



SUBMISSION | NEW SOUTH WALES
BAR ASSOCIATION

Inquiry by the Senate Standing Committees on Finance
and Public Administration into lessons to be learned
following the 2019-20 Australian bushfire season

22 May 2020

Promoting the administration of justice

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

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

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

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practice in NSW. 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 members, including its Legal Aid and Family Law Committees, and their experiences in the NSW registries of the federal 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, at [REDACTED] at first instance.

Contents

- 1 Executive Summary
- 2 Recommendations
- 3 Funding Legal Aid and legal assistance
- 4 Resourcing family violence service providers and family law services for regional Australia
- 5 Conclusion

1. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Senate Standing Committees on Finance and Public Administration (**the Committees**) for the opportunity to make submissions to the inquiry into lessons to be learned in relation to the preparation and planning for, response to and recovery efforts following the 2019-20 Australian bushfire season (**the Inquiry**).■
2. The Association acknowledges the devastating personal and financial cost of the 2019-20 bushfire crisis for many Australians. The Association recognises at the outset the terrible loss of life and pays tribute to the selfless, heroic contributions of many Australians during and after the bushfire season. This Inquiry provides an opportunity to consider many important issues arising in connection to the bushfires. The Association's submission focuses on a small but significant issue concerning the role of Australia's justice system and legal assistance sector in aiding people impacted by the bushfires during the season, response and recovery. Specifically, this submission relates to Terms of Reference (b), (f), (h) and (i).
3. The destruction and disruption caused by the bushfires has given rise to both immediate and longer-term complex legal questions for many affected people and businesses. These include but are by no means limited to property, insurance, tenancy and employment matters. Many justice services and legal assistance providers around Australia have offered pro bono assistance to victims of the bushfire crisis. However, these services were already struggling with limited resources and themselves in desperate need of funding relief. These pressures will continue to become more acute as the recovery effort and rebuild continues.
4. The bushfires have also put women, children and survivors of family violence at risk of increased domestic violence. In NSW, during the 2019-20 bushfire season family violence service providers reported increased assaults in regions severely impacted by the fires.¹ This has placed strain on front line services responding during and following the fires, including for legal support groups such as Legal Aid and Women's Legal Services.² It has also led to needs in family law, the courts and other sectors.■
5. Responding to family violence and legal need should be considered a primary, not a secondary, priority in emergency planning, disaster response and recovery. Access to affordable, timely legal assistance and justice during times of crisis is critical to deter unlawful behaviour, protect vulnerable people and uphold individuals' rights. This cannot be achieved effectively if service providers and courts are already under significant strain. Despite best intentions, the efforts of stakeholders in the justice system have been impacted during the bushfires and recovery by existing delays, chronic under-resourcing and under-funding. The 2019-20 season yields lessons about the importance of properly funding and resourcing legal assistance providers, family violence service providers, the courts and family law system to ensure these possess the resilience and agility to respond to increased need in times of crisis. The importance of learning these lessons has been subsequently underscored during the COVID-19 pandemic.

¹ Yoni Bashan, 'Bushfires: Agencies report post-natural disaster spike in domestic violence incidents', *The Australian* (online), 16 January 2020 <<https://www.theaustralian.com.au/nation/politics/bushfires-agencies-report-postnatural-disaster-spike-in-domestic-violence-incidents/news-story/ea822344afac37cb4796ff3e4735759b>>.

² See, eg, R Maguire, D Bozin, G Mortimer, 'Domestic violence will spike in the bushfire aftermath, and governments can no longer ignore it', *The Conversation* (online) 18 November 2019 <<http://theconversation.com/domestic-violence-will-spike-in-the-bushfire-aftermath-and-governments-can-no-longer-ignore-it-127018>>.

2. Recommendations

6. The Association recommends that the Committees advocate to the Government to:
 - a. Increase and sustain funding for Legal Aid and legal assistance in 2020-21 and over the forward estimates;
 - b. Increase and sustain funding for family violence service providers in 2020-21 and over the forward estimates;
 - c. Increase and sustain funding and resourcing of the family law system in 2020-21 and over the forward estimates;
 - d. Maintain and adequately fund accessible family law services and court access for regional Australia, to provide specialist assistance to children, families and survivors of family violence;
 - e. Fund the appointment of additional judicial officers, including specialist family law judges, to reflect the expansion and meet the workload of the family law courts;
 - f. Carefully consider and promptly respond to recommendations from the Australian Law Reform Commission's landmark *Review of the Family Law system* to improve collaboration, coordination and integration between Commonwealth and State family law systems, including family support services and family violence and child protection systems.

3. Funding Legal Aid and legal assistance

7. Underfunding legal assistance adversely impacts on access to justice and the quality of justice in Australia.■
8. Equal and fair access to the law is undermined by the reality that, without Legal Aid, many people are not able to afford legal representation in criminal, civil or family law matters. This affects victims and witnesses as well as clients, and places further pressure on already overstretched court systems. 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 contemporary tests imposed due to a chronic lack of resourcing.³■
9. The bushfires gave rise to significant community need for legal assistance. This need is difficult to quantify at this time as many matters continue, while others will not be felt for some time to come. In some cases, timely access to legal advice and assistance has been important to provide greater comfort and certainty to allow those affected by the bushfires to resume their lives or livelihoods to the greatest extent possible. In other cases, urgent access to legal advice and assistance has been critical to provide safety and security from abuse or violence, for them or their children.
10. Not investing in the justice system and legal assistance is a false economy. There is a direct correlation between investing in Australia's justice system and the timeliness and quality of justice the system and its courts deliver.
11. Ongoing, sufficient funding must be secured for this important system, including to ensure it can respond appropriately to meet demands and needs in times of crisis. In particular, the Commonwealth Government must take its share of responsibility for the current Legal Aid crisis as a 50:50 partner with State Governments, a commitment it has failed for many years to keep.
12. Before the 2019-20 bushfires, Federal funding was already falling hundreds of millions of dollars short of what was required to meet demand prior to the bushfire crisis. Legal aid had been progressively cut by successive Federal Governments of both political persuasions, to the point where Commonwealth funding had reached its lowest level in more than two decades.⁴■
13. The Federal Government's contribution to legal aid funding had dropped from 55 per cent in 1996-1997 to 32 per cent in 2017-2018.⁵ Twenty years ago, the Federal Government contributed \$11.57 per capita.⁶ In 2017-18 that contribution was \$8.40.⁷ The contribution is estimated to drop further to \$7.78 per capita in 2019-20.⁸

³ Ibid.

⁴ 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>>.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

14. The Law Council of Australia has advocated for an annual total increase of a minimum \$310 million in Commonwealth legal assistance funding.⁹ The Productivity Commission has recommended that an extra \$200 million a year¹⁰ be allocated to address the funding shortfall for civil legal assistance alone.
15. Immediate, additional and ongoing Commonwealth funding for legal assistance and legal aid is essential to ensure the administration of justice is equitable, sustainable and efficient.
16. While the Association welcomed the NSW Government's announcement in November 2019 of an \$88 million increase in Legal Aid funding staggered over four years, it warned that this funding falls significantly short of what is required to sustain appropriate levels of funding in 2019-20 and over the forward estimates. The \$88 million was only about a third of what Legal Aid NSW advised was desperately needed. Although a step in the right direction and long overdue, it must be followed and supplemented by further State and Federal funding to improve justice.
17. The justice system is significantly enhanced when those involved in the system are represented by counsel who are able to assist the Court to deal with matters fairly and efficiently. This will reduce delays and save money in the system.
18. These issues are not confined only to the provision of legal assistance in criminal law matters. Pressures and under-funding of Legal Aid also impacts adversely on the availability of assistance in civil and family law matters.
19. The legal assistance sector – including Legal Aid – urgently requires a sustained and significant increase in ongoing funding in partnership with State and Territory governments, to secure ongoing access in civil, criminal and family matters.■
20. The Association recommends immediate and sustained funding of both Legal Aid and legal assistance in 2020-21 and over the forward estimates as an immediate priority.
21. The Association acknowledges the Government's recent funding announcement of \$63.3 million to support frontline legal services in response to further pressures placed on legal assistance providers arising from the COVID-19 pandemic.¹¹ While this funding is welcome and urgently needed, such investment should be proactive and ongoing to ensure the justice system and those who perform essential services within it are best equipped to respond in times of crisis.
22. The Association considers that funding for these purposes should be provided annually as a recurring outcome of the Attorney-General's Portfolio budget to support disaster and emergency planning, build capacity and resilience in Legal Aid and legal assistance providers, and ensure Australians impacted by bushfires and other crises can access justice in their time of need.

⁹ Law Council of Australia, "Lives are being destroyed" – legal assistance funding needs urgent review, huge budget boost' (Media Release, 7 March 2019) <<https://www.lawcouncil.asn.au/media/media-releases/lives-are-being-destroyed-legal-assistance-funding-needs-urgent-review-huge-budget-boost>>; see also Law Council of Australia, *The Justice Project – Final Report* (August 2018) [2.1] <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf>.

¹⁰ Productivity Commission Inquiry Report, *Access to Justice Arrangements*, Report No 72, (5 September 2014).

¹¹ Commonwealth Attorney-General, the Hon Christian Porter MP, 'Funding boost to ensure struggling Australians can get legal assistance' (Media Release, 6 May 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/funding-boost-ensure-struggling-australians-can-get-legal-assistance-6-may-2020>>.

4. Resourcing family violence service providers and family law services for regional Australia

23. At any given time, Family Violence Prevention Legal Services have to turn away between 30 to 40% of people contacting them for support because they simply do not have the resources to meet community demand.¹² Crises including the 2019-20 bushfire season place urgent demands on family violence and women's legal services providers and the family law system that cannot be met without further resourcing, both during the disaster and the recovery. Put simply, systems and services that are not adequately resourced at the best of times simply cannot respond efficiently or with agility to meet increased demand during the worst of times.
24. Bushfires place tremendous pressures and ongoing stresses on affected communities, including trauma, homelessness, unemployment, dislocation and financial difficulties. This can escalate the seriousness of violence and risk for people in situations of existing domestic violence as well as trigger domestic violence in new cases.¹³
25. Studies have shown a significant increase in the incidence of family violence during and following crisis and post-disaster recovery.¹⁴ For example, one study found a 98% increase in violence against women as measured from before and after Hurricane Katrina.¹⁵ Police in New Zealand reported a 53% increase in domestic violence following the 2010 Canterbury Earthquake.¹⁶ Research by Women's Health Goulburn North East following the Black Saturday bushfires in Victoria in 2009 likewise evidenced an increase in domestic violence in bushfire affected communities.¹⁷
26. It is difficult to ascertain with precision the scale of the impact for many reasons, including under-reporting. Nevertheless, during the 2019-20 bushfire season, family violence service providers in NSW reported increased assaults in regions severely impacted by the fires.¹⁸ This has placed strain on front line services responding during and following the fires, including for legal support groups such as Legal

¹² Australian Women Against Violence Alliance, 'Women's lives will be at risk because of decision not to act today – domestic violence experts' (Media Release, March 2020) <https://awava.org.au/2020/03/13/media-release/womens-lives-will-be-at-risk-because-of-decision-not-to-act-today-domestic-violence-experts?doing_wp_cron=1589642604.5754508972167968750000>.

¹³ Debra Parkinson and Claire Zara, 'The hidden disaster: domestic violence in the aftermath of natural disaster' (2013) 28(2) *Australian Journal of Emergency Management* <<https://ajem.infoservices.com.au/items/AJEM-28-02-09#>>.

¹⁴ See, eg, R Maguire, D Bozin, G Mortimer, 'Domestic violence will spike in the bushfire aftermath, and governments can no longer ignore it', *The Conversation* (online) 18 November 2019 <<http://theconversation.com/domestic-violence-will-spike-in-the-bushfire-aftermath-and-governments-can-no-longer-ignore-it-127018>>.

¹⁵ Ibid, citing Schumacher, Coffey, Norris, Tracy, Clements and Galea, 'Intimate partner violence and Hurricane Katrina: Predictors and associated mental health outcomes' (2010) 25(5) *Violence Vict.* 588, 588-603.

¹⁶ Debra Parkinson and Claire Zara, 'The hidden disaster: domestic violence in the aftermath of natural disaster' (2013) 28(2) *Australian Journal of Emergency Management* <<https://ajem.infoservices.com.au/items/AJEM-28-02-09#>>.

¹⁷ Ibid, citing Women's Health Goulburn North East, 'The way he tells it...' *Relationships after Black Saturday* (2011) <genderanddisaster.com.au/wp-content/uploads/2015/06/Doc-005-The-Way-He-Tells-it1.pdf>.

¹⁸ See, eg, Yoni Bashan, 'Bushfires: Agencies report post-natural disaster spike in domestic violence incidents', *The Australian* (online), 16 January 2020 <<https://www.theaustralian.com.au/nation/politics/bushfires-agencies-report-postnatural-disaster-spike-in-domestic-violence-incidents/news-story/ea822344afac37cb4796ff3e4735759b>>.

Aid and Women's Legal Services.¹⁹ Chief Executive of Domestic Violence NSW, Joanne Yates, noted in January 2020 that there had been reports of an "uptick" in family violence in bushfire affected areas during the 2019-20 bushfire season, explaining that "Domestic violence is not a one-off incident. It's a pattern of behaviour, and under stress those patterns can intensify... Deep trauma and deep stress heighten those tensions".²⁰

27. Failing to be aware of or address family violence in emergency planning and responses puts at risk women, children and survivors of family violence. ■ Parkinson and Zara explain that:²¹

Emergency management can play a part in preventing domestic violence after disaster by attending to it in planning, response and recovery stages. While the emergency stage after disasters necessarily attends to primary needs of food, water and shelter, the recovery and reconstruction stages include services for grief and loss. This happened after the 2009 bushfires, as counsellors and case-managers, 'thick on the ground' in many fire-affected communities, attended to individual psycho-social needs. However, this research highlights that domestic violence was not recognised as a legitimate issue in the post-disaster reconstruction period... Federal, State and local governments need to establish disaster guidelines that include attention to domestic violence as a priority in the aftermath of disasters. Response and prevention strategies must include the involvement of domestic violence services and women.

28. The Association notes with concern the recent decision by the Senate Legal and Constitutional Affairs References Committee into domestic violence to report three months early without seeking a single submission, conducting any hearings or consulting with experts, stakeholders or survivors of family violence. These very important issues do not appear to have received the consideration they warrant from the other Committee and are matters of significant community importance that should be considered by this Inquiry.

29. Recommendations proposed in 2009 by Women's Health Goulburn North East included to:²²

- "Provide targeted funding to emergency management agencies involved in disasters to upgrade policies and practices and provide training in family violence recognition, response and reporting practices";
- "Ensure domestic and family violence services are a visible and engaged part of disaster recovery";

¹⁹ See, eg, R Maguire, D Bozin, G Mortimer, 'Domestic violence will spike in the bushfire aftermath, and governments can no longer ignore it', *The Conversation* (online) 18 November 2019 <<http://theconversation.com/domestic-violence-will-spike-in-the-bushfire-aftermath-and-governments-can-no-longer-ignore-it-127018>>.

²⁰ Quoted in Yoni Bashan, 'Bushfires: Agencies report post-natural disaster spike in domestic violence incidents', *The Australian* (online), 16 January 2020 <<https://www.theaustralian.com.au/nation/politics/bushfires-agencies-report-postnatural-disaster-spike-in-domestic-violence-incidents/news-story/ea822344afac37cb4796ff3e4735759b>>.

²¹ Debra Parkinson and Claire Zara, 'The hidden disaster: domestic violence in the aftermath of natural disaster' (2013) 28(2) *Australian Journal of Emergency Management* <<https://ajem.infoservices.com.au/items/AJEM-28-02-09#>>.

²² Women's Health Goulburn North East, 'The way he tells it...' *Relationships after Black Saturday* (2011) <genderanddisaster.com.au/wp-content/uploads/2015/06/Doc-005-The-Way-He-Tells-it1.pdf>.

- “Increase funding to domestic and family violence services when demand increases after disaster”;
 - “Provide financial and systemic support for women’s groups post-disaster”.
30. The Association reiterates these and further recommends that Governments should plan and budget for the downstream justice impacts and demands on legal services including the courts. While these impacts can be difficult to empirically measure or quantify, they must nevertheless be anticipated and planned for.
 31. 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, and play an important role in protecting children and families impacted by domestic violence, in concert with State courts.
 32. Access to family law services, including Court services, is extremely limited in rural, regional and remote Australia. The sparse geographic locations of Court registries in these areas, coupled with the infrequency of regional circuits, significantly impedes the accessibility of the system for families in need, including during crises. Despite this, there is a significant need to be met in rural, regional and remote communities. In 2018-19, work undertaken in regional locations by the Federal Circuit Court represented 20 percent of its family law workload.²³■
 33. On the South Coast of NSW, for example, a family in crisis and in need of Court assistance faces a choice between either the Canberra or Wollongong registries of the Federal Circuit Court. Neither registry may be geographically close or practically accessible, including during bushfires where roads and highways may be blocked or closed to assist ongoing fire-fighting efforts. The infrastructure of the Court is not set up to properly meet need. If the Federal Circuit Court cannot be accessed, families are required to use the Local Courts as a temporary stop gap. The Local Courts in NSW are already significantly overburdened and under-resourced. While the Local Court possesses jurisdiction under the *Family Law Act 1975* (Cth), the Courts do not have the specialist skills, or the time and resources, to be able to deal with increased demand in family law need such as during or following disasters like the bushfires.
 34. In addition, the family law courts must be adequately resourced within existing registries and circuits. Before the 2019-20 bushfires, the Family Court and Federal Circuit Court were each already facing backlogs of more than a year’s worth of cases.²⁴ Some families were having to wait up to three years,²⁵ or longer, to have their family law disputes resolved. In the Federal Circuit Court, most Judges had 300-500 cases in their docket²⁶ at any one time,²⁷ and some even more. These difficulties and demands are only exacerbated in times of crisis – the need to provide prompt and proper attention to emerging

²³ Federal Circuit Court of Australia, *Annual Report 2018-19*, 52.

²⁴ 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).

²⁵ Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018, [53]; Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2019, [59].

²⁶ A docket is the list of active cases before the Court that a Judge is managing and will eventually hear and decide.

²⁷ Federal Circuit Court, *Annual Report 2018-19* (2019) 3.

issues results in further and compounding delay for those already waiting interminably for their opportunity to be heard, and many of those waiting are themselves affected by the crisis situation. Australian children and families are faced with a spiraling set of difficulties which, for many, mean that protection and justice will simply be unattainable.

35. The Federal Circuit Court noted in its 2018-19 Annual Report that it was experiencing “an increase in the workload pressure on numerous circuits with increasing volumes of matters as well as increasing complexity of matters”.²⁸ 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. Judges perform this important work in a difficult, high-pressure environment that carries the risk of physical danger to themselves and their families, as well as the gravity of knowing that their decisions, especially regarding children, could in some instances provoke extreme responses resulting in violence to a child or a party, or in some tragic cases death. This working environment is not safe or sustainable, and should be addressed. The number of Judges available to hear matters directly affects disposition rates.
36. The Association considers that adequately funding accessible family law services including Court access for regional Australia, is an important part of emergency planning, response and recovery. The Association also recommends that careful consideration should be given to recommendations from the Australian Law Reform Commission’s landmark *Review of the Family Law system* to improve collaboration, coordination and integration between Commonwealth and State family law systems, including family support services and family violence and child protection systems.

²⁸ Ibid.

5. Conclusion

37. It has been estimated that Australians have a “1 in 6 estimated lifetime exposure to natural disaster”.²⁹ Access to justice during times of crisis and recovery should be a whole-of-government priority, and must be planned and budgeted for accordingly
38. The Association acknowledges that during the course of this Inquiry the Committees will hear from many stakeholders on critical priorities and areas for improvement of disaster planning, response and recovery. However, the Association encourages the Committees to include in their consideration lessons to be learnt from the 2019-20 bushfire season concerning the role and operation of Australia’s justice system in protecting and serving communities during crises. In particular, the Association invites the Committees to reflect on the importance of adequately resourcing legal assistance and family violence service providers, the courts and the family law system to ensure these are best equipped to respond to community need and demand.
39. Thank you again for the opportunity for the Association to make a submission to this important inquiry. If the Association can be of further assistance to the Committees, our contact at first instance is the Association’s Director of Policy and Public Affairs, Elizabeth Pearson, at

²⁹ Women’s Health Goulburn North East, *‘The way he tells it...’ Relationships after Black Saturday* (2011) 1 <genderanddisaster.com.au/wp-content/uploads/2015/06/Doc-005-The-Way-He-Tells-it1.pdf>.