

NEW SOUTH WALES BAR ASSOCIATION

2019-20 PRE-BUDGET SUBMISSION TO TREASURY

EXECUTIVE SUMMARY

1. The New South Wales Bar Association (**the Association**) thanks the Government for the opportunity to make submissions to Treasury regarding priorities for the 2019-20 Budget.
2. There can be no greater budget priority than the wellbeing of Australian children and their families. Increased funding and resourcing of Australia's family law system, especially the courts, must be a key priority in the 2019-20 Budget to improve access to affordable and timely justice for children and families in need of family law assistance.
3. The family law system and courts are a critical piece of social justice infrastructure that has been neglected by successive budgets. More Australians will have contact with the family law system than perhaps any other part of our justice system. The family law system must therefore be understood as an essential service on which many Australians rely, and funded accordingly.
4. The cost of failing to invest in our family law system has direct consequences for families and children, manifesting in unacceptable delays and costs which directly impact on the accessibility and quality of justice. There are also broader costs and economic impacts to the community resulting from the consequences of family breakdowns not being determined in a timely manner.
5. 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. The Courts therefore form an integral part of Australia's family law system. Furthermore, it is not possible to justly resolve matters by non-litigious means unless this is able to occur in the context and shadow of a properly functioning, sufficiently funded court system that stands ready to provide timely justice.
6. There is much frustration with Australia's current family law system. The system has been adversely affected by a chronic lack of funding and resources in both the Federal Circuit Court and Family Court, resulting from an absence of commitment by successive Governments to the proper funding of the system. These resources include an insufficient number of judicial officers to deal with an expanding jurisdiction and increasing workload and insufficient funding to maintain counselling and assessment services previously provided by the Courts.

7. Some Australian families are having to wait up to three years to have their family law disputes resolved,¹ and a number experience greater delays. This is unfair and unjust and is not sustainable. This also undermines public confidence in the courts and the system.
8. There is compelling evidence and consensus amongst key stakeholders that a direct causal link exists between resourcing and the quality of justice delivered by the system. 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”.²
9. 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, as detailed below. Accordingly, 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.
10. A decision to commit increased funding and resourcing to the family law system through additional appropriation in the 2019-20 Budget would be entirely consistent with the policy rationale behind Treasury’s announcements during the Mid-Year Economic and Fiscal Outlook (**MYEFO**) of:
 - a. the expense measure titled “Additional Court Resources to Assist Families” which will provide “\$3.7 million over four years from 2018-19 for an additional judge and support staff for the proposed Federal Circuit and Family Court of Australia (FCFCA), to hear family law case appeals;³ and
 - b. the expense measure titled “Federal Court – increased civil cases” which will provide “\$7.7 million over four years from 2018-19 to the Federal Court of Australia to manage the expected increase in case load as a result of increased enforcement action by the Australian Securities and Investments Commission including cases highlighted by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry”.⁴
11. At time of writing, the Senate’s Legal and Constitutional Affairs Legislation Committee (the **Committee**) is inquiring into the Federal Circuit and Family Court of Australia Bill 2018 (**FCFCA Bill**) and the Federal Circuit and Family Court of Australia (the Consequential

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

² 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>.

³ MYEFO, Appendix A, 155.

⁴ MYEFO, Appendix A, 157.

Amendments and Transitional Provisions) Bill 2018 (**FCFCA Consequential Amendments Bill**), together **the Bills**.

12. The Bills, which are currently before the Senate, would give effect to a proposal to restructure the federal courts that has been developed by Attorneys-General Brandis and Porter in consultation with three heads of court jurisdiction but without consultation with the legal profession or court users. The Senate has directed the Committee to report on 15 April 2019.
13. Additionally, the Australian Law Reform Commission (**ALRC**) is currently completing its Review of the Family Law System and is due to report to the Attorney-General by 31 March 2019.⁵
14. The Association has joined with many stakeholders including the Law Council of Australia in recommending that the Bills should not be passed at this time and the Government should first consider the ALRC's findings.⁶
15. The Association submits that regardless of whether the Bills are enacted in 2019-20, a significant injection of funding and resourcing is required into both legal aid and the family law system to promote improved access to affordable, timely justice.
16. This submission addresses three issues:
 - a. The business case for increased funding and resourcing of the family law system;
 - b. The difficulties in relying on statistics in budgeting for the family law system; and
 - c. Whether savings and efficiencies can be realised through the Bills.

RECOMMENDATIONS

17. The Association recommends that as an immediate priority the 2019-20 Budget must include:
 - a. Increased funding for the family courts in 2019-20 and over the forward estimates. This should include funding:
 - i. For the employment of further family consultants to assist in the timely and non-litigious resolution of parenting disputes;

⁵ See Australian Law Reform Commission, *Review of the Family Law System* (2017) <<https://www.alrc.gov.au/inquiries/family-law-system>>.

⁶ See New South Wales Bar Association, Submission 68 to the FCFCA Inquiry <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FederalCourts/Submissions>.

- ii. For the employment of further registrars to properly manage matters before the Courts and to release judge time which is otherwise allocated to those tasks;
 - iii. To appoint judges to both the Federal Circuit Court and the Family Court of Australia so as to at least restore the previous level of judicial resources; and
 - iv. To appoint additional judges to reflect the expansion and increase in the work of both courts;
- b. Increased funding for legal aid in 2019-20 and over the forward estimates;
 - c. Additional appropriation to fund the appointment of specialist family law judges, particularly if the Bills proceed in divisions 1 and 2 of the FCFCA, in 2019-20 and over the forward estimates;
 - d. Increased funding for resourcing of the broader family law system in 2019-20 and over the forward estimates, including to investigate and implement recommendations by the ALRC's Review of the Family Law System.

THE BUSINESS CASE FOR INCREASED FUNDING OF THE FAMILY LAW SYSTEM

18. It is widely acknowledged by court users, the legal profession, the Government and the judiciary that Australia's family law system is not serving the best interests of Australian children and families as well as it could or should.
19. The Association has consistently argued there is a dire need for greater investment in Australia's family law system for the following reasons:
 - a. The system has been systematically underfunded by successive Governments of both political persuasions;
 - b. The system has been adversely affected by a chronic lack and mismanagement of resources in both the Family Court and the Federal Circuit Court, including a failure to promptly replace retiring judicial officers;
 - c. Underfunding of legal aid has meant that a significant number of parties cannot afford legal representation in family law matters and by necessity appear unrepresented in court proceedings;
 - d. The above factors have cumulatively contributed to the creation of crippling judicial workloads and unacceptable, unfair and unsustainable delays in both courts; and
 - e. The challenges for judicial officers struggling with such caseloads, particularly in the Federal Circuit Court where judges are not required to satisfy the same statutory requirement as judges of the Family Court under section 22(2)(b) of the *Family Law Act 1975*, are adversely impacting the quality of outcomes delivered to parents and children.
20. Resourcing was a key issue raised by witnesses before the Committee's inquiry into the FCFCA Bills.

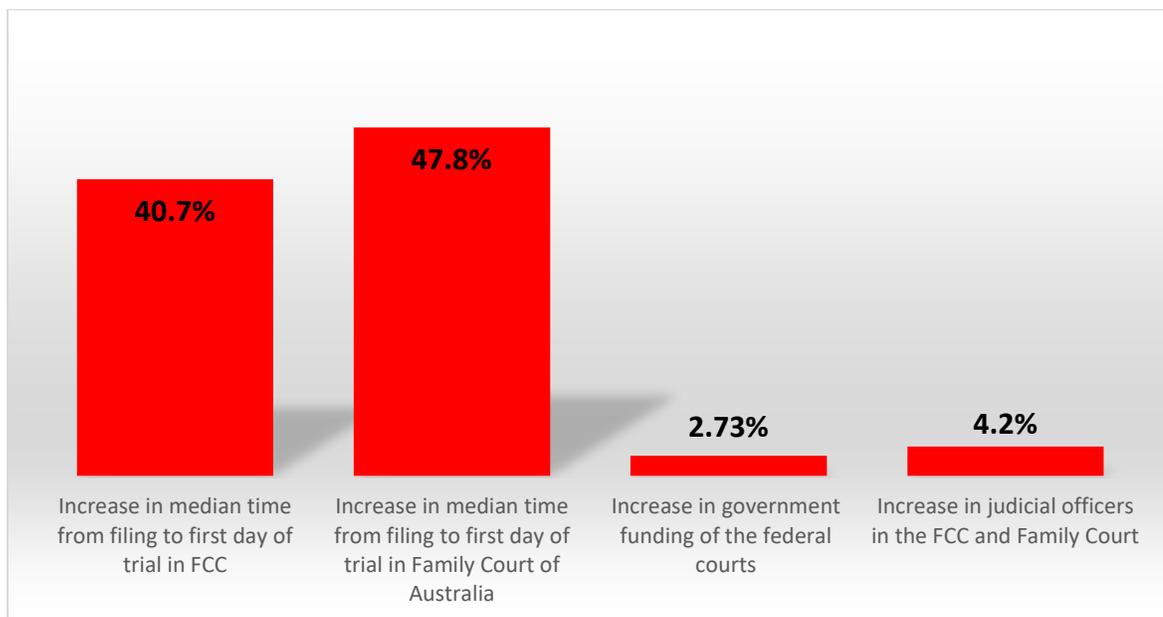
Underfunding and under-resourcing

21. The Attorney-General stated in May that the national median time to trial has 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%),⁷ from 2012-13 to 2016-17.⁸

⁷ 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>>.

⁸ *Question Number and Title: AE18-014 - Family Court of Australia trends*, Senate Standing Committee On Legal and Constitutional Affairs, Additional Estimates 2017-18 (February 2018).

22. During that time there has 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 2017-18.⁹
23. From 30 June 2013 to 19 January 2018, only two additional judicial officers were added to each of the FCC and the Family Court of Australia,¹⁰ bringing the total to 66 FCC Judges and 33 Family Court judges, representing a total increase of 4.2 percent.

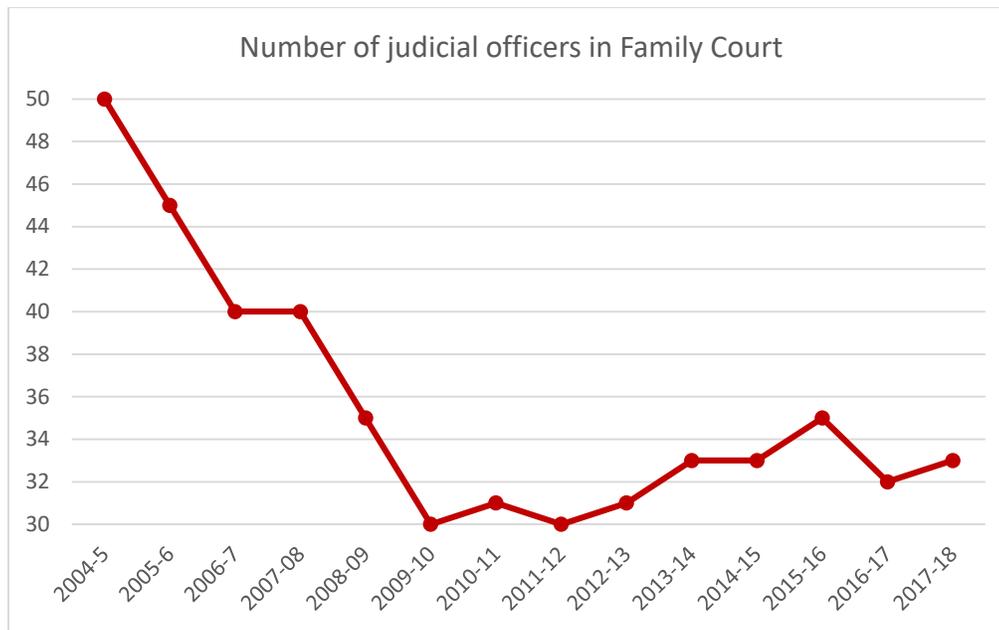


24. The number of judges available to hear matters directly affects disposition rates. There has been a significant decrease in the number of judicial officers in the Family Court over the last fourteen years, which has severely reduced the court’s capacity to manage its workload.
25. The reduction in 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.¹¹

⁹ 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).

¹⁰ 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).

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



Data source: Family Court Annual Reports

26. Further the 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 successive years.¹²
27. 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.¹³
28. 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* that:¹⁴

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

¹² Family Court of Australia, *Annual Report 2008-09* (Commonwealth of Australia, 2009), 4 <http://www.familycourt.gov.au/wps/wcm/connect/2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf/2008-2009+Annual+Report.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf-lRyQwWz>.

¹³ See, eg, Family Court of Australia, *Annual Report 2008-09* (Commonwealth of Australia, 2009), 4, 35 <http://www.familycourt.gov.au/wps/wcm/connect/2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf/2008-2009+Annual+Report.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf-lRyQwWz>; Family Court of Australia, *Annual Report 2009-10* (Commonwealth of Australia, 2010), 12, 41 <http://www.familycourt.gov.au/wps/wcm/connect/2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf/2008-2009+Annual+Report.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-2148c4cb-0c46-4a3b-91f5-fb6494a8d6cf-lRyQwWz>; Family Court of Australia, *Annual Report 2010-11* (Commonwealth of Australia, 2011) 46, 51 <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/annual-reports/archived-annual-reports/2010-11-annual-report>>; Family Court of Australia, *Annual Report 2011-12* (Commonwealth of Australia, 2012), 50.

¹⁴ 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.

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 alone 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 judges' retirement as they use up leave and clear their dockets.

29. 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,"¹⁵ and added that "In an ideal world, I'd love to see more funding for the courts..."¹⁶
30. In October 2018 the Chief Executive and Principal Register of the Family Court, Mr Warwick 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".¹⁷
31. Attorney-General Porter 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 case backlogs in the Family Court of Western Australia.¹⁸ The Attorney General's Press Release of 23 May 2012 stated as follows:¹⁹

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.

¹⁵ 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).

¹⁶ Ibid.

¹⁷ 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).

¹⁸ 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>>.

¹⁹ Ibid.

32. Resourcing was identified as an area in need of urgent reform in the 2017 inquiry by the House of Representatives' Standing Committee of Social Policy and Legal Affairs into *A better family law system to support and protect those affected by family violence*. 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”.²⁰
33. Further, the Family Court advised in its submission to the Inquiry that:²¹

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.
34. It is disappointing, therefore, that despite Parliament's awareness of the issue, and the Attorney-General's first-hand knowledge of the impact that increasing funding, judicial and support staff has in reducing family court backlogs, the Commonwealth has not provided sufficient resources to the courts to address their work load or delays.
35. The 2019-20 Budget represents an opportunity to remedy this and make a significant contribution to advancing just outcomes in the family law system.

Legal aid

36. 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.
37. Legal aid has been progressively cut by successive Federal Governments of both political persuasions, to the point where Commonwealth funding is now at its lowest level in more than two decades.²² The Federal Government's contribution to legal aid funding has dropped from 55 per cent in 1996-1997 to 32 per cent in 2017-2018.²³ Twenty years ago, the Federal Government contributed \$11.57 per capita.²⁴ In 2017-18 that contribution was \$8.40.²⁵ The contribution is estimated to drop further to \$7.78 per capita in 2019-20.²⁶

²⁰ 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].

²¹ 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.

²² 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>>.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

38. The Senate acknowledged in May 2018 that while 14 per cent of Australia’s population live below the poverty line, just six per cent of those below the line would actually qualify for legal aid under the current tests imposed due to a chronic lack of resourcing.²⁷
39. 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.²⁸
40. One in every three cases before the Family Court involve at least one unrepresented party.²⁹ Anecdotally it is believed there are similar rates of self-represented litigants in the Federal Circuit Court.
41. 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:³⁰
 - 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.
42. Dewar, Smith and Banks’ Report concluded that self-represented litigants “consume more Court resources than represented parties”³¹ 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”.³²
43. 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.³³
44. 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.

²⁷ Ibid.

²⁸ John Dewar, Barry Smith, Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 1.

²⁹ Family Court of Australia, *Annual Report 2017-18* (2018), 33 [3.17] (Representation of litigants at trials, 2012-13 to 2017-18); Family Court of Australia, *Annual Report 2016-17* (2017), 41 Figure 3.18 (Representation of litigants at trials, 2012-13 to 2016-17).

³⁰ John Dewar, Barry Smith, Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 1.

³¹ John Dewar, Barry Smith, Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 3.

³² Ibid, 2.

³³ Ibid, 51.

Delays and judicial workloads

45. The factors outlined above have contributed to crippling delays and crushing workloads in Australia's family law system. 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 workloads.
46. Legal Aid NSW has warned that:³⁴
- Such delays present barriers to the early identification of family violence, and the delivery of appropriate legal and nonlegal responses. Legal Aid NSW is concerned that many families with complex needs have been waiting for judicial determinations for excessive periods of time due to a shortage of judges. While these families wait, disputes often become more entrenched and risk issues can be heightened. Delay also increases the pressure on judicial officers and lawyers in terms of volume of work, which in turn decreases the likelihood of appropriate and comprehensive judicial responses to family violence. Reducing delay would allow for earlier findings of fact in relation to family violence to be made by the court.
47. 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.
48. Pressures are evident in both courts, with the Federal Circuit Court also facing a crushing workload. The Court's CEO and Principal Registrar, Dr Fenwick, gave evidence at Senate Estimates in May 2018 of a backlog of approximately 17,400 pending cases in the Federal Circuit Court.³⁵ Further, the Principal Registrar noted that the increasing number of migration and refugee division referrals to the Federal Circuit Court comprised "a significant component"³⁶ of the Court's workload and represented "roughly one-third of the total pending case load".³⁷ This in turn contributes to delays in the Federal Circuit Court's family law cases which must compete directly with migration matters for resources and court time. Practitioners have also raised concerns about delays and pressures evident in the Federal Circuit Court's industrial list.
49. While funding of the family law system is very welcome, the funding announced during MYEFO for the appointment of a judge in the new appeal division of the FCFCFA was premature as it pre-empts the findings of the Senate Committee's inquiry into the Bills and

³⁴ 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.

³⁵ Evidence to Senate Legal and Constitutional Affairs Legislation Committee - Estimates, Parliament of Australia, Canberra, 24 May 2018, 119 (Dr Stewart Fenwick, Chief Executive Officer and Principal Registrar).

³⁶ *Ibid*, 120.

³⁷ *Ibid*, 121.

overlooks the concerns that have been expressed by the Association and others regarding the proposal.

50. We suggest this funding be directed instead to a judicial appointment to the existing appeal division of the Family Court of Australia and not be contingent on passage of the Bills.
51. If the merger does proceed, the Attorney has indicated no further judges will be appointed to Division 1. This will have the effect of redirecting the most complex family law matters into Division 2, which is already struggling with migration and industrial matters. The Association recommends that in addition to increased funding of the family law system and legal aid, further judicial appointments must be made in the Family Court to ensure that Australians can continue to access the services of judges with specialist family law expertise.

DIFFICULTIES IN RELYING ON STATISTICS IN BUDGETING FOR FAMILY LAW

52. Court statistics are not a proper or reliable measure of a legal system's success, especially in family law. The quality of justice that families and children experience at court is an important factor that cannot be quantified on a spreadsheet.
53. The former Chief Justice of Australia, the Honourable Murray Gleeson AC QC, warned that:³⁸

Nobody has yet devised a satisfactory indicator of judicial productivity, probably because the concept of productivity of judges is no more amenable to measurement than the productivity of parliamentarians. It is possible to measure some aspects of the performance of a judge or a court; and this may have utility. Justice, however, is more a matter of quality than quantity, and the desired judicial product is not a decision, but a just decision according to law.

54. Similarly, the former Chief Justice of New South Wales, the Honourable James Spigelman AC QC noted, "the most important aspects of the work of the courts are qualitative and cannot be measured, such as fairness, accessibility, openness, impartiality, legitimacy, participation, honesty and rationality".³⁹
55. Statistics and economic analysis alone cannot form a reliable or compelling mandate for law reform without due consideration and discussion of the qualitative outcomes and experiences of justice. The Attorney-General himself has acknowledged that data analysis "is not determinative of any particular course of reform".⁴⁰

³⁸ Murray Gleeson, 'The State of the Judicature' (Speech to the 35th Australian Legal Convention, Sydney, 25 March 2007) 14.

³⁹ Quoted in Australian Bar Association, 'The ABA rejects the recent analysis of Federal Court judges' productivity' (Media Release, 30 October 2018) <<http://australianbar.org/news-media/the-aba-rejects-the-recent-analysis-of-federal-court-judges-productivity>>.

⁴⁰ Ibid.

56. This information can only be gleaned from meaningful consultation with court users, the community and key stakeholders including the legal profession. It is respectfully submitted that this must be taken into account by Treasury when budgeting.
57. As noted above, there is consensus across court users, the legal profession and the courts themselves that a resourcing and funding injection is urgently required to address demand.
58. The Attorney-General has sought to rely on comparisons in disposition rates between the Family Court and the Federal Circuit Court to justify in effect abolishing the Family Court by merging it into the Federal Circuit Court. For example, the Attorney-General stated in August 2018 that:⁴¹

One concerning trend that has developed, which must be remedied, is that while the Family Court's downward shift in workload has recently been at its most significant, there has been no corresponding increase in output based on cases finalised.

In 2015-16, the Family Court had about 3,000 matters filed for final orders. One year later it was 2,750. Usually, when workload decreases, output (finalisations), should increase.

Unfortunately, the reverse occurred. Finalisations dropped from about 2,950 to 2,750. This is a major driver of increasing backlogs in the family law system.

59. With respect, this statement is inaccurate. As explained in the Family Court's 2009-10 Annual Report:⁴²

Volumes of finalisations are difficult to predict each year: they are significantly dictated by client demand for Family Court services and the level of available judicial resources. Both of these are out of the control of the Court: clients determine where and when they will file their case and judicial appointments are at the discretion of the government...

60. The Attorney-General's argument does not take into account the fact that there is a fundamental difference in the complexity of work performed by the Family Court and the Federal Circuit Court.

61. The Family Court has explained that:⁴³

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.

⁴¹ Attorney-General for Australia, the Hon Christian Porter MP, 'Op-Ed – Family Courts reform' (Media Release, 3 August 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/Op-ed-family-courts-reform.aspx>>.

⁴² Family Court of Australia, *Annual Report 2009-10* (2010) 37; see also Family Court of Australia, *Annual Report 2008-09* (2009) 31.

⁴³ *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).

62. Australian Government budget documents acknowledge that the Family Court handles the most “complex and difficult family law matters”.⁴⁴ This includes matters involving allegations of family violence or child abuse, complex property matters, international family law including child abduction, and applications seeking approval for specialist medical procedures such as treatment for gender dysphoria in children.⁴⁵
63. In contrast, one in every two family law matters filed in the Federal Circuit Court are divorce applications.⁴⁶ This work is largely paper-based and, according to the Court’s 2016-17 Annual Report, largely undertaken by registrars, not judges.⁴⁷
64. It is not surprising, therefore, that the complex, highly specialised family law cases heard by the Family Court take longer to resolve and are more resource intensive, by their very nature, than the simpler matters handled by the Federal Circuit Court.
65. In October 2018 Mr Warwick Soden confirmed to Senate Estimates that:⁴⁸

My expectation would be, and I think the judges of the Family Court would correctly assert, that the cases the Family Court deals with are in the 'more complex' category. In other words, it's fair to say the Family Court and the Federal Circuit Court deal with complex cases but the Family Court deals with the very complex cases.
66. It is not possible to compare disposition rates between the Courts as an accurate measure of success, just as it is not useful to compare waiting times at a local GP with waiting times at a hospital emergency room. The type of work, the intensity and the complexity of cases that present are too different to be accurately or effectively compared.
67. The Judicial Conference of Australia recently warned that it is “neither meaningful nor helpful to compare the work of individual judges, and to purport to judge their productivity” by simplistic statistical analysis that fails to take into account such qualitative and quantitative factors, including:⁴⁹
 - a. the state of the lists in the various registries and the amount of time available immediately after matters were heard in which to write judgments;

⁴⁴ Federal Court of Australia, *Corporate Plan 2017-18* (2017) 18; Family Court of Australia, *Annual Report 2017-18* (2018) 21; see also Commonwealth, *Attorney-General’s Portfolio 2018-19 Portfolio Budget Statement* (2018); Commonwealth, *Attorney-General’s Portfolio 2017-18 Portfolio Budget Statement* (2017) 202; *Attorney-General’s Portfolio 2016-17 Portfolio Budget Statement* (2016) 210.

⁴⁵ Ibid.

⁴⁶ Federal Circuit Court of Australia, *Annual Report 2016-17* (2017) 45.

⁴⁷ Ibid, 52.

⁴⁸ Evidence to Senate Legal and Constitutional Affairs Legislation Committee – Supplementary Budget Estimates, Parliament of Australia, Canberra, 23 October 2018, 47 (Mr Warwick Soden, Chief Executive Officer and Principal Registrar, Family Court of Australia).

⁴⁹ Judicial Conference of Australia, ‘Judicial Association says analysis of Federal Court’s work is fundamentally flawed’ (Media Statement, 30 October 2018) <<https://www.jca.asn.au/judicial-association-says-analysis-of-federal-courts-work-is-fundamentally-flawed-30-october-2018/>>.

- b. the length and complexity of the matters heard and determined by individual judges during the limited time period over which the “statistics” were compiled;
 - c. the amount of time spent by individual judges case-managing matters which settle either before trial or part-heard and the clearance rate as a result of settlements;
 - d. the work done by judges sitting from time to time in other jurisdictions and other non-judicial work performed by individual judges, for example on committees, on Law Reform Commissions, and in judicial education in the region; or
 - e. appellate work of the court.
68. The Attorney-General’s statement does not acknowledge the fact that despite the challenges of under-resourcing, the Court is achieving a 100 per cent clearance rate.⁵⁰
69. Further, the Attorney-General’s statement does not take into account the adverse, ongoing impacts of delayed and insufficient judicial appointments over the last fourteen years. The ‘usual’ position advanced by the Attorney-General assumes at least a static level in those undertaking the work – when a workforce is reduced, the output of the overall organisation would usually be expected to reduce.
70. Additionally, orders entered by consent have not been excluded from the statistics for the Federal Circuit Court against which the Family Court is compared. Whilst it is accepted that proceedings commenced by Applications for Consent Orders are filed as a matter of course in the Family Court, (for which the statistics are adjusted), there is evident adjustment in the disposition rates asserted for the Federal Circuit Court to recognise consent orders entered, even where concluded by the parties or Registrars outside of Court.
71. Differences in the courts’ disposition rates are not proof that the Family Court is failing nor a mandate for reform. They are simply a reflection of the fact that the Courts perform work which differs substantially in complexity, content and form, and of manifest under-resourcing pressures.
72. To the extent that it is argued by the Government that the Bills will result in the disposition of more cases leading to less delays, the Association takes direct issue with the validity of that contention.
73. Former Chief Justice of the High Court, the Honourable Robert French AC, said in 2009 that:⁵¹

⁵⁰ Chief Justice of the Family Court of Australia, the Honourable Chief Justice John Pascoe AC CVO, ‘State of the Nation’ (Speech delivered at 18th National Family Law Conference, Brisbane, 3 October 2018) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/speeches-conference-papers/2018/speech-cj-nflc>>.

⁵¹ Chief Justice R S French, ‘Boundary Conditions – the funding of Courts within a Constitutional Framework’ (Speech to the Australian Institute of Judicial Administration, Australian Court Administrators’ Group Conference, Melbourne, 15 May 2009) 2-3 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj15may09.pdf>>.

...The provision of public moneys to the courts is necessarily founded upon value judgments about their functions in the maintenance of constitutional arrangements, the rule of law and the provision of access to justice for individuals, organisations and governments.

If these larger considerations are not taken seriously a reductionist approach characterised by a kind of simplistic economic rationalism may cause inappropriate funding decisions to be made or inappropriate conditions to be attached to funding. Any model which treats the courts as competitors in a market for the provision of dispute resolution services requires particularly close scrutiny. That having been said, the community, through its elected representatives, has every right to require that measures are in place to ensure that public resources allocated to the courts are used efficiently and that their use is capable of intelligible explanation and justification.

74. There was much discussion last year of statistics, case times and disposition rates. What has been missing from this policy debate is any meaningful consideration and discussion of the factors identified in Mr French's first paragraph, including the extent to which our family law system reflects and upholds the rule of law, provides and supports access to justice for families and children, and whether current budgeting arrangements and expectations satisfactorily support the institutional independence of the judiciary and the separation of powers.
75. The importance of family, and a just, accessible family law system, to Australian society is well-established. If a system is struggling to realise its key purpose or deliver a key service, the policy answer is not to compromise or do away with that service. The answer should be to better resource and support its service delivery.
76. Historically, inappropriate funding decisions have catastrophically undermined the civil justice system's capacity to deliver family law services in a timely manner. Correcting this through the injection of funding and resourcing in the 2019-20 Budget must be a priority.

CAN SAVINGS AND EFFICIENCIES BE REALISED THROUGH THE BILLS?

77. This section considers whether efficiencies and savings could be realised in the family law system through the proposed court merger the subject of the Bills.
78. There is widespread concern amongst stakeholders, shared by the Association, that in the name of achieving efficiencies, the Bills will have the effect of abolishing a specialist superior court of record and will thus result in a significant diminution in the quality of the family law justice system, to the detriment of Australian children and families in need of its services.
79. 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,⁵² and run in effect by the Federal Court.

80. As identified in the FCFCA Bill’s EM, the PWC Report has been relied upon by the Government as the foundation for its claims regarding the efficiencies, backlogs and delays in the Courts.⁵³
81. For the reasons set out in detail in the Association’s submission to the Inquiry, the PWC Report does not provide a clear mandate or persuasive case for the Government’s propose restructure of the family law system. There is no attempt to advance any basis for the efficiencies asserted, including in the PWC Report from which they are sourced. The asserted efficiencies defy rational explanation and display a misunderstanding of both the present court system and that which is proposed by the Bills.
82. In summary, the PWC Report has been taken out of context and the statistics relied on rejected by many witnesses before the Committee including the Association.
83. PWC Partner Ms Zac Hatzantonis, told the Committee in Adelaide that “We can’t comment on the broader intent of usage of our report by government. Our focus of the report was very clearly on operational data; it didn’t consider detailed reform opportunities.”⁵⁴
84. No procedural or management reforms can have any material impact upon the delays, and associated time, financial and emotional costs for litigants, without appropriate and increased resourcing.
85. The absence of any commitment to any real and sustained increase in funding to the court system, however structured, makes such efficiency claims unrealistic.
86. It is also unclear what the basis is for the financial saving of \$3 million to be realised over the forward estimates under the proposed reform.⁵⁵ If these savings are predicted to be realised through the creation of a single entry point and harmonisation of rules, which can be done without legislation, it would be more frugal not to proceed with the legislative reform, which would allow the \$4 million already earmarked “to assist with the implementation costs of the structural reform of the federal courts” to be used to fund further resourcing, including the provision of further family consultants and registrars.⁵⁶

⁵² See Commonwealth, *Attorney-General’s Portfolio 2018-19 Portfolio Budget Statement* (2018), 135 [1.1].

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

⁵⁴ Ms Zac Hatzantonis, Evidence to Adelaide Public Hearing of the Legal and Constitutional Affairs Legislation Committee’s Inquiry into the FCFCA Bills, 11 December 2018, 48.

⁵⁵ See Explanatory Memorandum, Federal Circuit and Family Law Bill 2018 [16].

⁵⁶ *Ibid*, [15].

87. 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.
88. The Bills propose that ultimately all of the work of the Family Court will be subsumed by the existing Federal Circuit Court which, as the examples illustrate, is simply unable to deal with its existing workload. That this is proposed to occur without any additional resourcing is alarming.
89. Failure to do so will simply perpetuate existing pressures and problems in a new structure.

Improvements that do not require legislation

90. There are improvements that can be made now to the family law system that do not require legislation.
91. The first is to make use of existing rule-making powers to achieve a single set of rules, practices and procedures for family law matters. The legal profession has long-advocated for this measure, which has been consistently rejected by both Courts. Legislation is not required to achieve the “common leadership, common management and a comprehensive and consistent internal case management approach” referred to in the Explanatory Memorandum of the FCFCA Bill.⁵⁷
92. There is no reason, therefore, why objectives outlined at [5] and [7] of the FCFCA Bill’s Explanatory Memorandum could not be achieved by harmonisation of court rules without requiring legislation.⁵⁸
93. A single case management procedure should be implemented, trialed and assessed before any further reform, particularly legislative reform is undertaken. If like results could be achieved without legislation, this could allow the \$4 million set aside to assist with “implementation costs of the structural reform” to be reinvested directly in additional resources for the courts including judges.⁵⁹
94. Second, investing funding and improved resourcing in the family courts, including appointing more judges with relevant experience would make an almost immediate impact on reducing case backlog and improving disposition rates.
95. The Association has repeatedly called for a commitment by the Federal Government to the proper funding of the family law system and the Courts within it so as to provide a functioning and sustainable system of justice for those members of the community in need of family law assistance.

⁵⁷ Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 [3].

⁵⁸ Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 [5], [7].

⁵⁹ Ibid, [15].

96. The NSW Bar is committed to working in a constructive manner with the Government to ensure the family law system is adequately resourced to promote access to timely and affordable justice for those family law litigants and children.
97. Legislative reform should not and need not be progressed until these initiatives have been tried and properly tested.

THE FAMILY LAW BAR IN NSW

98. The Association is a voluntary professional association comprised of more than 2,400 barristers with their principal place of practice in NSW.⁶⁰ Currently, 189 of our members reportedly practice in the area of family law and guardianship.⁶¹ 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.⁶²
99. Barristers are independent specialist advocates,⁶³ both in and outside of the courtroom.⁶⁴ Barristers owe their paramount duty to the administration of justice.⁶⁵
100. NSW barristers appear on a daily basis assisting clients in the Federal Circuit Court and the Family Court, including the appellate division. They do so on a pro bono basis, as well as in matters funded by Legal Aid NSW and on private retainers. Barristers also contribute in many and varied ways, all in a voluntary and unpaid capacity, to the development of the law and procedure of both Courts. The Association provides extensive pro bono assistance to the community of NSW in a family law context through barristers' participation in the Family Law Settlement Service and the Legal Referral Assistance Scheme. This is separate from the pro bono matters that many of our members take on of their own accord.
101. The Association's Family Law Committee is comprised of 12 appointed barristers with active practice in family law,⁶⁶ including three Senior Counsel, who volunteer their time and expertise. Representatives of the Family Law Committee meet regularly with Federal Circuit Court judges and Family Court judges to provide feedback and put forward the views of the profession in relation to the conduct of hearings and the management of delays in the Courts.

⁶⁰ New South Wales Bar Association, *Statistics*, as at 19 November 2018
<<https://www.nswbar.asn.au/the-bar-association/statistics>>.

⁶¹ *Ibid.*

⁶² New South Wales Bar Association, *New South Wales Bar Association Strategic Plan* (2017)
<<http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad061e3db4/attachment/strategic.pdf>>.

⁶³ *Barristers' Rules* rule 4(c).

⁶⁴ See *Barristers' Rules* rule 11(c)(d).

⁶⁵ *Barristers' Rules* rules 4(a), 23.

⁶⁶ New South Wales Bar Association, *Appointments* (2018) <<https://www.nswbar.asn.au/the-bar-association/appointments>>.

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

CONCLUSION

103. In conclusion, the Association recommends that funding and resourcing Australia's family law system, especially the courts, must be a key priority in the 2019-20 Budget to improve the administration of justice for children and families in their most vulnerable time.
104. The family law system and courts are a critical piece of social justice infrastructure that has long been neglected by successive budgets.
105. The cost of failing to invest in our family law system has direct consequences for families and children, manifesting in unacceptable delays and costs which in many cases are prohibitive and directly impact on the accessibility and quality of justice.
106. The Association would be pleased to provide any additional information or answer any questions Treasury may have.

29 January 2019