991* (Cth) and the *Foreign Judgments Regulations 1992* (Cth).

5. How can this Inquiry lead reform?

233. This Inquiry has an important role to play in promoting resourcing and reform of the family law system. It also has the potential to lead meaningful consideration and responses to recent reports, including the ALRC's 2019 landmark review of the family law system and the House of Representatives 2017 Inquiry, and to inform public debate on the issues of evidence, enforcement of orders and costs.

Responding to the ALRC's Report

234. In August 2017 the then Attorney-General, Senator the Hon George Brandis QC, commissioned the ALRC to undertake the first root and branch review of the *Family Law Act 1975* (Cth) in more than 40 years. That comprehensive report was handed down in April this year and highlighted the fragmented nature of the current family law system.[106]

235. The review included a recommendation intended to overcome jurisdictional gaps and information sharing blind-spots that pose risks to children because of the fractured jurisdiction and agencies associated with state child protection jurisdiction and federal family law jurisdiction.[107]

236. In particular, the ALRC's first recommendation was that the government consider fundamental changes to the identity and structure of the courts to deal with both family law as well as with family violence and child protection issues, which have traditionally been the province of the states.

237. Family violence and child abuse issues are ordinarily dealt with by the states and territories and financial and parenting issues arising on family breakdown fall to the Commonwealth. This results in delay, additional cost and on an unacceptable number of occasions in an inconsistent response to families and children in crisis. The ALRC identified a risk of children and victims of family violence falling through what the ALRC called the "jurisdictional gap".[108]

238. The Commonwealth's express legislative power over the family is restricted to laws concerning marriage, divorce, parental rights, and the custody and guardianship of children born in wedlock.[109] That legislative competence was expanded between 1986 and 1990 when all States (save for Western Australia) referred their law-making powers over ex-nuptial children to the Commonwealth.[110] The

---

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

[107] Ibid, Chapter 4 'Closing the Jurisdictional Gap'.

[108] Ibid.

[109] *Commonwealth of Australia Constitution Act 1900* (UK) ('*The Commonwealth Constitution*'), s 51(xxi) and (xxii) (the "marriage power" and "matrimonial causes power", respectively.

[110] Referral by the States was required pursuant to s 51(xxxvii) of the Commonwealth Constitution was required following *Re Cormick* (1984) 156 CLR 170, in which it was held that the marriage power did not encompass spouses' ex-nuptial children. See the *Commonwealth Powers (Family Law—Children) Act 1986* (NSW); *Commonwealth Powers (Family Law—Children) Act 1986* (Vic); *Commonwealth Powers (Family Law—Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas). It

subsequent passing of a series of referral acts between 2003 and 2008 similarly expanded the Commonwealth's legislative capacity to include regulating property and child-related disputes between de facto couples.[111]

239. All private proceedings concerning families now fall within the federal jurisdiction and are primarily dealt with by the Family Court and the Federal Circuit Court. Public proceedings remain primarily a matter for the States' and Territories' parliaments and courts.

240. The ALRC recommended establishing family courts in each state and territory to provide a comprehensive response to these difficulties. The ALRC also recommended that federal family law jurisdiction be devolved to the states and territories to overcome this issue by affording the Australian community the benefit of one comprehensive system to protect Australian families and children.

241. In recognition of the issue the ALRC has sought to address, but the pragmatic difficulty in implementing this proposal, the Law Council of Australia has suggested consideration should be given to inverting the ALRC's recommendation 1 and referring responsibility for all matters concerning child protection, family violence and family law to the Commonwealth instead.[112]

242. The Government is yet to respond to the ALRC's recommendations. As discussed below, the Government's proposed merger does not engage with or address the issue of the jurisdictional gap.

243. The Association urges the Committee to carefully consider the ALRC's recommendations, including recommendation 1, and consult with all stakeholders as to implementation.

Understanding the courts powers in relation to untruthful evidence

244. Another important aspect of the Committee's role is to lead careful consideration and promote understanding of the powers of the courts to ensure parties provide truthful, competent evidence and make orders for non-compliance.

245. The Committee's terms of reference include inquiring into:

> *the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the*

should be noted that referral of powers is not required for the Territories. The federal power to legislate over the Territories is enshrined in s 122 of the Commonwealth Constitution.

111 See the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

112 Arthur Moses SC, 'Commonwealth best to fix broken families, child violence', *The Australian* (online) 7 June 2019 <https://www.lawcouncil.asn.au/media/news/commonwealth-best-to-fix-broken-families-child-violence>; Law Council of Australia, 'Statement regarding the family law system' (Media Release, 19 September 2019) <https://www.lawcouncil.asn.au/media/media-releases/law-council-of-australia-president-arthur-moses-sc-statement-regarding-the-family-law-system-inquiry>; Arthur Moses SC, 'Why "radical" is not a dirty word in family law reform' (Speech to the Newcastle Law Society 2019 Annual Dinner, 5 November 2019) 15-16 <https://www.lawcouncil.asn.au/docs/9573ccbb-b210-ea11-9401-005056be13b5/Why%20%E2%80%9Cradical%E2%80%9D%20is%20not%20a%20dirty%20word%20in%20family%20law%20reform.pdf>.

court to make orders for non-compliance and the efficacy of the enforcement of such orders.

246. The Association believes that the Family Court and Federal Circuit Court do have appropriate existing powers to ensure parties provide truthful and complete evidence. However, the effectiveness of these powers has been undermined by a chronic lack of funding and resourcing, which inhibits any allegations of family violence – whether true or false – from being promptly considered, tested and appropriately action resolved.

247. The Family Court and Federal Circuit Court have existing Rules with a statutory foundation to control the procedural aspects of all matters that come before them. Those Rules impose detailed obligations as to disclosure upon parties to proceedings and the Courts are experienced in dealing with breaches of such obligations.

248. For example, in considering the consequences of non-disclosure in a financial case, the Full Court in *Weir and Weir* stated:[113]

> It seems that once it has been established that there has been a deliberate non-disclosure…then the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature.

249. Whether a witness is prepared to give truthful evidence or not is an issue which is not exclusive to courts exercising family law jurisdiction. A witness' honesty is not an issue likely to be enhanced by any particular further Rule or statutory provision. As with all courts, those in this area are well familiar with determining the honesty of witnesses, including with the assistance of oral evidence, and in imposing consequences for dishonesty – whether in terms of the determination itself or, where appropriate, by recourse to the relevant provisions of other legislation. For example, in New South Wales if a person has lied under oath then the offence of perjury may arise for consideration pursuant to section 327 of the *Crimes Act 1900* (NSW). The *Family Law Rules* also provide the means by which a party may be dealt with by the Court for contempt of Court.

Evidence about family violence

250. The preceding comments apply equally to evidence in relation to the occurrence of family violence.

251. The adversarial nature of the family law system provides for the testing of evidence. That includes situations where allegations are denied. The recent introduction of section 102NA of the *Family Law Act 1975* (Cth) has improved this process by ensuring that judicial officers have the benefit of lawyers to interrogate and test evidence in most cases involving allegations of violence.

[113] (1992) 110 FLR 403.

252. However, again the system's capacity to serve this important function is undermined by the lack of resourcing and funding.

253. In this context the Association notes that there remains significant concern that family violence continues to be under-reported.[114]

254. A 2015 research project indicated that the belief that women make false or exaggerated claims of family violence to obtain tactical advantage in family law proceedings persists among members of the legal professional and the general community despite having no foundation in research.[115]

255. Legal academic, Rosemary Hunter, has written about the effect that such views (if held by the Bench) can have on the availability of protection orders for women who require them.[116]

256. The Association encourages the Committee to carefully consider the research in this area, in order to overcome the prevalence of untruthful evidence on this topic.

Financial costs of proceedings

257. The Inquiry also provides an opportunity to carefully consider costs in family law.

258. The Association recognises that marital breakdown can have significant financial impact on families. In some cases, the amount of legal costs incurred can materially contribute to that impact.

259. Expert and ethical lawyers add value to any system of dispute resolution, particularly family law, by assisting parties to understand their rights and obligations, guiding parties to resolve their disputes on fair terms, protecting the interests of children and, importantly, assisting the courts to efficiently dispose of those matters where a curial solution is unavoidable. Such matters often involve complex factual and emotional issues for the parties and include cases in which mental health conditions and family violence, in its many forms, loom large, affecting as they do the subjectivity of the parties and the power imbalances between them.

260. Barristers working at the coal face of family law, many of whom practice exclusively in this area, have vast experience over many decades of development of the practice of family law. They are well placed to assist in identifying ways in which the financial impact of legal fees on families can be reduced.

261. In financial cases legal assistance in obtaining proper disclosure and the timely provision of accurate advice as to rights and obligations form a pivotal role in families achieving financial resolution and moving forward.

---

[114] Mugford J, *Domestic violence*. Violence today no. 2 (1989, Australian Institute of Criminology) <https://aic.gov.au/publications/vt/vt02>. See also H Chadwick and A Morgan, *Key Issues in Domestic Violence* (2009, Australian Institute of Criminology).

[115] Australasian Institute of Judicial Administration (2017) *National Domestic and Family Violence Bench Book*, 4.1.

[116] Rosemary Hunter, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney Law Review* 733.

262. Litigants in New South Wales are protected by the regulatory framework governing the charging of legal fees. The touchstones of this framework are:

    a. advanced disclosure of costs likely to be incurred (transparency); and

    b. accountability of lawyers to their clients and regulators for what lawyers charge.[117]

263. Section 172 of the *Legal Profession Uniform Law* (NSW) requires that legal fees must be "fair and reasonable" and in particular "proportionately and reasonably incurred and proportionate and reasonable in amount".

264. Lawyers' disclosure requirements include hourly and daily rates, an estimate of the total legal fees to be incurred and the ability of the client to negotiate the terms of such fees agreement, under section 174.

265. While cases of over-charging and breaches of the rules in relation to the rendering of proper fees regrettably do occur from time to time, these issues are and should be dealt with via an established and readily accessed system of consumer protection incorporating coercive powers to investigate and review and, in appropriate cases, sanctions upon transgressors. In appropriate cases such issues are also dealt with by courts, including in limiting or disallowing costs.

266. It is important to address in this submission the three separate issues raised of fees disproportionate to the asset pool or the totality of the issues under consideration in a case, the capping of fees and "disappointment fees".

Fees Disproportionate to Asset Pool

267. There is no doubt that on occasions parties choose to incur legal fees that are disproportionate to the amounts in dispute between them. This is almost without exception a feature that is exclusive to personal litigation, including family law disputes, disputes over estates and personal injury litigation to identify some examples. Commercial disputes are, generally, not motivated by the same sorts of emotions that often drive parties in family law disputes.

268. There is no evidence however to suggest that this is a common feature of Family Court litigation, or indeed how often it occurs and to what extent.

269. What is common is that, anecdotally, over 90% of disputes are settled by parties most often with the assistance of competent lawyers at a relatively early stage in proceedings and after the parties have obtained the advice necessary for them to make informed decisions and compromises.

270. Settlements achieved with the assistance of reliable advice have better prospects of permanence and may result in better outcomes for children in the longer term.

[117] Set out in the *Legal Profession Uniform Law* (NSW) Part 4.3.

271. That said, it would be naïve to assume every case is capable of an amicable and enduring compromise. Cases which involve family violence, betrayals of confidence and trust, financial and emotional coercion over many years, mental health or substance abuse issues or the complication of unhelpful involvement of extended family (or new family) quite often develop into intractable disputes that require access to a court for resolution.

272. It is trite to say that not all parties can be made to negotiate, less still made to agree. Where negotiations are conducted without reasonable and timely access to a curial resolution as a fallback to compromise, there is a basic failure of the rule of law. Coercion by virtue of the fact that there is no practical assistance available and no alternative but to accept unsatisfactory compromise can be and often is a very unpalatable and unproductive experience and one unlikely to assist children and families to emerge from the trauma of family breakdown.

"Capping" of Legal Fees

273. It is unclear by what mechanism is it proposed that legal fees could be capped. It would be difficult, if not impossible, to create an enforceable, fair system of tying fees to the size of an asset pool.

274. Even if caps or ceilings could be applied and enforced, the size of an asset pool per se is not reflective of the amount of legal work required to ensure justice is done between the parties in any given matter. It would necessarily be an arbitrary restriction and not justifiable.

275. Legal work is largely directed at gathering evidence of relevant issues in a case. The size of an asset pool is only one issue. The contributions made by parties, their future needs and the existence of and access to financial resources are other issues which sometimes require extensive investigation, analysis and advice. The extent of this work bears no relationship to the overall size of the asset pool.

276. For example, an asset pool might be sizeable but only consist of one asset of clear value, such as a term deposit of $10,000,000. Little work is required to establish the pool and its value.

277. Another asset pool of roughly $5,000,000 might be comprised of several assets including interests in businesses being conducted by one or other of the parties, or employee share options, or intellectual property rights, or assets held overseas. These all require experts to be engaged to provide valuation evidence, which is often an intricate process especially if the evidence of a single expert is to be critiqued or challenged.

278. The fees necessary to discharge professional obligations in the first example are negligible compared to the work demanded in the second.

279. Regulatory options to cap or limit legal costs carry with them significant risk of being counter-productive for the principal objective of assisting parties.

280. In a parenting context, it would be to the significant detriment of at least one (if not both) parties to constrain the fees permitted to be incurred. Some of the most difficult cases involve litigation in relation to abuse and violence by a well-resourced and relentless party who is alleged to be the perpetrator – to constrain the expenditure on legal fees of the victim of such conduct is to expose such a person to significant and obvious risk in any such proceedings.

281. In a financial context, in many cases one party to the marriage has control over the assets and the income. If fees were tied to the value of the asset pool there would be a greater incentive to hide assets. Moreover, a restriction on the amount of fees which could be charged would mean that less resources will be available to be deployed to discover and value undisclosed or fraudulently disposed of assets or financial resources. This would result in considerable injustice, in particular to women who may have filled the role of homemaker and parent during the relationship while the male controlled the income producing assets, and continues to do so.

282. Often cases involve parties whose level of education and need for advice and assistance is vastly different. To attempt to make the charging of fees for legal service and advice arbitrary and, presumably the same for each party, would be unconscionable and provide an unfair advantage to a party already in a stronger position.

283. Many cases involve unravelling complicated legal structures, such as family trusts, put in place to deprive a spouse of their just entitlements. The amount of work required to achieve a fair result in such cases is not referable to the size of the asset pool. In fact, in many cases there are few assets but significant financial resources. It is difficult to envisage how a system tying fees to the value of property work would be equitable in such circumstances.

284. There are numerous other practical difficulties with such a proposal. In the vast majority of cases the actual value of the pool is undetermined at the beginning. In many cases it remains for the courts to decide this at the end. How in those cases would the amount of costs that can be incurred on the preparation of the matter be able to be pre-determined? There is a great scope for injustice.

285. Arbitrary regulation of legal fees, even if it could be achieved, would constitute a serious erosion of a party's rights to engage a lawyer of their choosing and to utilise that service as they require. It is fundamentally unnecessary, and unjustifiable, to attempt to proscribe the rights of litigants in this way.[118]

286. The regulatory regime in New South Wales for lawyers to make costs disclosures and to provide proper and accurate estimates of a party's potential legal costs, and

[118] In the analogous area of restraint of legal practitioners it is well established that due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause: *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446;*Black v Taylor* [1993] 3 NZLR 403; *Bowen v Stott* [2004] WASC 94 (Hasluck J); *Williamson v Nilant* [2002] WASC 225 (McKechnie J).

be answerable for those estimates, has resulted in a legal landscape where it cannot be said that parties are taken by surprise by their legal costs.

287. Both barristers and solicitors are under enforceable professional obligations to make complete disclosures, be transparent about the charges that they render and provide estimates so that parties can make informed decisions.

288. There are cases that obtain some exposure and notoriety because the legal costs incurred by the parties would appear to be disproportionate to either the parenting issues that appear to be involved, or the amount of assets over which the parties are in dispute.

289. Great care however must be taken to understand how, in those cases, those fees came to be incurred.

290. A number of observations can be made.

291. First, the fees have been incurred with the parties' complete knowledge and at their direction.

292. Second, there are some clients who by their nature, and often as a consequence of their experience (or lack thereof) place high demands upon their lawyers. If those demands are not met traditionally those clients change lawyers, often more than once during the life of a case. There is an added expense to the privilege of changing lawyers.

293. Third, rightly or wrongly, some parties choose to exercise their right to spend their funds in pursuing what they perceive to be a just outcome in their case and would be aggrieved if they could not access the level of service they require when they are willing to pay for it.

294. Fourth, many cases in which it is said fees are "disproportionate" are cases in which the actual costs have been exacerbated as a consequence of delay and, unfortunately in a number of cases, inefficiencies within the Court system itself arising, it must be said, from a lack of resources.

"Disappointment Fees" (Known in New South Wales as "Cancellation Fees" or "Reservation Fees")

295. A barrister is not entitled to charge a "reservation fee" unless it is covered by the fee disclosure and costs agreement with the client. The expression "reservation fees" is interchangeable with "cancellation fees" and "disappointment fees".[119]

296. Reservation fees are not charged by all barristers and are intended to promote the administration of justice by ensuring Counsel set aside sufficient time to exclusively prepare for and appear in the client's case, for the duration of the client's matter.

[119] An expression used in Victoria.

297. Settlements late in the piece are not uncommon and are actively encouraged by barristers where appropriate to best promote clients' interests. If a barrister is able to obtain further work for the remainder of the unused days, the barrister will not charge for that period. If, however, the barrister is not able to obtain alternative work, the commercial opportunity to generate fees which would otherwise have been generated has been lost. Reservation fees therefore seek to promote access to justice by offering improved certainty and comfort to clients that a barrister will be exclusively available to them for the duration of the matter, while providing greater certainty for self-employed practitioners.

298. As outlined above, the *Legal Profession Uniform Law* (NSW) provides that barristers may not charge fees which are not "fair and reasonable", "proportionately and reasonably incurred and proportional and reasonable in amount", and must comply with strict disclosure requirements.

Conclusion

299. The Association therefore recommends that the Committee carefully consider and engage with the recommendations of the ALRC's landmark review of the family law system, including recommendations to overcome any jurisdictional gaps and improve information sharing between state-based child protection and family violence prevention, and Commonwealth family jurisdiction.

6. The Family Law Bar in NSW

300. The Association is a voluntary professional association comprised of more than 2,400 barristers with their principal place of practice in NSW.[120] More than 185 of our members reportedly practice in the area of family law and guardianship.[121] The Association also includes amongst its members Judges, academics, and retired practitioners and Judges. The Association is committed to promoting the public good in relation to legal matters and the administration of justice.[122]

301. Barristers are independent specialist advocates,[123] both in and outside of the courtroom.[124] Barristers owe their paramount duty to the administration of justice.[125] NSW barristers appear on a daily basis assisting clients in the Federal Circuit Court and the Family Court, including the appellate division. They do so on a pro bono basis, as well as in matters funded by Legal Aid NSW and on private retainers. Barristers also contribute in many and varied ways, all in a voluntary and unpaid capacity, to the development of the law and procedure of both courts. The Association provides extensive pro bono assistance to the community of NSW in a family law context through barristers' participation in the Family Law Settlement Service and the Legal Referral Assistance Scheme. This is separate from the pro bono matters that many of our members take on of their own accord.

302. The Association's Family Law Committee is comprised of eleven appointed barristers with active practice in family law,[126] including five Senior Counsel, who volunteer their time and expertise. Representatives of the Family Law Committee meet regularly with Federal Circuit Court Judges and Family Court Judges to provide feedback and put forward the views of the profession in relation to the conduct of hearings and the management of delays in the courts.

303. The Association can speak with experience to the challenges facing clients and practitioners in accessing the family law system and the courts in registries within NSW. This submission reflects the expertise, experience and concerns of the Association's members including through the above initiatives.

304. The Association would be pleased to assist the Committee with any questions it may have, through oral or further written submissions. Please contact the Association's Director of Policy and Public Affairs, Ms Elizabeth Pearson, on 02 9232 4055 or epearson@nswbar.asn.au if you would like any further information or to discuss this submission.

---

120 New South Wales Bar Association, *Statistics*, as at 18 December 2019 <https://www.nswbar.asn.au/the-bar-association/statistics>.
121 Ibid.
122 New South Wales Bar Association, *New South Wales Bar Association Strategic Plan* (2017) <http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad061e3db4/attachment/strategic.pdf>.
123 *Barristers' Rules* rule 4(c).
124 See *Barristers' Rules* rule 11(c)(d).
125 *Barristers' Rules* rules 4(a), 23.
126 New South Wales Bar Association, *Appointments* (2018) <https://www.nswbar.asn.au/the-bar-association/appointments>.