SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Senate Legal and Constitutional Affairs Legislation Committee

Inquiry into the Federal Circuit and Family Court of Australia Bill 2019 (Cth) and consequential amendments/transitional provisions bill

6 April 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. 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 Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) for the opportunity to make a submission on the Federal Circuit and Family Court of Australia Bill 2019 (Cth) and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 (Cth), together the **Amended Merger Bills**. 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. It created a bespoke and specialist, stand-alone Family Court of Australia (**the Family Court**) to exclusively hear family law matters, and placed the court at the heart of interrelated and co-located support, counselling and assessment services to promote a holistic approach to complex matters impacting families and children.

3. The emphasis of the legislation, and the Family Court's operation, has always been to promote the non-litigious resolution of issues for families in this most difficult of circumstances wherever possible. The reality is that 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.

4. The Amended Merger Bills would give effect to a proposal announced by the Government in April 2018 to abolish the stand-alone, specialist Family Court as we know it and collapse the Family Court into the generalist, overworked and under-resourced Federal Circuit Court of Australia (**the Federal Circuit Court**). Although current judges of the Family Court would be transferred to 'Division 1' of the merged court under the proposal, the Amended Merger Bills would nonetheless result in the abolition of a stand-alone specialist, multi-disciplinary court system dedicated exclusively to family law matters, to the detriment of those in need of its services.

5. The Government's merger proposal, in the original form of the Federal Circuit and Family Court of Australia Bill 2018 (Cth) and an accompanying consequential amendments and transitional provisions bill (**the Original Merger Bills**), did not pass the 45th Parliament.

6. The merger proposal has been strenuously opposed by the Association and other stakeholders including the Law Council of Australia, 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 because the merger will result in the loss of this stand-alone specialist model of 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.

7. On the last day of Parliament in 2019, the Government introduced the Amended Merger Bills into the House of Representatives. The merger proposal continues to represent dangerous policy and lacks both an evidential foundation and plausible business case. The merger is also inconsistent with expert advice, such as by former Chief Justice of the

Family Court, the Honourable Alastair Nicholson, and Margaret Harrison, who warned in 2000 that "experience in Australia and overseas suggests that where a family court is a division of a generalist court, or where family law cases are simply assigned to judges or magistrates in a generalist court, the quality of performance suffers greatly".[1]

8. The Association acknowledges that some amendments have been made to the Original Merger Bills in an effort to seek to better protect victims of family violence. The Association understands the intention behind those changes but considers these are insufficient to overcome the fundamental flaws and risks associated with the proposal.

9. Fundamentally, the strongest protection for children, families and victims of family violence is to maintain a stand-alone, specialist family court involving a holistic, specialist system of interrelated and co-located services and resources, as was intended when the Family Court was originally created. Even with amendments, the Amended Merger Bills would nevertheless mark the end of a specialist, stand-alone court as know it and should be opposed.

10. It must be remembered that the Original Merger Bills lacked any sound policy basis. They were driven by a flawed and now discredited report, commissioned for the overt purpose of seeking to justify a proposal developed without consultation with relevant stakeholders, without regard to a series of fundamental issues confronting the family law system and without regard to the then pending work of the Australian Law Reform Commission. The Amended Merger Bills represent no more than a further iteration of that original proposal, changed in an ad hoc manner to attempt to obtain political support for their passage, and suffer from the same fundamental flaws as the Original Merger Bills.

11. That is not to say that Australia's family law system does not need reform.

12. 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.

13. Yet it is widely acknowledged by court users, the legal profession, the Government and judiciary 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. There is understandably much frustration with the current state of Australia's family law system.

14. 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.

[1] The Honourable Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24(3) *Melbourne University Law Review* 756.

15. The Amended Merger Bills do not achieve either. Instead, there is a real risk the Amended Merger Bills will adversely impact children, families and survivors of family violence.

Committing to resourcing the family law system

16. 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.

17. 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.

18. At the core of so many of the issues confronted by the system is a chronic and sustained lack of proper funding and resources for the Family Court and the Federal Circuit Court, and a mismanagement of those resources. This includes a failure to appoint and maintain sufficient and appropriately experienced judicial officers and associated staff and insufficient funding to maintain the counselling and assessment services previously provided by the courts.

19. 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,[2] 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.

20. 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.

21. These factors have contributed to crippling judicial workloads. Both courts now have backlogs of more than a year's worth of cases.[3] Judges in the Federal Circuit Court have "workloads of anywhere up to 600 cases on a docket"[4],[5] some as many as 630 in NSW.

22. 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).

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

3 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).

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

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

Committing to implementing improvements

23. 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.

24. 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.

25. To overcome these issues, the Association proposed in July 2018 the creation of a 'Family Court 2.0' to bring Judges currently hearing family law matters in, and the jurisdiction currently exercised by, the Federal Circuit Court into a second, lower division within the specialist, stand-alone Family Court.[6] 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**).[7] 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.[8]

26. The Association's model does not, of itself, involve any greater revenue implications than the Government's merger proposal.

27. Unlike the Government's merger proposal, 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.

28. Almost 70% of matters before the Commonwealth family courts involve allegations of family violence.[9] The family law system must move to consolidate and strengthen, not undermine, specialisation in this critical area.

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6 New South Wales Bar Association, *Time to talk about a Family Court of Australia 2.o* (2018) <https://nswbar.asn.au/docs/mediareleasedocs/Family_Court_MR2.pdf>.

7 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>.

8 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); Women's Legal Services NSW, Submission No 702 to the Joint Select Committee on Australia's Family Law System (2020) [15.8].

9 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

29. Concerningly, the Attorney-General has stated that further funding will not be invested in the system unless the Government's merger proposal is passed.[10] Up until recently, the Attorney-General proposed to do away with Division 1 of the proposed merged court altogether by failing to reappoint any new judges. Even now, the regulation that has been suggested to create a minimum number of judicial officers in Division 1 is exercisable entirely at the discretion of the government of the day. It would reduce the level of judges to an unprecedented 25 – the lowest level of judges in the Court's history, and is inconsistent with the Chief Justice's observation that adding "an extra judge in every major registry would make a massive difference" to backlogs.[11]

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

31. 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. That blueprint is not, however, the merger proposal.

32. Accordingly, the Association addresses four questions in this submission:

    i. First, why is resourcing Australia's family law system necessary?

    ii. Second, is there a better way to reform the family law system?

    iii. Third, what is wrong with the merger proposal and why don't the Amended Merger Bills fix this?

    iv. Fourth, why should a specialist family court stand alone?

Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (2017) [1.6].

[10] 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).

[11] Quoted in Tony Keim, 'A family (court) affair', *Proctor* (November 2019) 32.

2. Recommendations

33. The Association recommends that:

a. The Amended Merger Bills should not be passed;

b. This Committee advocate to the Parliament to properly fund and resource the family law system, including legal assistance, and commit to doing so on an ongoing basis;

c. A specialist, stand-alone and properly resourced Family Court be maintained in Australia to continue to provide specialist assistance to children, families and survivors of family violence;

d. This Committee advocate to the Parliament to adopt the Association's Family Court 2.0 Model and relocate judicial officers hearing family law matters and the family law jurisdiction of the Federal Circuit Court into a second division within the Family Court;

e. The Amended Merger Bills should not be debated in the Senate or passed before the ongoing inquiry by the Joint Select Committee on Australia's Family Law System has concluded, so as not to pre-empt or undercut the Joint Select Committee's important work or findings; and

f. This Committee advocate to the Parliament to 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.

3. Why is resourcing Australia's family law system necessary?

34. 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.

35. There is a direct causal link between resourcing and the timeliness and quality of justice delivered by the courts. Resourcing must therefore be a primary consideration when evaluating any proposed change to the family law system.

36. 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".[12]

37. 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". [13]

38. 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. Some assertions as to disposition rates of cases from ad hoc events conducted by the Courts are also of concern and both lack a sound statistical and evidentiary basis and are inconsistent with the objective data available, including that referred to below. Further, 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.

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

40. Despite achieving a clearance rate of 102 per cent in 2018-19,[14] and finalising more cases than were filed during the year,[15] the Family Court has a backlog of 2,979 cases.[16]

41. The Productivity Commission's *Report on Government Services*, released in January 2020, reported that the backlog of all pending non-appeal applications in the Family Court has

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12 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>.

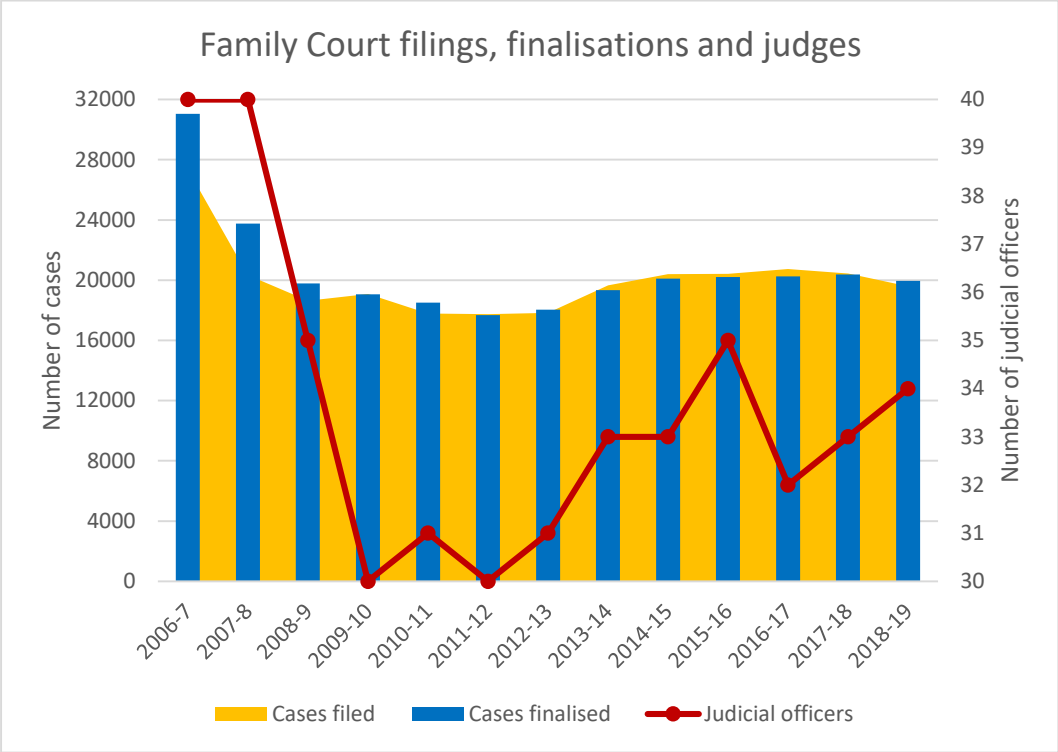
13 Quoted in Nicola Berkovic, 'Family law reform: Priority for next Australian government', *The Australian* (online) 23 April 2019 <https://www.theaustralian.com.au/inquirer/family-law-reform-priority-for-next-australian-government/news-story/93af28df3bbe0c6f67b1e69910c7a0a2>.

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

15 Ibid, 19.

16 Ibid, 17.

grown from 4,997 to 6,720 (34 percent) since 2012-13, while the backlog of all pending applications in the Federal Circuit Court has grown from 31,067 to 50,791 (63 percent).[17]



42. The backlog in the Federal Circuit Court increased from 17,088 cases in 2017-18 to 17,478 cases in 2018-19.[18] 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.[19]

43. In addition to the strain of its family law work, 11 percent of the Federal Circuit Court's workload comprises other general federal law.[20] 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.[21] The Annual Report noted:[22]

> 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.

44. As at November 2019, the Federal Circuit Court had 10,000 migration matters pending.[23]

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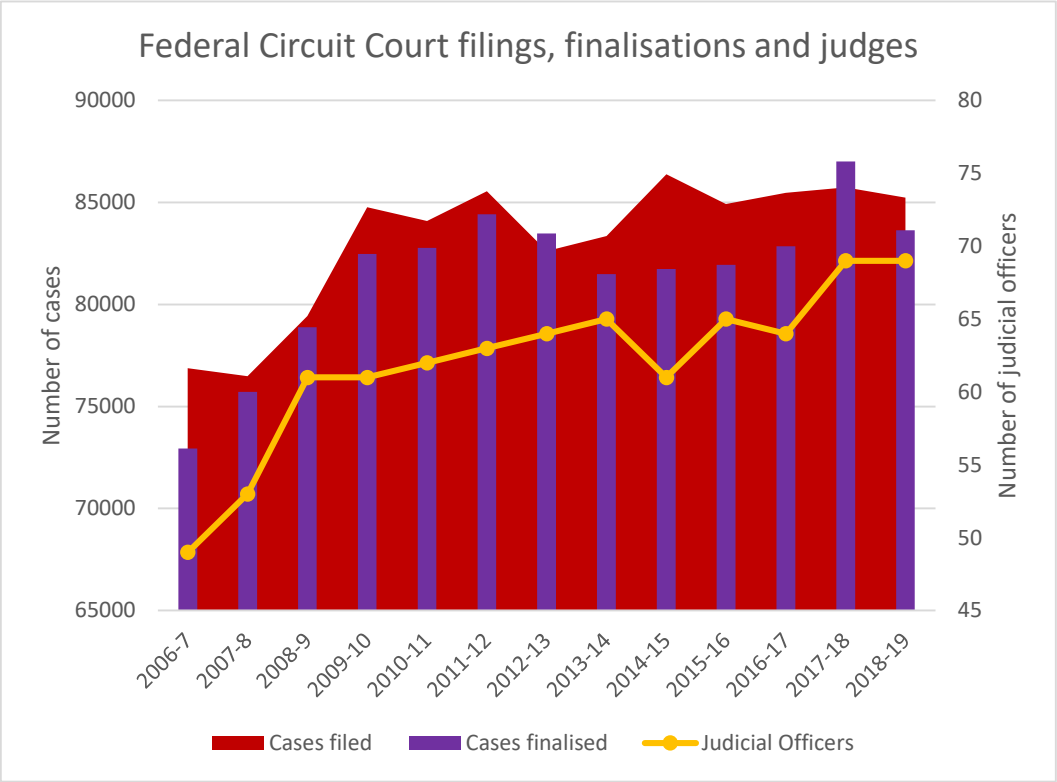
17 Australian Productivity Commission, 'Part C – Justice', *Report on Government Services 2020*, table 7A.21.
18 Federal Circuit Court of Australia, *Annual Report 2018-19* (Cth) 30.
19 Ibid, 27.
20 Ibid, 30.
21 Ibid, 42.
22 Ibid, 42.
23 Tony Keim, 'A family (court) affair', *Proctor* (November 2019) 32.



45. This chapter addresses 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

46. 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 Original Merger Bills. Then Committee Chair, Senator the Honourable Ian Macdonald, admitted that:[24]

> 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…

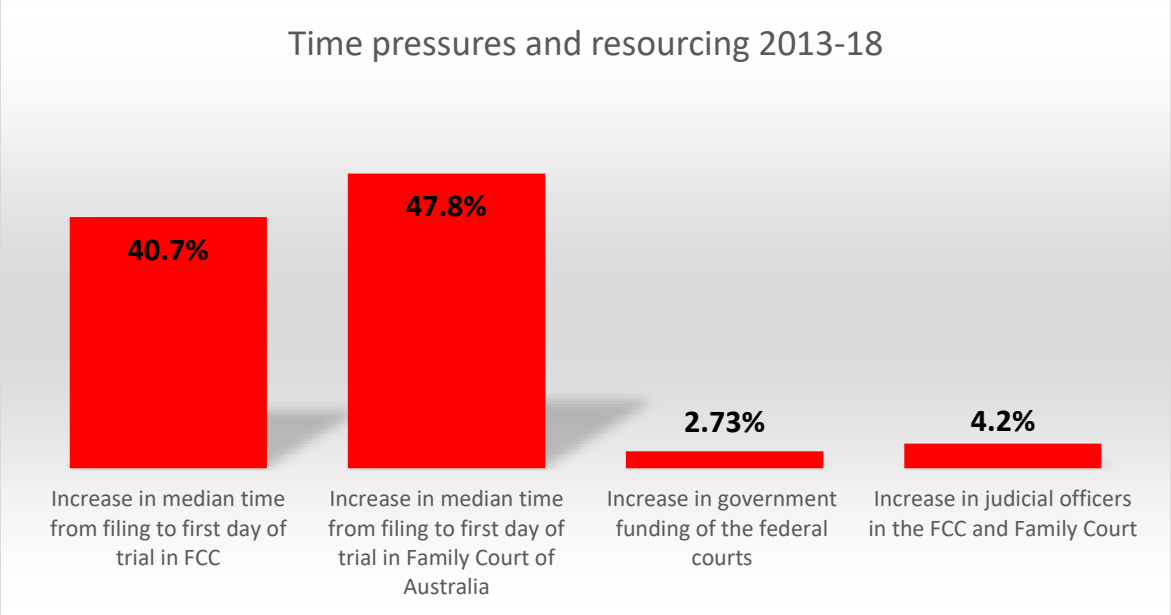
[24] Senator Macdonald, Sydney Public Hearing of the Legal and Constitutional Affairs Legislation Committee's Inquiry into the FCFCA Bills, 12 December 2018, 20.

47. The Government stated in May 2018 that the national median time to trial had increased from 10.8 months to 15.2 months in the Federal Circuit Court (an increase of 40.7%), and from 11.5 months to 17 months in the Family Court (47.8%),[25] from 2012-13 to 2016-17.[26]

48. 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.[27]

49. Real recurrent expenditure in the Family Court has almost halved, from $101,940,000 in 2012-13 to $57,689,000 in 2018-19. Real recurrent expenditure in the Federal Circuit Court increased from $113,486,000 in 2012-13 to $154,942,000 in 2018-19.[28]

50. 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,[29] bringing the total to 66 FCC Judges and 33 Family Court Judges, representing a total increase of 4.2 percent.



25 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>.

26 *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).

27 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).

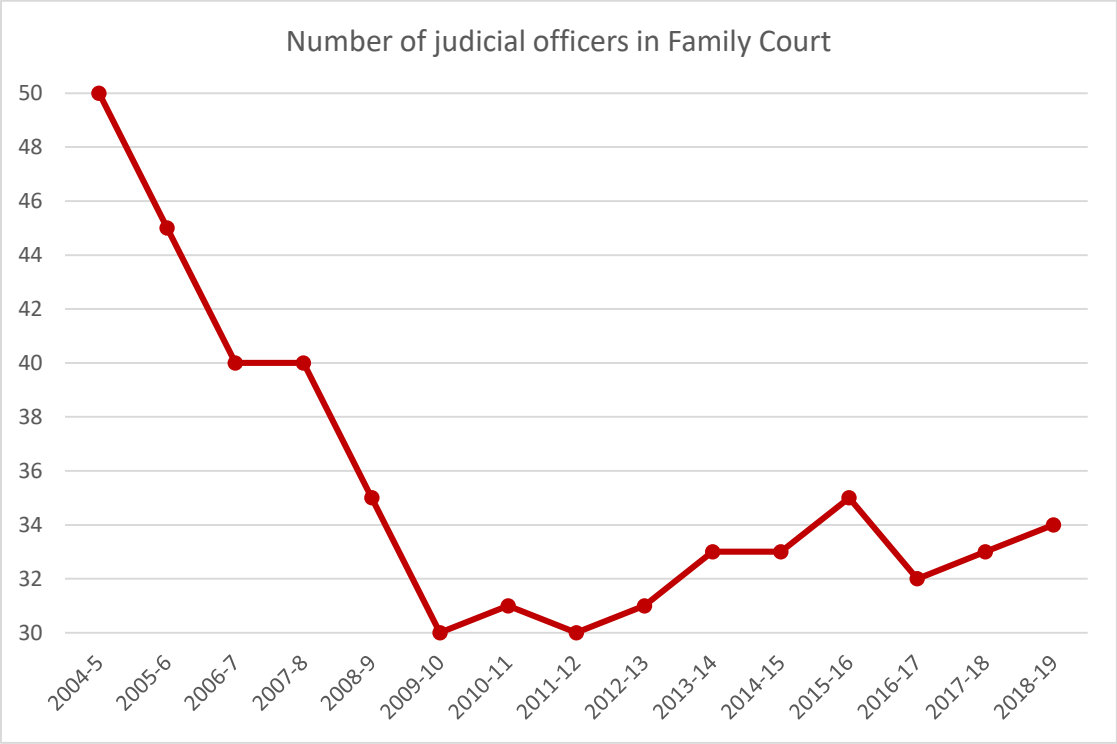
28 Australian Productivity Commission, 'Part C – Justice', *Report on Government Services 2020*.

29 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).

51. At 30 June 2019, there were 69 Judges in the Federal Circuit Court including the Chief Judge[30] and 34 Family Court Judges.[31] The Federal Circuit Court has now been without a separate dedicated Chief Judge since December 2018.

52. The number of Judges available to hear matters directly affects disposition rates. There has been a significant decrease in the number of judicial officers in the Family Court over the last fourteen years, which has severely reduced the Court's capacity to manage its workload.

53. 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.[32]



Data source: Family Court Annual Reports

54. 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.[33]

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

31 Including the Chief Justice and Deputy Chief Justice: Family Court of Australia, *Annual Report 2018-19* (2019) 4, 50.

32 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>.

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

55. 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.[34]

56. 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:[35]

> 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.

57. 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,"[36] and added that "In an ideal world, I'd love to see more funding for the courts…"[37]

58. 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".[38]

59. 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 reduce waiting times and

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

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) 370.

36 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).

37 Ibid.

38 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).

case backlogs in the Family Court of Western Australia.[39] The Attorney General's Press Release of 23 May 2012 stated as follows:[40]

> 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.

60. 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".[41]

61. Further, the Family Court advised in 2018 that:[42]

> 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.

62. 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.

63. The Attorney-General has also stated that further funding will not be invested in the system unless the Government's merger proposal is passed.[43] Services to the Australian public should not be made conditional on the passage of any legislation but especially not legislation that has been comprehensively opposed by a number of stakeholders as unsound policy.

64. 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-resourcing of the courts. There are simply

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39 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>.

40 Ibid.

41 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].

42 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.

43 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>.

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

65. 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.

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

67. 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.

68. Some families are having to wait up to three years,[44] or longer, to have their family law disputes resolved. In November 2019 the Chief Justice advised that "in some registries, where over 40 to 50 percent of cases are over 12 months old ... and in some cases over 15 and 25 percent are over three years old".[45]

69. 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.

70. 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.

71. Delays also materially increase costs – costs in providing the services necessary to address the ongoing needs of parties and children whilst awaiting a determination and the costs, including legal costs, incurred by parties in seeking to address their difficulties whilst awaiting a hearing.

72. Parties and the legal profession experience marked success in resolving issues without recourse to the Courts, with some 95% of matters settled by the profession without the need to engage the Courts.[46] However, despite the best efforts of parties and the profession, there are matters involving intractable conflict, including hotly contested allegations of risk and violence, which require a judicial determination. The longer it takes to achieve that determination, the greater the costs of the parties in seeking to advance and/or protect their position, and often that of their children, whilst waiting.

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

[45] Tony Keim, 'A family (court) affair', *Proctor* (November 2019) 31.

[46] Deputy Chief Justice Robert McClelland, *Update on some significant initiatives* (Speech to the Family Law Section's Family Law Intensive 2020, 8 February 2020, Sydney).

73. Regrettably, stories of cases that have been in the system for over five years, including those the subject of appeal and retrial, are not uncommon.

74. In Parramatta, parties are presently being told that there are no hearing dates available in the Federal Circuit Court until 2021 at the earliest – even for interim determinations. Some Judges of the Federal Circuit Court in Sydney routinely advise parties that they are unable to provide hearings for interim issues at all.

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

76. 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:[47]

> 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.

77. 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.

78. It is 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

79. 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

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

temporary orders to cover the situation until a full hearing can be conducted are customarily dealt with in a truncated[48] hearing which involves:

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

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.

80. 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.

81. 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.

82. 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.

83. 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;

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

d. Placing families under even greater strain, escalating the conflict, which in turn can lead to 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.

84. The obvious consequence of any, or all, of these outcomes is greater expenses being incurred by the parties.

85. 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.

86. 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

[48] 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.

available (or indeed any Judge time) 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.

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

88. 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.

89. 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.

90. 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. Additionally, there is a risk that 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, will be (or be perceived to be) unsatisfactory and break down, only to start the cycle again.

91. 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 waiting for a hearing. Often this necessitates multiple interim applications.

92. 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.

93. 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.

94. 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

95. 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.

96. However, the nature of litigation is such that cases listed to be heard or actually commence do not always continue as scheduled. 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". 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 and prompts 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.

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

98. 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; 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.

99. 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.

100. 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.

101. The time and money spent on preparing matters for trials that are not reached is often entirely wasted, and further legal fees are 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.

102. 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.

103. 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. 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.

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

105. 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.

106. 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.

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

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

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

110. 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.

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

112. As outlined below, underfunding legal assistance has meant that 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

113. 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.

114. 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.[49] 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.[50] Twenty years ago, the Federal Government contributed $11.57 per capita.[51] In 2017-18 that contribution was $8.40.[52] The contribution is estimated to drop further to $7.78 per capita in 2019-20.[53]

115. 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.[54]

116. 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.[55]

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49 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>.

50 Ibid.

51 Ibid.

52 Ibid.

53 Ibid.

54 Ibid.

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

117. 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.

118. 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%.[56]

119. The experience of the Bar and indeed of the judiciary[57] is that cases involving one or more parties without legal representation take significantly longer to conduct properly and justly.

120. 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.

121. 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:[58]

    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.

122. Dewar, Smith and Banks' Report concluded that self-represented litigants "consume more Court resources than represented parties"[59] 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".[60]

123. 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 matters involving self-represented litigants would have been reduced by more than three hours, or half the time, if they had been represented.[61]

124. 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.

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

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

57 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

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

59 Ibid, 3.

60 Ibid, 2.

61 Ibid, 51.

126. As the Family Court noted in its 2018-19 Annual Report:[62]

> 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.

127. 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.

128. 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.[63]

129. The Australian Productivity Commission has 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".[64]

Numbers of judicial officers and judicial workloads

130. 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.

131. In the Federal Circuit Court, some Judges now have up to 500 cases or more in their docket at any one time.[65] 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.

132. The Family Court has explained that:[66]

> 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.

133. Legal Aid NSW has warned that:[67]

> 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

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62 Ibid, 25.

63 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>.

64 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>.

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

66 *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).

67 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.

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.

134. 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).

135. 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). <u>This comment should not be allowed to pass unnoticed. This was no way to speak about the children's parents</u>….
>
> [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)

136. 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.

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

138. 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.

139. 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.

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

141. 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.

142. 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.

143. 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.

144. 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

145. The Association 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. Is there a better way to reform the family law system?

146. The Association does not dispute that Australia's family law system requires reform as the system is not serving the best interests of Australian children and families as well as it could or should.

147. However, the Amended Merger Bills would effect a regression, not a reform, of the family law system. The Association maintains there is a better way.

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

149. 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.

150. To overcome this issue, the Association has proposed the creation of a 'Family Court 2.0' to bring Judges currently hearing family law matters in, and the jurisdiction currently exercised by, the Federal Circuit Court into a second, lower division within the specialist, stand-alone Family Court. 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.[70]

151. 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. as outlined above, a proper funding and resource commitment from government.

152. 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

[70] 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).

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

153. As almost 70% of matters before the Commonwealth family courts involve allegations of family violence,[71] our system must move to bolster, not undermine, specialisation in this critical area.

154. This part of the submission outlines:

a. The current structure of the family law courts; and

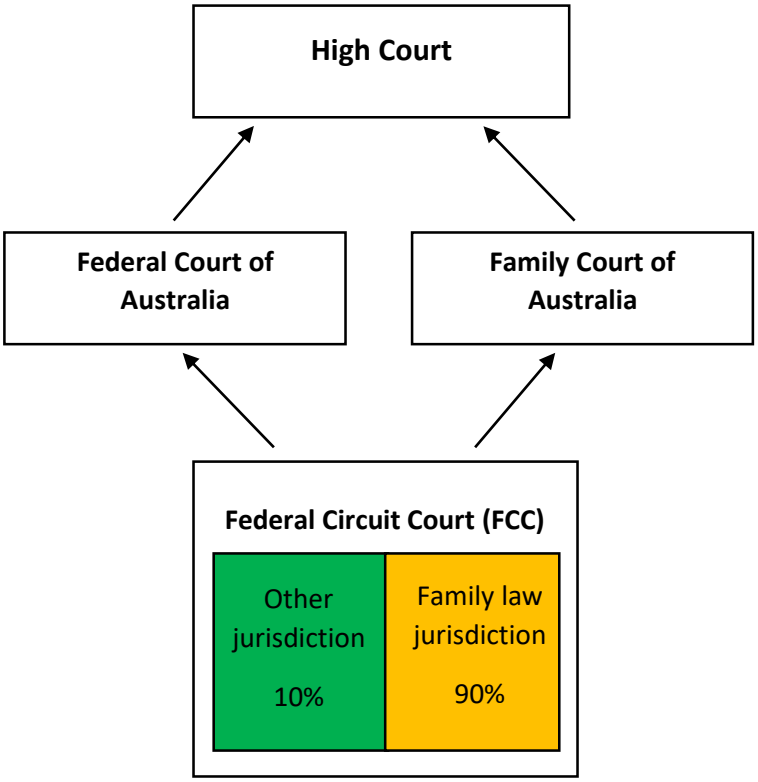
b. The Association's proposal for a Family Court 2.0.

Current structure of the family law courts

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

Diagram A:

Current structure of the Federal Courts



156. 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

[71] 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].

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.

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

158. 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:[72]

> 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.

159. 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.

160. 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.

161. Since its very inception, there have been concerns over the "waste",[73] "confusion"[74] and "complexities"[75] created by the establishment of a "separate and distinct" third federal court.[76]

162. 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"[77] delays being experienced in the Family Court system at the time and warned that:[78]

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72 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974, 4322 (the Prime Minister), quoted in The Honourable 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>.

73 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 1999, 11788 (Member for Barton).

74 Ibid.

75 Ibid, 11789.

76 Ibid, 11787.

77 Ibid, 11786

78 Ibid.

> 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.[79]

163. Similarly, the Honourable Alastair Nicholson, then Chief Justice of the Family Court, warned in 1999 that:[80]

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

164. 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.

165. 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".[81]

166. 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…".[82]

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

168. 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**.

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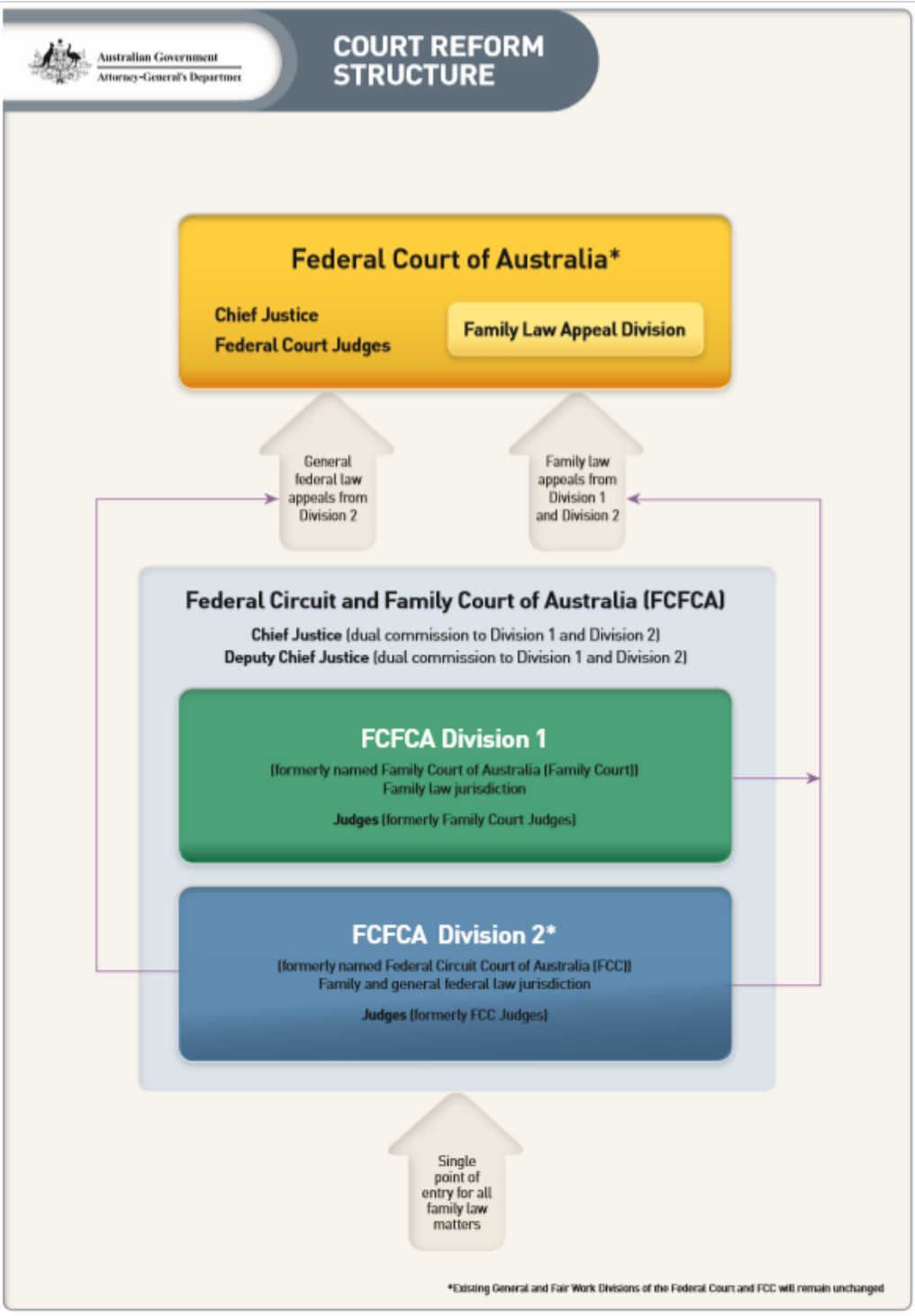
79 Ibid, 11787.

80 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.

81 Attorney-General for Australia, the Honourable 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>.

82 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



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

170. After opposition from the legal profession and key stakeholders, the Senate's Legal and Constitutional Affairs Committee inquired into the Original Merger Bills and recommended substantial amendment. The Original 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 Original Merger Bills lapsed when Parliament was prorogued for the May Election.

171. 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.

172. 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.

173. The Amended Merger Bills were reintroduced on the last sitting day of 2019 and have been referred for inquiry by November 2020, one month after the Joint Select Committee's inquiry into Australia's Family Law System is due to conclude. 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.

174. 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.

175. The Association's longstanding position has therefore been to oppose the Government's merger proposal due to 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.

176. 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".[83]

177. 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.

178. Once in the Federal Circuit and Family Court of Australia, all family law matters will have to compete for judicial resources and court time with other matters in federal jurisdiction, including a growing migration and industrial 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. This would further increase costs and delays.

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

179. Former Liberal Senator Ian MacDonald, who chaired the inquiry into the Original Merger Bills, has conceded the proposal was only a "short term fix".[84] The Association disputes it is even that.

180. 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

181. 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.

182. The Association's 2.0 model reflects the recommendations and model of the 2008 Semple Report. The Semple Report found that:[85]

> 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.

183. The Semple Report claimed its model would achieve the following outcomes:[86]

- 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;
- 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;

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

- 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.

184. 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;

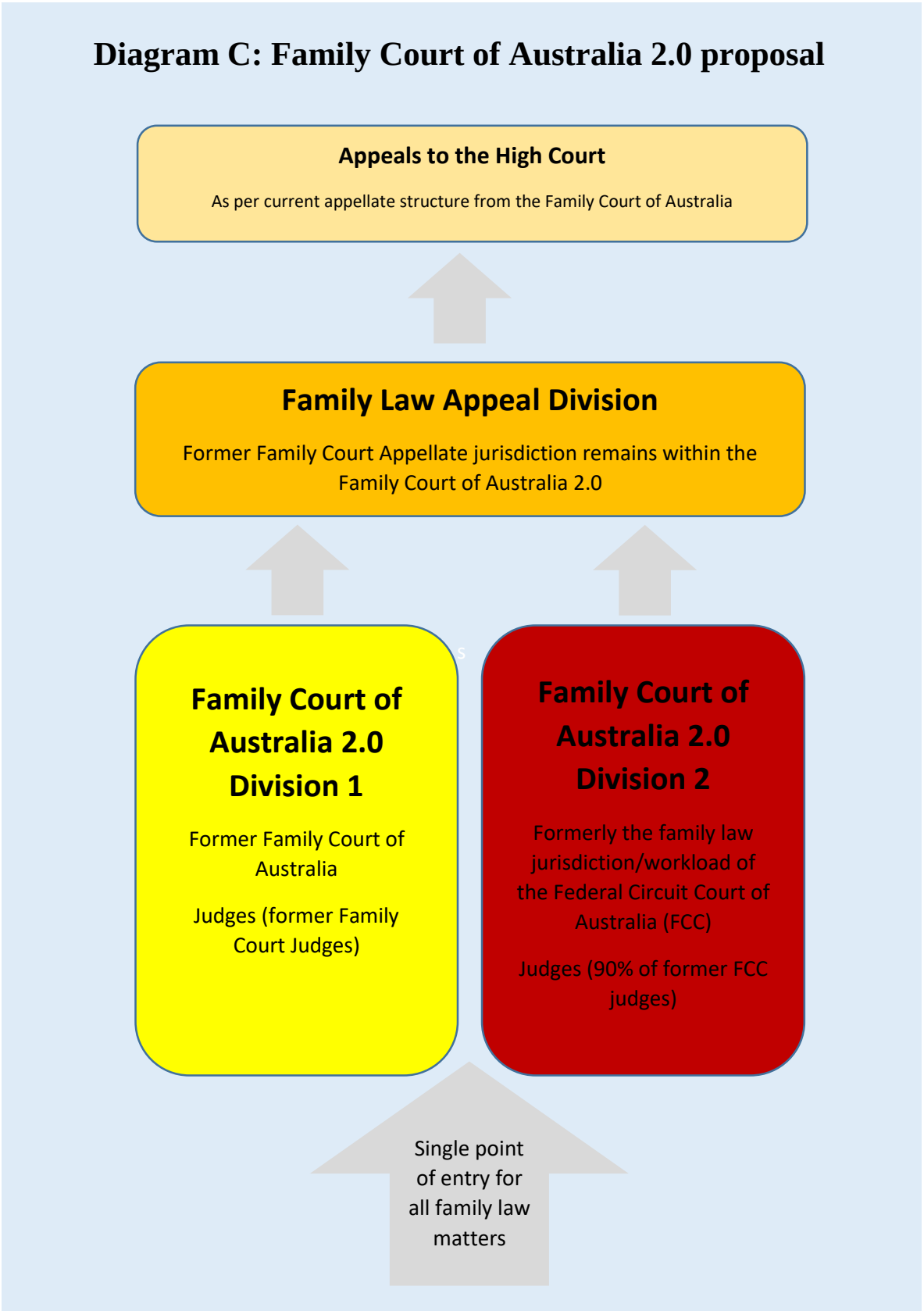
b. a specialist Family Court be abolished altogether; or

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

185. 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.

186. 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



187. 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.[87]

188. In October 2018 the Attorney-General dismissed the Association's proposal as "radical".[88] 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.

189. Further, it has been suggested that the Association's proposal and indeed that emerging from the Semple Report poses some constitutional issues in being implemented.[89] To date, such suggestions have not been developed in a manner which permits them to be examined. The Association does not accept that there are any impediments of substance to the implementation of its proposal, as opposed to that presently proposed by the Government; and it stands ready to meet any such suggestion should it be advanced in a manner capable of being met.

190. 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.

191. In 2017, then Attorney-General Brandis said "The government is open to change, if need be, radical change".[90]

192. 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 foregone – family law is too important to fail.

193. 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 within an integrated matrix of support services.

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87 *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>.

88 Attorney-General for Australia, the Honourable 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>.

89 Evidence to the Joint Select Committee on Australia's Family Law System, Sydney, 13 March 2020, 6 (the Honourable Kevin Andrews MP).

90 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>.

5. What's wrong with the Government's merger proposal and why don't the Amended Merger Bills fix it?

194. The Association holds several concerns with the merger proposal, which are not cured by the Amended Merger Bills. Clause 5 of the Amended Merger Bill outlines the following objects:

a. to ensure that justice is delivered by federal courts effectively and efficiently; and

b. to provide for just outcomes, in particular, in family law or child support proceedings; and

c. to provide a framework to facilitate cooperation between the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit and Family Court of Australia (Division 2) with the aim of ensuring:

(i) common rules of court and forms; and

(ii) common practices and procedures; and

(iii) common approaches to case management.

195. The capacity for the Amended Merger Bills to achieve each of these objects is considered in turn below.

a. Ensuring justice is delivered effectively and efficiently

196. The Government has effectively sought to trial the merged Courts, with one head of jurisdiction across both Courts, and some common points of entry, yet with no discernable impact. Notwithstanding the best efforts of both Courts and the Chief Justice, statistics produced by the Productivity Commission evidence an increase in case backlogs from the time of the dual appointment.[91]

197. Common leadership of both divisions, as has been proposed,[92] is not necessarily beneficial to both Courts, all litigants or the Head of Jurisdiction themselves. The jurisdiction of the Federal Circuit Court, which would become Division 2, is substantially broader than the Family Court, in that it also includes industrial relations, migration appeals and other federal matters. Migration appeals are increasingly comprising a larger part of the Federal Circuit Court's workload and present unique challenges and pressures of their own.

198. That this is problematic is implicitly recognised in the Amended Merger Bills which now provide in clause 10(2)(b) of the Federal Circuit and Family Court of Australia Bill 2019 (Cth) for the appointment of two Deputy Chief Judges within the proposed Division 2 – one to handle family law responsibilities and the other "General and Fair Work" law responsibilities.

199. In addition to the sheer diversity of work and crippling caseloads facing the court, the head of the merged entity would be required to manage more than 100 judges across 19 odd registries.

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

92 See Federal Circuit and Family Court of Australia Bill 2019 (Cth) cl 129(1).

200. The Law Council of Australia has advocated for a separate judge to be appointed to preside over each Court, citing concerns for the welfare of judges and litigants alike. In 2019 the Law Council President noted that "It is not possible for one person to lead both courts and know what is occurring in relation to each judge… this is not good for litigants or the welfare of judges"[93] and that:[94]

> One person cannot be an effective head of these two important and different jurisdictions. Despite the best of intentions, one chief judge cannot be on top of the business of both these Courts, let alone ensure the effective operation of the two Courts which must extend to personally mentoring judges who may be struggling...
>
> This is not the fault of the Chief Judge who has had the unenviable task of trying to straddle both the FCC and the Family Court…
>
> But it is not in the best interests of the courts or the head of jurisdiction and the public they serve for this arrangement to continue.

201. The Association submits there are existing ways in which the heads of jurisdictions can work effectively and collaboratively together to improve outcomes for both Courts and for litigants in all types of matters, not merely family law, without requiring a single person to hold a dual commission over both courts or divisions.

b. Just outcomes

202. Providing just outcomes, as per the object in clause 5(b) of the Amended Merger Bill, does not require change for the sake of change, but rather proper resourcing, careful attention to the ALRC's recommendations, and meaningful consultation with stakeholders and community.

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

204. Indeed, the Amended Merger Bills remove original jurisdiction from the proposed Division 1 of the Court, providing that all matters must be commenced in Division 2 – constituted by the Judges of the Federal Circuit Court. Without any increase in resources, the present 68 judges of the Federal Circuit Court (excluding the Chief Justice) will be required to move from dealing with 95,442 lodgments to some 115,036 lodgments.[95]

205. 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.

206. 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

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93 Nicola Berkovic, 'Law Council wants independent body for judge complaints', *The Australian* (online), 18 December 2019.

94 Michael Pelly, 'Law Council calls for chief judge to stand down', *Australian Financial Review* (online), 13 September 2019 < https://www.afr.com/work-and-careers/leaders/law-council-calls-for-chief-judge-to-stand-down-20190911-p52qb7>.

95 See Productivity Commission, 'Justice – Part C', *Government Services Report* (2020) Table 7A.2.

frameworks governing family violence in Australia".[96] This was reinforced more recently by the ALRC's review of the family law system.

207. 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.

208. 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.

209. 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.

210. 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.

211. 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).

212. 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.

213. 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. 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:

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

> 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

214. Clause 111(3) of the Federal Circuit and Family Court of Australia Bill 2019 (Cth) further provides as follows:

> To avoid doubt, for the purposes of paragraph (2)(b), if the kinds of matters that may be expected to come before a person as a Judge of the Federal Circuit and Family Court of Australia (Division 2) are family law matters, the person, by reason of their knowledge, skills, experience and aptitude, is a suitable person to deal with those matters, including matters involving family violence.

215. The above clause 111(2)(b) 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.

216. 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.

217. The Amended Merger Bills will effectively remove the specialist appeal division of the Family Court.

218. Contrary to the model proposed by the Original Merger Bills, 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 the Government proposed last year.

219. 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.

220. The Explanatory Memorandum states that the Amended Merger Bill will:[97]

> 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.

221. 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

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

single Judge may be any current Family Court Judge, rather than a member of the current appeal bench.

222. 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.

223. The Association disputes the efficiencies it has been claimed the merger will produce under either the Original Merger Bills or the Amended Merger Bills, for the reasons outlined below and outlined in further detail in its submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Original Merger Bills in 2018.

224. The Attorney-General has indicated the merger proposal would realise the following outcomes:[98]

> It is estimated that structural reforms will improve the efficiency of the federal family law system by up to a third, with the potential in time to allow up to an extra 8,000 cases to be resolved each and every year.
>
> - It is estimated that consolidating first instance family law jurisdiction into a single court entity with a single point of entry could result in finalising up to an additional 3,500 family law matters each and every year.
> - It is estimated that a common structured initial case management process and managed case listing could result in up to 3,000 additional family law matters being finalised every year.
> - It is estimated that better management of appeals could result in up to 1,500 additional family law matters being finalised every year.

225. 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 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,[99] and run in effect by the Federal Court.

226. 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. There is no attempt to advance any basis for the efficiencies asserted, including in the PWC Report from which they are sourced.

227. The Government has also sought to rely on four other consultancy reports to justify the merger proposal.[100] However, as outlined in the Association's submission on the Original Merger Bills, the four reports relied upon by the Attorney-General do not provide a clear and persuasive case for reform. There has been very limited involvement of the legal

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98 Attorney-General of Australia, *Structural reform of the federal courts - Fact Sheet 2 – Facts and Figures* (2018) 2 <https://www.attorneygeneral.gov.au/Media/Documents/Court-reforms.pdf>.

99 See Commonwealth, *Attorney-General's Portfolio 2018-19 Portfolio Budget Statement* (2018), 135 [1.1].

100 The Semple Report; KPMG, *Review of the performance and funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia*, 5 March 2014; EY, *High Level Financial Analysis of Court Reform Initiatives – Final Report*, February 2015; The House of Representatives 2017 Inquiry.

profession or other stakeholders in these reports. Until August 2018, several of those reports had not even been provided to the Parliament or released publicly.[101] Further, the reports were limited in scope and heavily caveated.

228. With the exception of the Semple Report, none of the consultancy reports consider the broader issues to which the Association has referred above. Rather, the reports have been used to justify a proposal contained within the Bills which no report has considered nor been directed to.

229. Further, the absence of any commitment to any real and sustained increase in funding to the court system, however structured, makes any such efficiency claims unrealistic.

230. It is unclear what the basis is for the financial saving of $3 million to be realised over the forward estimates under the proposed reform.[102]

231. It is also unclear how the Government could continue to claim these efficiencies would be realised by the Amended Merger Bills, since they 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.

232. 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.

233. 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 unable to deal with its existing workload.

234. The Attorney-General stated in his Second Reading Speech on the Amended Merger Bills in December 2019 that:[103]

> 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.

235. The Amended Merger Bills are not accompanied by any additional funding than was announced with the Original Merger Bills and the Mid-Year Economic and Fiscal Outlook 2018-19.

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[101] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 August 2018, 8253 (Ms O'Dwyer, Minister for Revenue and Financial Services).
[102] See Explanatory Memorandum, Federal Circuit and Family Law Bill 2018 [16].
[103] Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2019, 7-9 (the Honourable Christian Porter MP, Attorney-General).

236. Further, it is understood that much of the $4 million has already been expended on the rules project, signage investment and other IT.

237. 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.

238. In 2018-19, the budget for the Federal Circuit Court was $97 million.[104] Actual expenditure in 2018-19 was $100.9 million.[105]

239. In 2018-19, the budget for the Family Court was $45 million.[106] Actual expenditure was $47 million.[107]

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

241. 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.[108]

242. Further, it is not appropriate for the Government to make additional funding contingent on passage of the merger proposal. This funding should be made available to the system immediately.

243. The Association acknowledges the devastating personal and financial cost of the developing COVID-19 pandemic, following the bushfire crisis, for many Australians. The Association appreciates that immediate crisis management, support and the recovery effort rightly require priority funding and will place unanticipated pressure on budget forecasts.

244. Nevertheless, the Association urges the Government and Treasury not to postpone investment in the family law system, as many of the legal assistance services and justice infrastructure considered will also be impacted by, and face increased demand during and the wake of, these crises.

245. Studies have shown a significant increase in the incidence of family violence during and following crisis and post-disaster recovery. For example, one study found a 98% increase in violence against women as measured from before and after Hurricane Katrina.[109]

246. This will inevitably lead to needs in the family law sector and place significant pressures on already over-burdened courts and judicial officers.

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

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104 Federal Circuit Court, *Annual Report 2018-19* (2019) 68, Table A1.1 Outcome 3: Federal Circuit Court of Australia.

105 Ibid.

106 Family Court of Australia, *Annual Report 2018-19* (2019) 62, Table A1.1 Outcome 2: Family Court of Australia.

107 Ibid.

108 See, eg, $27.5 million to eradicate three species of ants, $48.7 million over four years to commemorate the 250th anniversary of James Cook's voyage to Australia: 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>; Commonwealth, *Budget Measures 2018-19 – Part 2: Expense Measures*, 78.

109 See, eg, 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, cited in 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-thebushfire-aftermath-and-governments-can-no-longer-ignore-it-127018>.

248. 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.

249. The recent commencement of the Family Violence and Cross-examination of Parties Scheme (**the Scheme**) without sufficient funding illustrates the adverse impacts that occur for victims of family violence, legal assistance providers and the Courts when adequate resourcing is not provided to the family law system. The Scheme is also a cautionary tale about the importance of ensuring the financial implications of proposed reforms to the justice system are properly evaluated and budgeted for before it is introduced and enacted.

250. The Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (Cth) (**the Cross-Examination Bill**) was introduced to the Parliament in June 2018 without any funding commitment and before negotiations had been concluded with National Legal Aid.

251. The Cross-Examination Bill introduced a new section 102NA to the *Family Law Act 1975* (Cth), which was intended to provide mandatory protections for victims of family violence by prohibiting direct cross-examination in certain cases.[110] Under the amendment, if relevant circumstances of family violence apply, a party intending to personally cross-examine the other party may be restrained by Order from doing so. If such an Order is made, the cross-examination must be conducted by a legal practitioner acting on behalf of the examining party (regardless of whether the examination is being conducted by the alleged perpetrator or the alleged victim).

252. Stakeholders including the Association, National Legal Aid and the Law Council of Australia, raised significant concerns that the Scheme would not be able to achieve its intended purpose and would adversely impact upon access to justice unless properly resourced and funded.

253. Cross-examination serves an important role in testing evidence presented to the courts. Funding the Scheme is crucial to ensure alleged victims and alleged perpetrators alike could access legal assistance, otherwise they would be denied the opportunity to cross-examine a witness.

254. National Legal Aid made it clear that the Scheme was not able to be funded from existing legal aid resources. The Scheme's successful operation therefore required the provision of additional funding for legal aid and legal assistance providers, as well as the family law system and courts more broadly.

255. In August 2018 the Legal and Constitutional Affairs Legislation Committee inquiring into the Cross-Examination Bill recommended the bill's passage be subject to details regarding the funding of the measures contained in the bill being made public prior to the commencement of debate in the Senate.[111]

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

[111] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* (Report, August 2018) vii.

256. In November 2018 the Government announced that $7 million would be provided over three years to legal aid commissions to administer the Scheme and provide legal representation to parties subject to the ban.[112]

257. The Cross-Examination Bill was passed in December 2018 and the new section 102NA and the Scheme commenced from 10 September 2019.[113]

258. Just three months after its commencement, the Government had to make an urgent $2 million funding injection, through the Mid-Year Economic and Fiscal Outlook, to prop up the Scheme during 2019-20 alone, National Legal Aid having advised the courts that the funding allocation had already been exhausted.

259. Another $1.2 million funding injection was urgently required in February, after Forrest J noted in a judgment that in Brisbane registries alone, more than 5 listed trials in the Family Court and more than 30 listed trials in the Federal Circuit Court had been directly impacted by notice from Legal Aid Queensland that funding under the scheme is not available.[114]

260. In March 2020, Departmental officials told Senate Estimates that the original appropriated budgeted for the Scheme was based on an expectation of receiving just 192 applications this year.[115] As at 31 January 2020, 431 applications had been received since the Scheme commenced – more than double the modelled number.[116]

261. The additional $3.1 million that has been allocated is insufficient to meet outstanding need, or to set the Scheme up for success. It represents two one-off investments in the current financial year 2019-20 only. No further funding has been committed over the forward estimates to support the Scheme.

262. This significant underfunding of the Scheme must be addressed as an urgent priority. Importantly for present purposes, lessons must be heeded from the manner of its introduction and implementation, in particular the importance of accurately budgeting for and allocating adequate resources to support legislative change to the justice system, including to legal assistance and the family law system.

263. Understanding and giving practical effect to the reciprocity between resourcing and the justice system is crucial to promote the administration of and access to justice. Budgeting on the run, and after the fact, in this context has direct, adverse impacts on the lives of those engaging and working within the justice system. Mistakes made in respect of financial provision to support the Cross-Examination Bill must not be repeated.

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112 Attorney-General's Department, Women's Economic Security Package: Family Violence and Cross-examination of Parties Scheme (November 2018); see also Attorney-General's Department, Supporting women to recover financially after separation (2018).

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

114 See Vanessa Marsh, 'DV victims failed by Federal Court funding shortfall', *The Courier Mail* (online), 28 February 2020 <https://www.couriermail.com.au/truecrimeaustralia/police-courts/dv-victims-failed-by-federal-court-funding-shortfall/news-story/8bc80c1089dc792910c02e7312f4851a>; see also Law Council of Australia, 'Legal funding welcome but underscores crisis' (Media Release, 28 February 2020) <https://www.lawcouncil.asn.au/media/media-releases/legal-funding-welcome-but-underscores-crisis>.

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

116 Ibid.

264. Including a minimum number of judges for Division 1 of the merged court by regulation does not provide sufficient protection for specialisation or the future of a Chapter III Court.

265. Despite the Government's statement to the contrary, the effect of the Amended Merger Bills will be to abolish the specialist Family Court.

266. Clause 38 of the original Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth) and clause 36 of the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 (Cth) both repeal Part IV of the *Family Law Act 1975* (Cth) which establishes the Family Court thereby, without more, abolishing the Family Court. The intent of the bills to avoid infringement of the prohibition on the removal of the judges of the Court is then sought to be achieved by the transfer of existing Family Court commissions to Division 1 of the new Court.

267. The Attorney-General announced in 2018 the Government's intention to make no further appointments to Division 1, thereby effecting the final abolition of the remnants of the Family Court by attrition:

a. The Attorney-General stated in May 2018 that:[117]

> The intention is that we won't reappoint into Division 1 … Over time there will no longer be a Division 1.

b. In October 2018, the Attorney-General confirmed that this remained his view:[118]

> I want people to know what we're doing, and why. My view is Division 1, or the Family Court at the moment, is the less efficient of the two jurisdictions, so naturally you'd want to rebalance and shrink that and grow Division 2.

268. The Original Merger Bills thus imposed what then Shadow Attorney-General Brandis described as an "institutional death-sentence"[119] on the Family Court.

269. As at November 2018, the median age of Family Court judges was 63.[120] Approximately one third of those Family Court judges will turn seventy within five years and their commissions will expire, unless they choose to retire sooner. Another third will turn seventy within ten years.

270. After eleven months of no appointments, eight judges were appointed to the Family Court between February and March 2019, in the shadow of the 2019 Federal election.[121]

271. Unlike the Original Merger Bills, and purportedly in response to stakeholder concerns about the importance of maintaining specialisation, clause 9(3) of the amended Federal Circuit and Family Court of Australia Bill 2019 (Cth) provides that:

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[117] Quoted in Nicola Berkovic, 'Break-up is so hard to do', *The Australian* (online) 3 November 2018 <https://www.theaustralian.com.au/news/inquirer/breakup-is-so-hard-to-do/news-story/5e91cc743adfb5a8b01c89c98bf8f1d4>.

[118] Ibid.

[119] Commonwealth, *Senate Estimates*, 23 May 2012, 70 (Senator Brandis).

[120] See *Family Court of Australia* <https://www.directory.gov.au/portfolios/attorney-generals/federal-court-australia/family-court-australia>.

[121] See *Family Court of Australia* <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/judges-_senior-staff/judges/>.

> For the purposes of paragraph (2)(c), the regulations may prescribe a minimum number of Judges (whether appointed as Senior Judges or Judges) that are to hold office in accordance with this Act.

272. However, this clause does not alleviate concerns about the abolition of the specialist Family Court in effect or in practice. Nor do the recent appointments to the Family Court, whilst undoubtedly very welcome and long overdue. Use of the word "may" in this clause, rather than "must" which appears elsewhere in the Act', indicates there is Executive discretion as to whether to prescribe such a requirement.

273. Further, the Attorney-General's Department has indicated that the apparent minimum number is now to be fixed at 25 judges by reference to a 13 year old benchmark - the 2008 Semple Report - rather than by any reference to the current needs of the Courts or Australian society.[122] This approach neglects a crucial aspect of the Semple Report's recommendation – that "the number of justices "be reduced over time as judges retire to around 25, ***based on current family law workloads in the Family court and FMC***" (emphasis added).[123]

274. The proposed number is an entirely inappropriate minimum threshold. Twenty-five judges would represent a 26% decrease from the current number of judges in the Family Court, and is unprecedented in the modern history of the Family Court. At no time during the last 16 years has the number of judges in the Family Court fallen below 30, as demonstrated in the graph at paragraph [53] above collating data from the Court's annual reports. As outlined above, concern has consistently been expressed that the number of Judicial Officers has been insufficient for the Court's workload.

275. Based on current workload presently, the Chief Justice has recommended an increase – not a decrease - in judges. This proposed minimum threshold is inconsistent with the Chief Justice's advice in November 2019 that "we definitely need more judges" in both courts, and that "if we had an extra judge in every major registry it would make a massive difference".[124]

276. Between 2012-13 and 2018-19, the backlog of cases in the Family Court has grown by 34 per cent, while all matters in the Federal Circuit Court has grown by 63 per cent.[125]

277. In 2007-08 the number of filed applications in the Family Court alone was 20,337 and pending applications 6,160.[126] In 2018-19, the number of applications filed was 19,594 and pending 6,210. In 2008, there were 39 judges in the Family Court including the Chief Justice and Deputy Chief Justice:[127] now there are just 34. In 2008 Australia's population

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122 Attorney-General's Department, *Submission 581 to the Joint Select Committee on Australia's Family Law System* (2020) 23.
123 The Semple Report, 43.
124 Quoted in Tony Keim, 'A family (court) affair', *Proctor* (November 2019) 32.
125 Productivity Commission, 'Justice chapter', *Report on Government Services* (2020), cited in Law Council of Australia, 'Family courts need urgent funding injection says Law Council' (Media Release, 1 February 2020) <https://www.lawcouncil.asn.au/media/media-releases/family-courts-need-urgent-funding-injection-says-law-council>.
126 Family Court of Australia, *Annual Report 2007-08* (2008) Figure 3.3.
127 Ibid, 31.

was 21.96 million[128] and the rate of divorce was 2.2 divorces per 1,000 population.[129] Australia's population is now 25.36 million,[130] and the rate of divorce in 2017 was 2.0.

278. Further, it is inappropriate, and not best drafting practice, to include a requirement of such significance in regulation, rather than legislation.

279. If the Government is serious about committing to maintaining specialisation, the number of Division 1 judges must be expressly mandated in the parent Act itself, not subordinate regulation, to ensure that a Chapter III Court cannot be dismantled by stealth or attrition, subject to the policy directives of the government of the day. The decision to dismantle a Chapter III Court is one for Parliament, with specific legislation, in full knowledge and awareness of the implications.

280. Further, the Amended Merger Bills do not engage with concerns raised by the ALRC over the jurisdictional gap and information sharing.

281. In August 2017 the then Attorney-General, Senator the Honourable 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 2019 and highlighted the fragmented nature of the current family law system.[131]

282. 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.[132]

283. 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.

284. 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".[133]

285. 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.[134] That legislative competence was expanded between 1986 and 1990 when all States (save for Western Australia) referred their law-making powers over ex-

[128] Australian Bureau of Statistics, 'Regional Population Growth Australia' (2008-09) <https://www.abs.gov.au/ausstats/abs@.nsf/Products/3218.0~2008-09~Main+Features~Main+Features>.
[129] Australian Bureau of Statistics, '7.40 Crude divorce rate', *Marriages, Divorces and De Facto Relationships* (2010) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/947114F16DC7D980CA25773700169C64?opendocument>.
[130] Australian Bureau of Statistics, 'Australian Demographic Statistics' (June 2019) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/3101.0>.
[131] Australian Law Reform Commission, *Review of the family law system* (Report No 135, 2019).
[132] Ibid, Chapter 4 'Closing the Jurisdictional Gap'.
[133] Ibid.
[134] *Commonwealth of Australia Constitution Act 1900* (UK) ('*The Commonwealth Constitution*'), s 51(xxi) and (xxii) (the "marriage power" and "matrimonial causes power", respectively.

nuptial children to the Commonwealth.[135] The 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.[136]

286. 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.

287. 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.

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

Common rules, forms, practices and procedures

289. Much of this work has already been undertaken through the Courts' Rules Harmonisation Project. As the legal profession has long advocated, this work does not require legislation and has already commenced, and will continue, without the need for the Amended Merger Bills.

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

Other drafting concerns

291. In addition to the substantive concerns outlined above, the Association is concerned that the Amended Merger Bills risk adversely impacting upon families and children by exposing them to unintended consequences arising from extremely complicated drafting instructions.

292. The Association appreciates that the drafting involved in seeking to achieve the Government's merger proposal has been extremely involved and delicate. The margin for error, despite best efforts, is therefore high. It is noted that no opportunity was afforded to the Association to consult in relation to the drafting process.

293. The Association is particularly concerned that the Amended Merger Bills may suffer from unintended but detrimental consequences which have not been appropriately considered or fully worked through, including by way of example:

[135] 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 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.

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

a. the absence of any conferral on Division 1 of the proposed court of "original jurisdiction" other than in respect of matters the subject of referral, on appeal or by other specific legislative provision (clause 6 of the Federal Circuit and Family Court of Australia Bill 2019 (Cth) (**2019 FCFCA Bill)**), Division 1 of the Court thereby being invested with no independent jurisdiction despite its apparently intended status as a Chapter III Court;

b. the possibility that subclause 26(2) of the 2019 FCFCA Bill could operate to remove the right of appeal for an unsuccessful applicant for leave pursuant to section 44(3) of the *Family Law Act 1975* (Cth) – being to commence proceedings for substantive financial relief after the expiration of the 12 month time limitation;

c. the possibility that clause 32 of the 2019 FCFCA Bill could purport to prevent appeals from decisions of a single judge of Division 1 sitting in the appellate division;

d. the absence of a complaint mechanism in relation to the Chief Justice, other than to the Chief Justice, pursuant to clause 48 of the 2019 FCFCA Bill;

e. the resourcing issues that presently confront the Courts forming a specific ground for consideration in the allocation of matters between the Divisions from which determination there is no appeal: clause 51 of the 2019 FCFCA Bill; and

f. the absence of any detail in the proposals as to those matters, or categories of matters, which will be denied access to Division 1 by the operation of Regulation: subclause 149 of the 2019 FCFCA Bill.

294. By contrast, the Association considers that drafting to implement the Association's Family Court 2.0 or Semple model would be more straightforward and represent a lesser risk.

6. Why should a specialist family court stand alone?

295. Departing from a stand-alone, specialist family court model with co-located legal and non-legal support services, as the proposed merger entails, is contrary to the advice of experts and research.

296. This section of the submission examines two characteristics of the existing Family Court model – its specialist nature and its independent, stand-alone structure –and the importance of retaining both, which simply cannot happen under the proposed merger.

Why is specialisation important?

297. 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.[137]

298. 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".[138]

299. 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.

300. One of the Family Court's most admired features is the fact that only those who "by reason of training, experience and personality"[139] 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.[140]

301. This was acknowledged by the House of Representatives 2017 Inquiry, which stated that:[141]

> 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

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

138 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>.

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

140 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.

141 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).

jurisdiction in general federal law matters, despite the fact that 87 per cent of the total family law workload is heard in that court.

302. The Council of Single Mothers and their Children told the Senate Legal and Constitutional Affairs Legislation Committee in July 2018 that:[142]

> 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.

303. The House of Representatives 2017 Inquiry recommended an increase in the specialisation of Judges undertaking family law work.[143]

304. Former Chief Justice of the Family Court of Australia, Elizabeth Evatt AC, warned in a recent submission to the Joint Select Committee on Australia's Family Law System that:[144]

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

305. The Attorney-General is right to say that "fundamental structural reform is an absolute necessary condition to further improvements" to the family law system,[145] the experiment of sharing jurisdiction between two federal courts and running family law matters in separate courts with separate rules and procedures has failed.

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142 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.

143 See House of Representatives Inquiry, above n 141, [8.76] – [8.84] and recommendations 27-29.

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

145 The Honourable 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>.

306. 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.

307. Chief Judge Alstergren has acknowledged that:[146]

> 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.

308. 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".[147] It is important to be clear about what is meant by a specialist family court and what that entails.

309. 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."[148]

310. 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.

311. 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".[149] Justice services operate on the front line in responding to violence, alongside police and support services.

312. 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.

313. 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.

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146 Chief Judge of the Federal Circuit Court of Australia, the Honourable 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>.

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

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

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

314. 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.[150]

Why should the Family Court stand alone?

315. The Association has consistently warned that the merger proposal would mean the end of the Family Court *as we know it*. This is because by virtue of its very nature, the merger proposal would result in the court ceasing to exist as a separate, stand-alone entity and being merged into a generalist court.

316. In 1974, the Senate Standing Committee on Constitutional and Legal Affairs considering the Family Law Bill 1974 (Cth) "emphasised the need for a federal court of record which could deal *exclusively* with family law matters"[151] (emphasis added).

317. The Report observed that:[152]

> There is a need for a new start in matrimonial law and administration in creating a new entity not interchangeable with existing courts. The Court will require new standards and methods, both in its physical environment, its procedural methods and in its approach to marital problems. Court premises should be separated from existing courts, and business be conducted in modern surroundings with small well provided court rooms, enabling easy dialogue between the court and the parties. Conference rooms and other facilities and ready access to advice, including legal aid are essential…
>
> The Family Court of Australia, properly constituted, requires ancillary support at three levels: -
>
> a. Welfare officers who can talk to parties, evaluate custodial difficulties, report to the court and, where required, provide ongoing supervision of custody and access orders;
>
> b. Court counsellors who can counsel on marriage and personal difficulties; and
>
> c. Legal advisers who can inform parties as to their legal rights, and as to the availability of legal aid and other community services.
>
> …
>
> In addition to ancillary services employed by the court, provision must be made for use, on a consultant basis, of specialised services required in particular cases e.g. psychiatric, psychological, voluntary marriage guidance services and accountancy services.

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

151 The Honourable Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24(3) *Melbourne University Law Review* 756, citing Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parl Paper No 133, 1974) 10 [33] <https://nla.gov.au/nla.obj-840875983/view?partId=nla.obj-842436336#page/n21/mode/1up>.

152 Standing Committee on Constitutional and Legal Affairs, ibid, [38] – [41].

318. Writing in 2000, former Chief Justice of the Family Court, the Honourable Alastair Nicholson AO QC RFD and Margaret Harrison noted:[153]

> The relative paucity still of specialist family courts around the world prompts queries about their strengths and weaknesses and the will of governments for their establishment. There are obvious arguments for and against such courts. It is undoubtedly bewildering, costly and inefficient to deliver fragmented services through a plethora of courts, tribunals and social welfare agencies. Nevertheless, Australia has recently added another, the Federal Magistrates Service, which exercises jurisdiction largely concurrent with that of the Family Court. It is also apparent, as occurred before the establishment of the Family Court, that in a generalist jurisdiction many judges and magistrates do not like family law work and will either hear these matters last or avoid them. A divisional structure is a slight improvement, but judges working in the family law area tend to be transferred into other areas, or a rotation system is employed which has the effect of removing the best family law judicial officers after they have attained competence in the area. Because some senior judges and magistrates in a generalist court regard family law as less important than other areas of their jurisdiction, family law tends to suffer when there are budget cuts and workload increases. **Moreover, experience in Australia and overseas suggests that where a family court is a division of a generalist court, or where family law cases are simply assigned to judges or magistrates in a generalist court, the quality of performance suffers greatly.**
>
> The principal argument that can be advanced *against* a specialist family court is that because of the nature of family law, the court is never a popular institution. In Australia disaffected persons constantly attack the system on the basis of gender bias, arguing that either mothers or fathers gain an unfair advantage in parenting disputes, because judges have particular preferences which the discretionary nature of the legislation accommodates. Other criticisms are that the Family Court shows no understanding of the needs of children and their parents, and that the non-financial contributions of a spouse (usually, but not necessarily, a wife) are undervalued, thus perpetuating a systemic bias in the distribution of matrimonial property. Because nearly all of the Family Court's decisions are discretionary, it is not hard to produce 'evidence' (which is difficult to rebut) of alleged inconsistencies in approach. Although it is the legislation which creates the discretion, and not the Court, it is easy to criticise the Court in this regard. Specialist courts are placed in a more difficult position than generalist courts, as they are isolated from the so-called 'legal mainstream' and are thus not defended with the same vigour. When public attacks arise, there is a right and a duty for judges — and particularly a Chief Justice — to defend their court. (citations omitted, emphasis added)

319. Chief Justice Nicholson argued that "the advantages of specialist courts far outweigh the disadvantages", observing that:[154]

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[153] The Honourable Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24(3) *Melbourne University Law Review* 756.

[154] 'Future directions in Family Law', Speech by the Honourable Justice Alastair Nicholson, Chief Justice Family Court of Australia (10th World Conference of the International Society of Family Law, 10 July 2000) 11.

> Most of the disadvantages to which I have referred are those of perception, whether it be by Government, the media or the public. Family Courts nevertheless have to be robust and independent. Governments, the media and the public need to be reminded of their crucial role.
>
> This is not an easy road and the financial pressures employed by Governments do not make it easier. I think that we must remember what it is we are trying to do in such courts and I think that this is best summed up in the object adopted by my Court of resolving and determining family disputes and putting children and families first in that process…
>
> …The Australian Family Court approach of including under the roof of the Court other relevant professionals such as psychologists, social workers and mediators is also one that is worth repeating. I also think that the Australian system of having a specialist appellate division within the Court is highly desirable. All too often in other countries having specialist courts, the particular problems of family law are not appreciated by generalist appellate judges who produce judgments that detrimentally affect the operations of the specialist court.

320. In conclusion, the Association recommends that:

- The Amended Merger Bills should not be passed;
- This Committee advocate to the Parliament to properly fund and resource the family law system, including legal assistance, and commit to doing so on an ongoing basis;
- A specialist, stand-alone and properly resourced Family Court be maintained in Australia to continue to provide specialist assistance to children, families and survivors of family violence;
- This Committee advocate to the Parliament to adopt the Association's Family Court 2.0 Model and relocate judicial officers hearing family law matters and the family law jurisdiction of the Federal Circuit Court into a second division within the Family Court;
- The Amended Merger Bills should not be debated in the Senate or passed before the ongoing Joint Select Committee on Australia's Family Law System has concluded, so as not to pre-empt or undercut the Joint Select Committee's important work or findings; and
- This Committee advocate to the Parliament to 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.

7. The Family Law Bar in NSW

321. The Association is a voluntary professional association comprised of more than 2,400 barristers with their principal place of practice in NSW.[153] More than 185 of our members reportedly practice in the area of family law and guardianship.[154] 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.[155]

322. 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, and in particular its Family Law Committee, which is comprised of eleven barristers with active practice in family law.

323. 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,

153 New South Wales Bar Association, *Statistics*, as at 18 December 2019 <https://www.nswbar.asn.au/the-bar-association/statistics>.
154 Ibid.
155 New South Wales Bar Association, *New South Wales Bar Association Strategic Plan* (2017) <http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad061e3db4/attachment/strategic.pdf>.