Law Council
OF AUSTRALIA

Responses to Questions on Notice

Joint Select Committee on Australia's Family Law System

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges that this submission has been prepared by the Executive of its Family Law Section. The Family Law Section is the largest of the Law Council's specialist Sections. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2,400 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The current members of the Family Law Section Executive are:

- Paul Doolan (Chair);
- Michael Kearney SC (Deputy Chair);
- Di Simpson (Treasurer);
- Wendy Kayler-Thomson (Immediate Past Chair);
- Sydney Williams QC
- Greg Howe
- Jaquie Palavra
- Anne-Marie Rice
- Marcus Turnbull
- Minal Vohra SC
- Jason Walker
- Nicola Watts

Introduction

1. The Law Council of Australia (**Law Council**) is grateful for the opportunity to have appeared before the Joint Select Committee on Australia's Family Law System (**Committee**) at its public hearing in Sydney on 13 March 2020.

2. On 24 March 2020, the Committee provided the Law Council with four additional questions on notice arising from the public hearing. Responses to these questions are found below.

Question 1

3. In the course of the public hearing, Senator Hanson raised the issue of costs orders against lawyers in family law proceedings and has sought further details on examples of this occurring.

4. In addition to the cases cited at paragraph 123 of the written submission lodged by the Law Council with the Committee on 20 December 2019, and the matters referred to in the Law Council's oral testimony before the Committee,[1] the following reported cases from the Family Court of Australia, its Appeal Division, and the Federal Circuit Court of Australia, address the power of courts exercising jurisdiction under the *Family Law Act 1975* (Cth) (**Family Law Act**) to make costs orders against lawyers:

Federal Circuit Court of Australia

- *Bartram v Ogden* [2018] FCCA 3195;
- *Eames v Eames (No 2)* [2018] FCCA 3908 (appeal dismissed in *Benard v Eames* [2020] FAMCAFC 47);
- *Kaufman v Sandor* [2018] FCCA 2701;
- *Laurens v Laurens (No 2)* [2017] FCCA 109; and
- *Weldon v Levitt (No.2)* [2018] FCCA 436.

Family Court of Australia

- *Cassidy v Murray* (1995) 19 Fam LR 492;
- *Dunwell v Dunwell (Indemnity Costs Against A Lawyer)* [2012] FAMCA 337;
- *Farina v Lofts* [2019] FAMCA 354;
- *Freye v Gingko* [2012] FamCA 942;
- *Goldy v Goldy* [2011] FAMCA 477;
- *In the Marriage of C J and K M Anstis* (1999) 26 Fam LR 548;
- *Lambert v Jackson* [2011] FAMCA 275;
- *Martin v Harris* [2010] FAMCA 239; and
- *Tang v Keats* [2016] FAMCA 99.

Full Court of the Family Court of Australia

- *F Zawadzki v A Zawadzki* [2020] FAMCAFC 14;
- *G & G (a Law Firm) v McMurphy* [2012] FAMCAFC 134;
- *G (a Solicitor) v Monaghan* [2013] FAMCAFC 63;

[1] Joint Select Committee on Australia's Family Law System, *Proof Committee Hansard* (13 March 2020), 6.

- *Hutcheson v Meli* [2016] FAMCAFC 258; and
- *Z (a Solicitor) v Limousin* [2010] FAMCAFC 5.

Question 2

5. In the first of a series of written questions on notice, Senator Waters asserts that underfunding of the Commonwealth Family Violence and Cross-Examination of Parties Scheme (**Scheme**) resulted in significant delays to matters where parties could not retain lawyers. Noting this position, Senator Waters has asked whether the Law Council can:

    - provide information about the extent of delays across the country and whether there are any other difficulties with the operation of the scheme; and
    - comment on the importance of the cross-examination scheme, and the funding needed to support it.

6. The Law Council notes that these questions might also be usefully directed to National Legal Aid which may be able to provide information as to the funding of cases attracting section 102NA of the Family Law Act, and in particular, whether allocated funding has been exceeded and what percentage of parties subject to a section 102NA order receive funding to engage legal representation.

Can the Law Council provide information about the extent of delays across the country, and whether there are any other difficulties with the operation of the scheme?

7. The Scheme operates in conjunction with section 102NA of the Family Law Act, which reads as follows:

> **102NA Mandatory protections for parties in certain cases**
>
> (1) If, in proceedings under this Act:
>
> (a) a party (the ***examining party***) intends to cross-examine another party (the ***witness party***); and
>
> (b) there is an allegation of family violence between the examining party and the witness party; and
>
> (c) any of the following are satisfied:
>
> (i) either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party;
>
> (ii) a family violence order (other than an interim order) applies to both parties;
>
> (iii) an injunction under section 68B or 114 for the personal protection of either party is directed against the other party;
>
> (iv) the court makes an order that the requirements of subsection (2) are to apply to the cross-examination;
>
> then the requirements of subsection (2) apply to the cross-examination.

(2) Both of the following requirements apply to the cross-examination:

(a) the examining party must not cross-examine the witness party personally;

(b) the cross-examination must be conducted by a legal practitioner acting on behalf of the examining party.

Note 1: This section applies both in the case where the examining party is the alleged perpetrator of the family violence and the witness party is the alleged victim, and in the case where the examining party is the alleged victim and the witness party is the alleged perpetrator.

Note 2: This section does not limit other laws that apply to protect the witness party (for example, section 101 requires the court to forbid the asking of offensive questions and section 41 of the *Evidence Act 1995* requires the court to disallow certain questions, such as misleading questions).

Note 3: To avoid doubt, a reference to a party in this section includes a reference to a person who is a party because of the operation of a provision of this Act (for example, sections 92 and 92A, which are about intervening parties). This section only applies to an intervening party if the intervening party is involved in the allegation of family violence, whether as the alleged perpetrator or as the alleged victim.

(3) The court may make an order under subparagraph (1)(c)(iv):

(a) on its own initiative; or

(b) on the application of:

(i) the witness party; or

(ii) the examining party; or

(iii) if an independent children's lawyer has been appointed for a child in relation to the proceedings—that lawyer

8. As can be seen, when subsection (1) of section 102NA is satisfied, the effect of subsection (2) is that the court must make an order preventing any applicable unrepresented party from cross-examining the other party, if they attempt to do so. Once such an order is made, the Legal Aid Commission (however so named in the relevant jurisdiction) is called upon to allocate the representation and funding is to be provided.

9. Problems arise when section 102NA orders are made close to the trial date. Once an unrepresented party attracts the provisions of section 102NA, the court must make an order preventing that person from cross-examining the other party. To afford procedural fairness to that unrepresented party, the trial may need to be adjourned to allow that party to receive the benefit of the Scheme.

10. On occasions there have not been funds available under the Scheme to enable a party to receive representation, notwithstanding a section 102NA order having been made. An example is found in the decision of *Fraser v Lafayette* [2020] FCWA 43 (*Fraser*) in which O'Brien J stated at paragraphs 31 and 32:

> *In short, I conclude that a trial in this matter cannot proceed in a manner fair to the wife if she is precluded from cross-examining the husband because the operation of s 102NA prevents her from doing so*

> *personally, and she is unable (as distinct from unwilling) to secure representation, whether through the Scheme or otherwise. That conclusion is readily reached.*
>
> *Indeed, there is even potential for unfairness to the husband if he is, in those circumstances, not cross examined on his evidence in chief. That is so, as the weight to be given to admissible evidence upon which the witness cannot be cross examined, through no fault of the party who would wish to cross examine, can itself potentially be diminished.*

11. In *Vallace v Vallace* [2020] FCCA 664*,* the court adjourned the trial because the mother had ceased to be legally represented. While she had attracted the Scheme, she was unable to obtain funding for new representation in time for the trial.[2]

12. There are no doubt many other (unreported) examples of similar situations, where a trial has been adjourned to allow a recently unrepresented party to have the benefit of the Scheme.

13. It is noted that Judges are now adding notations to orders made throughout proceedings, placing parties on notice as to the effect of section 102NA. An example is found in the decision of *Waldon v Cronin* [2019] FCCA 1517, as follows:

> *B. If in any proceedings there are allegations of family violence and the provisions of section 102NA of the Family Law Act 1975 apply (see attached Family Violence Information Sheet), any unrepresented party will not be permitted to personally cross-examine the other party/parties.*
>
> *C. Affected unrepresented parties may apply to the Commonwealth Family Violence and Cross-Examination of Parties Scheme ("the Scheme") for representation but any such application must be made at least 12 weeks prior to the final hearing.*
>
> *D. Further information about the legislation and the Scheme can be found at Part 4 of the attached Family Violence Information Sheet.*
>
> *E. If s102NA applies and a party becomes unrepresented after trial directions have been made, that party is required to promptly advise the Court.*

14. Such notations may prevent some unrepresented parties successfully arguing that a trial should be adjourned if that party has known of their position for some time prior to the trial date.

15. Court lists around Australia, are already oversubscribed. The COVID-19 crisis, and the associated rise in unemployment, will no doubt see more people become unrepresented and attract the Scheme (where they fulfil the other criterion). This will likely result in more trials being vacated and increase the delays in the system. There will also be greater pressure to find monies to fund those who require assistance.

16. As stated, the question regarding the actual number of section 102NA orders made and the funding of same are issues better addressed by National Legal Aid (and/or the Attorney-General's Department).

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[2] See, *Vallace v Vallace* [2020] FCCA 664, [9]-[10], [15].

Can the Law Council comment on the importance of the cross-examination scheme, and the funding needed to support it?

17. The Scheme is of great importance. It protects vulnerable witnesses (particularly victims of family violence) from being exposed to their alleged abuser.

18. Protection of vulnerable witnesses exists in other jurisdictions. An example is section 8A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas), which provides:

> **8A. Cross-examination of victims of certain offences and applications**
>
> (1) In any prescribed proceeding for an offence, a defendant is not to be permitted to cross-examine a witness who is the alleged victim of the offence unless the cross-examination is undertaken by counsel.
>
> (1A) In an application referred to in paragraph (ac) or (ad) of the definition of ***prescribed proceeding*** in section 3 , a ***defendant*** referred to in paragraph (ab) , (ac) or (ad) of the definition of defendant in section 3 is not to be permitted to cross-examine a person who is the alleged victim of any family violence offence to which the application relates unless the cross-examination is undertaken by counsel.
>
> (2) If a defendant is not legally represented in a prescribed proceeding that will involve the taking of evidence from a witness who is referred to in subsection (1) , or a person who is referred to in subsection (1A) , the judge must ensure that the defendant –
>
> (a) has been warned of the limitation on the right of cross-examination imposed by this section; and
>
> (b) has been informed that he or she may be entitled to legal assistance under the *Legal Aid Commission Act 1990*; and
>
> (c) has had a reasonable opportunity to obtain the assistance of counsel before the evidence is taken.
>
> (3) If it appears to be in the interests of justice that a person should have legal aid in connection with this Part and that the person has insufficient means to enable him or her to obtain that aid, the judge may make an order directing that the person be given assistance under the approved scheme for the time being in force under the *Legal Aid Commission Act 1990*.
>
> (4) If, in a prescribed proceeding, an unrepresented defendant obtains the assistance of counsel for the purpose of cross-examining such a witness, the judge must –
>
> (a) explain to the jury the limitation imposed by this section on the defendant's right to personally cross-examine the witness; and
>
> (b) warn the jury that no adverse inference may be drawn against the defendant from the requirement for the unrepresented defendant to obtain the assistance of counsel to cross-examine the witness.

19. The Law Council supports the Scheme and has always emphasised the need for it to be adequately funded. It is untenable for there to be delays to trials because of a lack of funding for an unrepresented party who attracts the Scheme.

20. The Scheme also ensures that the alleged abuser is represented so there can be a proper testing of the serious allegations made against that person. It is common for one party or both or all, to make accusations of family violence including, on occasions, child sexual abuse. This Scheme should result in most of those persons being properly represented at trial, allowing serious accusations to be tested. The Scheme also prevents a self-represented accuser from cross-examining the accused. This was the case in *Fraser*, referred to above. The Scheme is therefore protective of the accused and the accuser.

21. As a rule, having both parties represented leads to shorter trials, and greater settlement rates. The Scheme should be supported and properly funded.

Question 3

22. Senator Waters has asked the Law Council for its views on the adequacy of funding available to legal assistance services within the family law system. Specifically, Senator Waters asks whether the Law Council:

    - has an estimate of the funding needed to properly resource legal aid, and the legal assistance sector to support families in the family law system; and
    - has done any analysis of whether that investment would result in long-term cost savings to the justice system.

23. Legal assistance is provided in different forms by legal practitioners, law firms and publicly funded legal assistance services. It may be provided through free legal advice at a legal assistance service, through a grant of legal aid, through a pro-bono scheme provided by a private law firm, or through paid legal representation from a private law firm. The Law Council notes that Family Relationship Centres also receive Commonwealth funding to provide free legal advice and legally assisted family dispute resolution (**FDR**).

24. Early access to legal assistance can support parties to identify the nature and scope of their legal problem, understand the law, processes and pathways available to help them resolve it and dispel the commonly held, and sometimes dangerous, misconceptions held by some members of the public.

25. The Law Council notes a number of studies and reports that have been compiled over the years (although not an exhaustive list) which consider the cost of justice, access to it and the overall benefits to the community.[3] Reference will be made to some these in order to attempt to answer the specific question on notice.

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[3] See, eg, KPMG for Attorney-General's Department (Cth), *Family Dispute Resolution Services in Legal Aid Commissions* (December 2008); Rosemary Hunter, Jeff Giddings and April Chrzanowski 'Legal Aid and Self-Representation in the Family Court of Australia - A study to examine the relationship between the limited availability of legal aid funds for family law matters and the phenomenon of self-representing litigants in the Family Court' (Socio-Legal Research Centre, Griffith University, May 2003); PricewaterhouseCoopers for National Legal Aid, *Economic value of legal aid - Analysis in relation to Commonwealth funded matters with a focus on family law* (2009);
PricewaterhouseCoopers for Law Council of Australia, *Legal aid funding – Current challenges and the opportunities of Cooperative Federalism Final Report* (December 2009); National Legal Aid, Submission to the Treasury, *2018-29 Pre-Budget Submissions* (31 January 2018); Productivity Commission, *Access to Justice*

26. At the outset, the Law Council notes the difficulty the questions import in terms of quantification of funding required to properly or adequately resource the sector and calculating long-term costs savings to the justice system.

27. As found recently by the Australian Law Reform Commission (**ALRC**) in their report *Family Law for the Future – An Inquiry into the Family Law System* (**the Family Law System report**):

> *the family law system has been deprived of resources to such an extent that it cannot deliver the quality of justice expected of a country like Australia, and to whose family law system other countries once looked and tried to emulate.*
>
> *There is a chronic lack of funding for the appointment and proper training of judicial resources (including judges, judicial registrars – none of whom are currently employed within the courts, and registrars), court-based social services professionals (including Family Consultants and Indigenous Liaison Officers), and legal aid services (including Independent Children's Lawyers). As a consequence, children and families are deprived of sufficient time and attention being given to their matter at all stages of the process, with the obvious risks that this entails. Faith in the system is lost. The lack of resources has been a matter of concern at the highest levels for 30 years. In 1991, in Harris v Caladine, Brennan J said:*
>
> > *It seems the pressures on the Family Court are such that there is no time to pay more than lip service to the lofty rhetoric of s. 43 of the Act … It is a matter of public notoriety that the Family Court has frequently been embarrassed by a failure of government to provide the resources needed to perform the vast functions expected of the Court under the Act. But the Constitution does not bend to the exigencies of a budget and, if the humanly familial relations create a mass of controversies justiciable before the Family Court, Justices must be found to hear and determine them.*[4]

What is the Law Council's estimate of the funding needed to properly resource legal aid, and the legal assistance sector to support families in the family law system?

28. As noted above, this is a difficult question to answer with any great precision, due the limited number of recent empirical studies or reports specifically examining the cost of providing family law services by the legal assistance sector. The Law Council notes that the majority of the reports referenced above consider funding to the sector in diverse areas of law (civil, family and criminal) and regard must be had to these to inform any possible estimate or quantification, including the lack of sufficient levels of funding overall of the legal assistance services sector, as they are an indicator of actual levels of funding, service gaps and unmet need.

29. Throughout 2017-18, the Law Council undertook one of the most comprehensive, national reviews into the state of access to justice in Australia in the past 40 years,

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Arrangements (Inquiry Report No 72, 2014); National Legal Aid, Submission No 6 to Productivity Commission, *Access to Justice Arrangements Inquiry* (16 August 2013); Urbis Consulting for Attorney-General's Department (Cth), *Review of the National Partnership Agreement on Legal Assistance Services 2015-2020 Final Report* (19 December 2018.

[4] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Report No 135, March 2019) [1.8].

the *Justice Project*.[5] The *Justice Project Final Report* estimated that the Commonwealth funding shortfall for the total legal assistance sector is at least $310 million per annum. This figure comprised:

(a) the Productivity Commission's estimate that the Commonwealth should provide additional funding of around $120 million per annum for civil legal assistance services; and

(b) PricewaterhouseCoopers' (**PwC**) estimate that to return the Commonwealth's share of Legal Aid Commission funding to at least 50 per cent, the Commonwealth should provide $190 million per annum.[6]

30. In the 2019-20 Budget, the Australian Government announced that it will increase overall funding of the legal assistance sector by approximately $20 million per annum (indexed) from 1 July 2020.[7] As part of this, the Australian Government provided funding certainty to the sector and reversed scheduled cuts to the funding of Aboriginal and Torres Strait Islander Legal Services (**ATSILS**). Additionally, in the Mid-Year Economic and Fiscal Outlook 2019-20 released in December 2019, the Australian Government announced that it would provide $15.3 million in additional funding to the legal assistance sector.[8] This additional funding is contingent on it being matched by the states and territories. While these measures are welcome and desperately needed, they fail to address chronic underfunding of the sector by the Australian Government.

31. In its submission to the Treasury's 2020-21 pre-Budget process, the Law Council estimated that this annual shortfall is now at least $390 million.[9] Updated estimates from PwC indicate that for the Commonwealth to return to a 50 per cent share of total funding for Legal Aid Commissions, the level of additional funding required has increased from $190 million per annum to $270 million per annum.[10] The Law Council has repeatedly called for the Commonwealth's share of Legal Aid Commission funding to return to at least 50 per cent, allowing for a more equitable split with the states and territories. This reflects the Law Council's longstanding concerns that since 1997, the Commonwealth has dramatically reduced its spending on Legal Aid Commission funding on a real *per capita* basis.

32. Beyond the Law Council's *Justice Project,* a number of other reports, reviews and evaluations highlight the funding cycles, short-falls, cost-benefit analyses and Commonwealth/state/territory share of funding of legal assistance sector services, including:

(a) The Commonwealth Attorney General's Department evaluation report on *Family dispute resolution services in legal aid commissions*, which found in the cost-benefit analysis that FDR was cheaper than litigation,[11] and recommended continuous improvement of the FDR programme in the legal

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[5] Law Council of Australia, *The Justice Project: Final Report* (August 2018) <https://www.lawcouncil.asn.au/justice-project/final-report>.
[6] Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018) 11 recommendation 2.1.
[7] Australian Government, *Mid-Year Economic and Fiscal Outlook 2019-20* (December 2019) 198 <https://budget.gov.au/2019-20/content/myefo/download/MYEFO_2019-20.pdf>.
[8] Ibid.
[9] Law Council of Australia, Submission to the Treasury, *2020-21 Pre-Budget Submissions* (20 December 2019) 13 <https://www.lawcouncil.asn.au/docs/cd726d84-2459-ea11-9403-005056be13b5/3727%20-%20Pre%20Budget%20submission%202020-21.pdf>.
[10] Ibid.
[11] KPMG for Attorney-General's Department (Cth), *Family Dispute Resolution Services in Legal Aid Commissions* (December 2008) 93.

aid commissions, encompassing a number of areas including: undertaking risk assessment and management approach to screening; strengthening referral pathways and relationships to Family Relationship Centres; developing an objective, outcomes based performance measurement framework; and collecting robust data regarding the cost of FDR and the cost of litigation.[12]

(b) The report prepared by PricewaterhouseCoopers for National Legal Aid titled the *Economic Value of Legal Aid* looked at legal aid funding over a 12 period from 1997 to 2008.[13] The data showed a decline in the Commonwealth funding share from 49 per cent in the 1996-97 period to 32 per cent in the 2007-08 period. The Law Council notes that this share has fallen further in the intervening period.[14] At the time of National Legal Aid's report, family law matters comprised 93 per cent of cases where legal advice and representation was provided. It found that unmet demand was expected to increase as a result of increasing demand for services and the increasing number of persons not eligible under the means test. The law Council anticipates that, given the current COVID-19 crisis and significant job losses nationally, this demand on legal aid services will increase dramatically.

This report found that the:

> *net efficiency benefits of providing legal aid for Family Court representation, duty lawyers and dispute resolution services range from $15.86 million to $32.90 million per annum. This is a range of benefit-cost ratios of 1.60 to 2.25.*[15]

This report concludes

> *there is a strong economic justification for the provision of legal aid on multiple levels:*
>
> - *Direct legal aid assistance in relation to court and dispute resolution services for Family Law matters has a net positive efficiency benefit for the justice system. These benefits outweigh the costs of providing these services, ranging from a return of $1.60 to $2.25 for every dollar spent.*
> - *Efficiency benefits can be expected to be observed in a greater magnitude through the provision of education, information and legal advice by legal aid. These services reach a broader group of recipients and are likely to lead to appropriate and efficient pathways taken through or away from the justice system, from the outset.*
> - *Benefits also accrue to individuals and the community from quality and effective justice outcomes and resolutions of matters, reached with the assistance of legal aid services.*

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[12] Ibid 4-5.
[13] PricewaterhouseCoopers for National Legal Aid, *Economic value of legal aid - Analysis in relation to Commonwealth funded matters with a focus on family law* (2009).
[14] Law Council of Australia, Submission to the Treasury, *2020-21 Pre-Budget Submissions* (20 December 2019) 13 <https://www.lawcouncil.asn.au/docs/cd726d84-2459-ea11-9403-005056be13b5/3727%20-%20Pre%20Budget%20submission%202020-21.pdf>.
[15] PricewaterhouseCoopers for National Legal Aid, *Economic value of legal aid - Analysis in relation to Commonwealth funded matters with a focus on family law* (2009), table ES3 'Summary Results of Cost Benefit Analysis', viii.

The case studies presented in this report give some indication of these benefits and when these results are extrapolated out across legal aid recipients, they are significant.

Clearly, the benefits quantified in this report are only one part of the economic return that legal aid provides; legal aid demonstrably benefits those receiving legal aid support, those people and businesses they have contact with, the community more broadly and the efficiency of the legal system as a whole.

Therefore, there is a strong economic case for appropriately and adequately funded legal aid services, based on the magnitude of the quantitative and qualitative benefits that this funding can return to individuals, society and the government.[16]

(c) The report entitled *Legal aid funding – Current challenges and the opportunities of cooperative federalism,* commissioned by the Law Council, Australia Bar Association, Law Institute of Victoria and the Victorian Bar, which noted that Commonwealth *per capita* funding to Legal Aid Commissions (primarily for family law matters) in 2009 was $8.26, non-specific funding for Community Legal Centres was $1.40, and non-specific funding ATSILS was $2.75. The report recommended that increased funding with a reformed funding framework was required to assist disadvantaged Australians in obtaining adequate legal representation.[17]

(d) The Final Report of the *Review of the National Partnership Agreement on Legal Assistance Services 2015-2020* quantifies the cost of duty lawyer and representation services delivered by Legal Aid Commissions in 2017-18 in family law as $46 million.[18] This report details a national data profile showing that:

- *LACs [Legal Aid Commissions] have provided over 600,000 duty lawyer, legal representation and facilitated resolution services in the 2016, 2017 and 2018 Financial Years*
- *There has been a steady growth in the total number of services delivered by LACs in these matters over the last few years, from 615,835 services in the 2016 Financial Year to 651,461 services in the 2018 Financial Year*
- *The overall growth in services was almost 6%, but the highest rate of growth over the last three years of the NPA has been in relation to civil law duty lawyer services (+ 46%), family law duty lawyer services (+29%) and in criminal law representation services (+12%).*
- *Criminal law matters comprise the majority of legal assistance services followed by family law and civil law matters.*

[16] Ibid ix.
[17] PricewaterhouseCoopers for Law Council of Australia, *Legal aid funding – Current challenges and the opportunities of Cooperative Federalism Final Report* (December 2009) 9.
[18] Urbis Consulting for Attorney-General's Department (Cth), *Review of the National Partnership Agreement on Legal Assistance Services 2015-2020 Final Report* (19 December 2018) 11.

- *The private legal profession plays a critical role in the delivery of legal assistance services provided by LACs. While LAC salaried lawyers provided the bulk of duty lawyer services (69%) in Financial Year 2018, around 70% of legal representation services are conducted on assignment by private legal practitioners. This pattern has remained steady over the last three years for representation services, but the proportion of duty lawyer services conducted by in-house lawyers has increased.*[19]

The report concludes that the legal assistance sector continues to deliver value for money under the National Partnership Agreement (**NPA**):

> *However, a range of factors support a finding that the sector delivers good value for money. Legal assistance services under the NPA have a strong focus on targeting financially disadvantaged clients, and other priority groups who are otherwise unlikely to secure legal advice or representation. This underpins a core value proposition for the sector, with legal assistance services contributing to efficient resolution of legal problems, as parties operating without advice or representation add time and cost to legal processes and to the courts. Clients who are subject to legal orders may also be more likely to breach those orders if they do not understand them or the consequences of breach. More generally, legal advice or representation assists in securing better outcomes for clients.*
>
> *The NPA also supports early intervention through required reporting on community legal education (CLE), legal task assistance and pre-court resolutions. The integration of legal and non-legal services (for example, financial counselling in CLCs, family support workers in some LACs) also create a better service experience for clients, allow lawyers to efficiently focus on core legal work, and are enabling of better legal outcomes.*
>
> *Together, these practices are likely to reduce downstream costs and deliver value to the community.*
>
> *A further marker of value for money lies in the ability of LACs and CLCs to leverage low cost legal support services outside their organisations, through grants of legal aid at rates below private market cost and coordination, the facilitation significant pro bono support from legal professionals, and utilisation of law students and paralegals.*[20]

However, the Law Council noted in its October 2018 submission to the Review of the National Partnership Agreement on Legal Assistance Services that:

> *… the current level of funding under the existing NPA does not address the growing funding crisis in the legal assistance sector, resulting in significant unmet legal need.*

[19] Ibid 7.
[20] Ibid viii-ix.

The Law Council has consistently advocated for increased funding to the legal assistance services, in line with the findings of numerous inquiries and reviews. Most recently, the Law Council's the Justice Project, concluded that Commonwealth, State and Territory governments should invest significant additional resources in LACs, CLCs, ATSILSs and FVPLSs to address critical civil and criminal legal assistance service gaps. This should include, at a minimum, $390 million per annum.

A prominent theme identified throughout the Justice Project is that the cost of legal assistance is a frequent and formidable barrier for people with complex and intersectional disadvantage. Government-funded legal assistance services such as those provided under the NPA are often the only option for vulnerable people experiencing legal problems. Yet, federal funding for legal aid has declined to such an extent that despite the fact that around 14 percent of Australians live below the poverty line, just eight percent of all Australian households now qualify for legal aid. Meanwhile, in 2015-16, CLCs had to turn away nearly 170,000 people, which the National Association of Community Centres highlights is a conservative number.

While it is understood that the overall quantum of funding available to the sector is outside the review's terms of reference, to meet the objectives of the NPA, there is, unavoidably, a need for increased funding. Without increasing funding to the legal assistance sector, the NPA and mechanisms such as collaborative service planning essentially involve moving service gaps, rather than filling gaps.[21]

(e) The Productivity Commission's Final Report entitled *Access to Justice Arrangements* was delivered in 2014. It found that there are more people living in poverty (14 per cent) than are eligible for legal aid (8 per cent).[22] It also found that Legal Aid Commissions generate net benefits to the community and recommended an 'interim funding injection in the order of $200 million per annum' in order that the more pressing gaps in service delivery were addressed by legal assistance services.[23] This recommended injection included approximately $57 million to maintain existing front-line services in the legal assistance sector and relax the Legal Aid Commissions' means tests by 10 per cent.[24] The Productivity Commission estimated that this would increase the number of people eligible for grants of aid from around 1.4 million to 1.9 million people.[25] The recommended injection also included $124 million to provide additional grants of aid in civil matters (which included non-family law matters), estimating that this would provide an additional 40,000 grants of aid per year.[26]

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[21] Law Council of Australia, Submission to Urbis Consulting for Attorney-General's Department (Cth), *Review of the National Partnership Agreement on Legal Assistance Services* (5 October 2018) 5-6 <https://www.lawcouncil.asn.au/docs/a50e6d48-aeca-e811-93fc-005056be13b5/3520%20-%20NPA%20Review.pdf>.

[22] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) Appendix H, 1021-2.

[23] Ibid Appendix H, 1017.

[24] Productivity Commission (n 2) Appendix H 1023.

[25] Ibid.

[26] Ibid 1025.

33. The Law Council, like National Legal Aid, recognise the need for a mixed model of service delivery to enable Legal Aid Commissions to draw on both in-house professionals and the private profession for delivery of services. National Legal Aid has drawn attention to its ongoing concerns that private legal practitioners providing quality legal representation services on a grant of legal aid are withdrawing from legal aid work because of poor legal aid fee rates.[27]

34. The benefit to the community of pro-bono work undertaken by the legal profession cannot be underestimated as an integral part of legal assistance to disadvantaged Australians. In the *Justice Project Final Report*, the Law Council noted that:

> *… the pro bono contribution of the Australian legal profession is substantial, of great value to the community, and is a celebrated aspect of Australia's legal culture. Australian lawyers provide hundreds of thousands of pro bono work hours every year to those who have no other options and cannot afford to pay for legal services. In 2017, the Australian Pro Bono Centre ('APBC') reported that in 2015-16, the number of pro bono hours per lawyer, per year, was 34.8, a 9.7 per cent increase since 2014.36 This is based on data from larger firms in Australia only, and does not include the contributions of sole practitioners, those in smaller or mid-sized firms, or counsel. Pro bono services are especially valuable in RRR communities. In this context, Regional Alliance West highlighted:*
>
> > *…the unacknowledged contribution that many private practitioner lawyers make to their communities through providing free or low cost assistance to their clients or contributing in other ways, such as being involved on the boards of local not-for-profit organisations or sporting groups.*
>
> *The APBC aims to grow the capacity of the Australian legal profession to provide pro bono legal services for marginalised persons, including by identifying best practice and innovation in this arena. Its submission described how pro bono services have assisted individuals across all Justice Project priority groups through a variety of innovative means. Pro bono assistance was also emphasised by several legal assistance services as fundamental to their operations, or in underpinning collaborations to address emerging and urgent needs.*[28]

Has the Law Council done any analysis of whether that investment would result in long-term cost savings to the justice system?

35. As noted above, in 2017-18, the Law Council undertook a comprehensive examination of the access to justice needs of vulnerable people, referred to as the *Justice Project*. The *Justice Project* focused on barriers to justice faced by different priority groups of disadvantaged Australians and identified what worked to reduce those barriers. This analysis was not specific to one area of law. However, it can be drawn on to inform and contextualise pressures on the family law system as a whole, and to the downstream benefits flowing from a properly resourced system. This should not only be measured in cost savings, but also on how children and families are kept safe and their well-being maintained.

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[27] National Legal Aid, Submission to the Treasury, *2018-29 Pre-Budget Submissions* (31 January 2018) <https://www.nationallegalaid.org/resources/nla-submissions/>.
[28] Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018) 13.

36. In the *Justice Project Final Report*, the Law Council noted that:

> *The recent policy focus by governments on addressing family violence has led to positive movement. However, this focus has not generally included a sufficient investment in courts and legal services for people experiencing family violence to manage the downstream impact. Legal assistance services are unable to keep up with demand; many victims are forced to self-represent, which sometimes can allow violence to continue or even escalate. The funding of family courts, as well as state and territory courts, has similarly failed to keep pace with the growth in the number of people who need access to the courts. This, combined with the breadth and complexity of the issues, can result in long and unsustainable court delays.*
>
> *These realities have serious consequences for victims, threatening their physical safety and emotional wellbeing, as well as the safety of their children. There is a clear need to increase funding to courts and to ensure there is stable and adequate funding of legal assistance services, including specialist service providers such as FVPLS and women's legal services. The downstream consequences for the justice system should also be considered earlier in the policy development process.*[29]

37. It was also noted that intensive legal assistance is often important for many other disadvantaged Australians, including Aboriginal and Torres Strait Islander people, who often have serious unmet needs in civil and family law areas.[30]

38. The Law Council, in the Dispute Resolution Chapter of the *Justice Project Final Report*,[31] recommended as part of increasing the evidence base, that governments should resource research bodies to undertake further independent research into the suitability of various alternative dispute resolution (**ADR**) models for different groups of people experiencing disadvantage, noting that there is a lack of detailed research in this area. This research should investigate the benefits and risks of ADR models, and the necessary safeguards, accommodations and support which are needed to address any risks and to increase accessibility for different client groups.

39. The Law Council also recommended that Governments should consider funding the expansion of appropriate models of legally assisted ADR for more vulnerable client groups at risk of power imbalances, such as victims of elder abuse and family violence. Relevant models include Legal Aid Commission Family Dispute Resolution programs, which employ safeguards including screening out inappropriate cases, 'shuttle' or remote conferencing and specially trained mediators. The Law Council notes that the Australian Institute of Family Studies has been engaged by the Commonwealth Attorney-General's Department to evaluate the family law courts Small Claims Property Pilot and the Legal Aid Commission Lawyer-assisted Family Law Property Mediation Trial. [32]

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[29] Law Council of Australia, *The Justice Project: Final Report – Introduction and Overview* (August 2018) 27.
[30] Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018) 20.
[31] Law Council of Australia, *The Justice Project: Final Report – Recommendations and Group Priorities* (August 2018) 6.
[32] Australian Institute of Family Studies, *Evaluation of the Lawyer-assisted Property Mediation: Legal Aid Commission Trial* (Web Page) <https://aifs.gov.au/projects/evaluation-lawyer-assisted-property-mediation-legal-aid-commission-trial>.

40. The Law Council emphasises, as recently noted in its submission to the *Review of the National Partnership Agreement on Legal Assistance Services* on 18 November 2019, that current funding levels are insufficient for the legal assistance sector generally:

> *The Law Council appreciates that the quantum of funding provided to the legal sector is outside the scope of the Overview Paper. However, the Law Council remains concerned that the small increases in sector funding over the proposed life of the NLAP do not nearly address the funding shortfall identified by numerous reports, including the Law Council's Justice Project. Without the provision of significant additional funding commitments to be administered under an agreed NLAP, the extreme access to justice gaps will be perpetuated and entrenched for the life of the agreement.*
>
> *The strain on the legal assistance sector to address unmet legal need given restricted funding was noted by the NPA Review. The Reviewer acknowledged in the Final Report the consistent narrative among stakeholders that 'growing demand for legal assistance services coupled with the increasing costs of delivery are placing significant external pressure on the sector' and that this 'compromises the achievement of the NPA's aspirations as services' resources are focused on striving to meet demand while facing increasing costs, rather than focussing on the aspirations of the NPA'. Unmet legal need was also identified in the review of ILAP, where it was pointed out that submissions 'consistently articulated the view that there is an insufficient level of funding provided for legal assistance services to Aboriginal and Torres Strait Islander peoples through the ILAP and other sources to meet the current level of legal need.*[33]

41. The Law Council recommended in the *Justice Project Final Report* that Justice Impact Tests be introduced at Commonwealth, state and territory levels to facilitate the smoother development of laws and policies which would have downstream impacts on the justice system.[34] It was also suggested that Governments should better support the legal professionals who deliver justice to marginalised groups,[35] recognising their invaluable role in serving the community and preventing downstream costs to communities and individuals, by implementing relevant recommendations in the Legal Services chapter.[36] The role of the Law Council in implementing its respective recommendations in that chapter is also essential.

42. In terms of examining long-term costs savings and the pressures caused by underfunding of the legal assistance sector and, indeed, the family law courts, the Law Council maintains its position that a lack of funding for one area of the justice system results in cost-shifting to other areas, often causing additional expense and delay. This is an inefficient use of taxpayer funding, for example::

    - a lack of legal assistance results in court delays to assist self-represented litigants, who must act for themselves in often enormously stressful circumstances; and

[33] Law Council of Australia, Submission to Urbis Consulting for Attorney-General's Department (Cth), *Review of the National Partnership Agreement on Legal Assistance Services* (5 October 2018) 1-2.
[34] Law Council of Australia, *The Justice Project: Final Report – Recommendations and Group Priorities* (August 2018) 13-4.
[35] Ibid 6 [2.16].
[36] Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018).

- funding cuts in one legal assistance area result in additional pressures elsewhere across the sector to meet the gaps – including upon the pro bono sector, which can never be expected to take the place of government-funded legal assistance.[37]

43. A 2003 study examining levels of legal aid and self-represented litigants in the Family Court by Griffith University, found:

> *… an extensive relationship between the unavailability of legal aid and self-representation in the Family Court. That relationship is found not just in legal aid rejections or terminations, but also in non-applications for legal aid.*
>
> *The data suggests, however, that the level at which the means test is currently set does not accurately reflect the level at which people can and cannot afford to pay for their own lawyer, but rather creates a group of people who are not eligible for legal aid but who are unable to afford private representation. These people become self-representing.*[38]

44. The study also suggested that discrete or unbundled nonrepresentation type legal services provided by Legal Aid Commissions performed an important role for litigants who were ineligible for legal aid and were, consequently, self-represented:

> *… given the impact of the means and merits tests, other non-means and merits tested,*
>
> *non-representation services provided by Legal Aid Commissions prove to be an important source of assistance for self-representing litigants. Interactive services such as legal advice sessions, telephone or in person advice, assistance with documents and letters, and duty lawyers, were the most frequently used services.*[39]

45. The ALRC's Family Law System Report, reporting on available data regarding the number of families entering the family law system, observed:

> ***unrepresented litigants are more likely to take a matter to trial:*** *The proportion of self-represented litigants increased sharply when matters that proceeded to trial were isolated from the proportion of unrepresented litigants in all matters.* [40]

46. Concerningly, the data indicated that in 2017, over half (52 per cent) of applicants seeking parenting orders were unrepresented, 25 per cent in financial matters and 29 per cent for both parenting and financial matters.[41]

47. Reducing these percentages alone would result in long-term cost savings to the justice system and warrant an investment on the part of government.

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[37] Law Council of Australia, *The Justice Project: Final Report – Executive Summary* (August 2018) 12.
[38] Rosemary Hunter, Jeff Giddings and April Chrzanowski 'Legal Aid and Self-Representation in the Family Court of Australia - A study to examine the relationship between the limited availability of legal aid funds for family law matters and the phenomenon of self-representing litigants in the Family Court' (Socio-Legal Research Centre, Griffith University, May 2003) 33.
[39] Ibid 34.
[40] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Report No 135, March 2019) 80 [3.3].
[41] Ibid 107 [3.102].

48. In addition to its work as part of the *Justice Project*, the Law Council draws the Committee's attention to the recent report of the International Bar Association and the World Bank which surveyed 50 cost-benefit studies of past and proposed legal aid programs across the world.[42] This report found that these cost-benefit analyses suggest that the economic benefits of legal aid investment outweigh the costs, and that support for legal aid programs can bring significant budgetary savings to the government.[43]

49. The report further identified that legal aid can bring cost savings to the justice system and can deliver substantial savings to governments by reducing expenditure on other public services or by avoiding or limiting the use of state resources. For example, in the United Kingdom:

    - for every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34;
    - for every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98;
    - for every £1 of legal aid expenditure on advice relating to social welfare entitlements, the state saves £8.80; and
    - for every £1 of legal aid expenditure on employment advice, the state saves £7.13.[44]

50. In Scotland, every £1 spent on legal aid in housing cases saw a return of around £11 and every £1 spent on legal aid in criminal or family cases saw a return of around £5.[45]

Question 4

51. A further written question on notice provided by Senator Waters seeks the Law Council's view on the proposed merger of the Family Court of Australia and the Federal Circuit Court, specifically the Law Council's reflections on the impacts of the merger on the quality and timing of outcomes in family law matters.

52. On 2 April 2020, the Law Council lodged its submission with the Senate Legal and Constitutional Affairs Legislation Committee in respect of the Federal Circuit Court and Family Court of Australia Bill 2019 (**the Bill**).[46] This submission provides detailed analysis and commentary on the Bill and the negative effects of the merger of the courts which would, in the view of the Law Council, effectively abolish the Family Court of Australia. For ease of reference, the Law Council refers the Committee to paragraphs [3] to [22] of that Submission which have been extracted below as an Annexure to this response.

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[42] International Bar Association and World Bank Group, *A Tool for Justice: A Cost Benefit Analysis of Legal Aid* (2019) 2 <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=341684c7-5ad5-4f20-810a-54473bfa5829>.
[43] Ibid.
[44] Ibid 19.
[45] Ibid.
[46] Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Federal Circuit and Family Court of Australia Bill 2019 & Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 [Provisions]* (2 April 2020).

Annexure

Extract from the Law Council's submissions to the Senate Legal and Constitutional Affairs Legislation Committee, in respect of the Federal Circuit Court and Family Court of Australia Bill 2019.

1. …

2. …

3. The LCA agrees that:

   (a) there are significant shortcomings in the dual family law courts structure (of the FCoA and FCC) and the management of the family law system;

   (b) government, the courts and the legal sector must work to improve outcomes for families and children following the breakdown of relationships;

   (c) it was timely for the Government to have commissioned the ALRC to undertake a far-reaching review of the Australian family law system which resulted in the release of the ALRC Final Report;

   (d) where parties cannot resolve matters themselves following relationship breakdown, the Australian family law system must deliver them justice in the form of multiple avenues by which a timely, efficient and cost-effective resolution of disputes can occur and which provides protection for the vulnerable and for victims of family violence. However, there will always be a need for a properly resourced and functioning court system to provide both a context within which disputes can be resolved and a just means by which those not otherwise able to be resolved can be determined; and

   (e) the move that is presently being undertaken by the FCoA and FCC through the Harmonisation of Rules Project to a single point of entry, harmonisation of rules and forms, and unification of procedures, will assist users of the family law courts system and the practitioners who operate within it and lead to reduced costs and greater certainty of outcomes. This is a matter which has been raised previously by LCA. The rule making power presently exists to the Courts to implement this reform and is already underway. There is no legislation required to enable this to occur.

4. The LCA does not agree that:

   (a) the court structural changes as proposed by the Bills (as was the case with the 2018 iteration of the Bills), will produce efficiencies, reduction in delays and deliverables for the community;

   (b) the Bills will reduce complexity or legal costs in the family law system;

   (c) the PwC Report makes a business case or policy foundation supportive of the changes proposed by the Bills. Further, that the primary economic case for the reforms put forward by the PwC Report, namely that it would result in an ability for the courts to dispose of an additional 8,000 cases per year (even were that disposals outcome accepted to be accurate), can no longer be seen to have any relevance as a basis for the proposed merger given that:

(i) the Bills have (in accordance with the recommendations made on 14 February 2019 by the Senate Committee) abandoned the transfer of appeals to the Full Court of the Federal Court of Australia. The PwC report estimated that by increasing the use of Appeal Division judges on first instances matters (and vice versa), increasing the rate of appeals matters managed as a single judge and by implementing a system of managed listing of appeals and scheduling, a combined efficiency gain of an additional 1,495 finalised cases per year could be achieved.[47]

(ii) the move to a single point of entry is already under consideration by the Harmonisation of Rules project of the family law courts without the need for statutory reform. The PwC Report stated that the establishment of a single point for filing, assessing and allocating first instance family law matters could result in a potential disposal of an extra 670 cases per year;[48] and

(iii) the consolidation of a single set of rules, forms, procedures and case management is already under consideration by the Harmonisation of Rules project of the family law courts without the need for statutory reform. Regarding case management, the PwC Report stated that implementing structured initial case management with appropriate judicial authority, and coordinating and standardising case listing, could result in an additional 3,170 matters being finalised per year.[49]

(d) governments have provided proper funding and resourcing to the existing family law courts system, associated services and/or Legal Aid Commissions.

5. The LCA recommends that:

(a) the Bills not be passed by the Parliament;

(b) the move to a single point of entry, harmonisation of rules and forms, and unification of procedures in the family law system should continue to be implemented with the benefit of consultation with the legal profession as that is a matter that has near universal acceptance (and can be implemented by reference to the rules of Court with no legislative amendments required);

(c) the Government engage with the ALRC Final Report and liaise with stakeholders as to which of the 60 recommendations are proposed to be implemented; and

(d) having regard to the ALRC Final Report and its recommendations, the stated aims of the Bills can be better and more effectively achieved by proper funding of the existing court system, timely appointment of judicial officers, improved case management, more intensive use of Registrars, proper funding of Legal Aid, and the structural reforms to the family law courts system put forward in the Semple Report and by the NSWBA.

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[47] PricewaterhouseCoopers, *Review of Efficiency of the Operation of the Federal Courts* (Final Report, April 2018) 2 <https://www.ag.gov.au/LegalSystem/Courts/Documents/pwc-report.pdf> ('*PwC Report*') 8, 55. The Law Council notes that the efficiency opportunities are additive to either a single point of entry (efficiency opportunity 1) or a consolidated first instance jurisdiction (efficiency opportunity 2) and that all efficiency opportunities, including case management efficiency opportunities, may have some overlap and specific consideration of how they interrelate would be required to access the potential efficiency gain.

[48] Ibid.

[49] Ibid.

The fundamental issues that family law reform must address

6. When examining the Bills, and having in mid-2019 provided to the Attorney-General's Department the comments of its FLS on the 60 Recommendations made in the ALRC Final Report, the LCA has considered:

   (a) what problems the Bills are designed to address;

   (b) how the Bills propose to address such problems;

   (c) the ability for the Bills to achieve those goals, and the likely cost, both in financial and justice terms; and

   (d) whether other or better solutions exist.

7. There are Objects of the Bills and statements made within the accompanying Explanatory Memoranda to the Bills, that LCA supports as essential to the maintenance and continued development of the Australian family law system.

8. The Explanatory Memorandum for the FCFC Bill (at paragraph 6) provides that the structural reform proposed would:

   (a) improve the efficiency of the existing split family law system – the LCA agrees with that aim and notes that the FLS has long advocated against a dual court system;

   (b) provide appropriate protection for vulnerable persons – the LCA agrees with that aim and notes it is the subject of consideration and recommendation by the ALRC Final Report; and

   (c) ensure the expertise of suitably qualified and experienced professionals to support those families in need – the LCA agrees with that aim and notes it is the subject of consideration and recommendation by the ALRC (see Recommendation 51 of the ALRC Final Report).[50]

9. It is the mechanism by which those goals and aims are to be achieved where views differ.

10. In November 2019, the (then) President of the LCA, Arthur Moses SC, delivered a speech to the Newcastle Law Society entitled, 'Why "Radical" is Not a Dirty Word in Family Law Reform'.[51] It outlines the proposals made by the LCA for structural family law reform, and makes the case for that reform and its benefits to the Australian community. A copy of the paper is annexed to and forms part of these submissions.

11. The LCA notes the following submission from the NSWLS in relation to the 2018 version of the Bills:

> *The Family Court of Australia should be a priority and choice as to where public money is spent.*

[50] Explanatory Memorandum, Federal Circuit Court and Family Court of Australia Bill 2019 and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 (Cth) 2 [6].
[51] Arthur Moses, 'Why "Radical" is Not a Dirty Word in Family Law Reform' (Speech, Newcastle Law Society, 1 November 2019).

Family law impacts a broad range of Australians, not just court users. The social, economic and emotional costs of having a system that is chronically under-funded and under-resourced are immense.

Many other nations look to Australia as a 'gold' standard for the provision of specialised family law services. Countries such as Hong Kong, Singapore, Japan and Fiji have turned to Australia to emulate many of our family law systems. We must not dissolve what we have, so hastily and without proper consultation.

12. The LCA notes the following submission received 6 March 2020 from the Queensland Law Society:

> *In summary, QLS does not support the Federal Circuit and Family Court of Australian Bill 2019 and Federal Circuit or the Family Court of Australia (Consequential Amendment and Transitional Provisions) bill 2019. In our view, the proposed reforms are significantly flawed and the Bills will not achieve their intended objective.*

13. The LCA notes the following submission in 2018 from the LIV in relation to the 2018 version of the Bills:

> *The LIV fully supports the objectives of the proposed restructure. Unfortunately, the proposal as it stands is unlikely to deliver on these expectations and is likely to instead have extensive and unintended adverse consequences for the families and children who participate in the family law system.*

14. In 1999, the then Shadow Attorney-General, Robert McClelland, used the debate in the House of Representatives on the Federal Magistrates (Consequential Amendments) Bill 1999, to state:

> *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.*[52]

15. The LCA notes the following March 2020 submission of the Queensland Bar Association:

> *Section 284 of the 2019 Bill proposes a wholesale review of the operation of the Act five years after its enactment. While a review of the legislation might suggest a commitment to ensuring the ongoing success of the proposed model, it is entirely unclear how long the court will take to implement these changes and therefore how long the new model will be effectively operating prior to such a review, thereby casting into doubt any statistics upon which such a review may be based.*
>
> *The Association is concerned with the substantial investment and delay caused by the numerous reviews of the family law system which have been undertaken in the previous five years. Furthermore, the Association is concerned that this proposed structural reform does not appear to be*

[52] Commonwealth, *Parliamentary Debates,* House of Representatives, 18 October 1999, 11,786-7 (Robert McClelland).

based upon the substantive recommendations advanced by the Australian Law Reform Commission despite the significant cost associated with that review. It is difficult to contemplate the purpose of such a review, if the review process is time and resource intensive, the recommendations of existing substantial reviews have not been adopted and the model may not be sufficiently operative for a review to give an accurate reflection of the model.

These concerns are exacerbated by the limitations identified in the report by PricewaterhouseCoopers upon which current criticisms of efficiency are based, and its ultimate conclusion that "the actual scope for efficiency will vary from estimates presented in this report". These limitations are likely to be present in any future review unless those limitations and assumptions are overcome.

16. The Government has now acknowledged that which appears otherwise universally accepted for a substantial time, namely that the dual family law courts system is and has been a failure.[53]

17. Criticisms of the decision to create dual courts, its structural inefficiencies and the manner in which it operates has meant less resources for the FCoA, are not new. In an article 20 years ago entitled *Family Law and the Family Court of Australia: Experiences of the First 25 Years*, then Chief Justice Nicholson of the FCoA and Margaret Harrison observed:

> *The Family Court has, on a number of occasions, pointed out the unacceptable complexities in its structure to various governments and parliamentary inquiries. Specifically, it has sought the appointment of specialist 'Chapter III' federal magistrates within the Court itself, and the establishment of something akin to a small claims tribunal to allow the summary disposition of minor disputes. Instead, the Government decided to establish the [*then*] Federal Magistrates Service as a separate entity under Chapter III, notwithstanding that scarce funds would be diverted from the Family Court into the administrative establishment and other costs of the Federal Magistrates Service.*[54]

18. The LCA notes the following submission received 6 March 2020 from the Queensland Law Society:

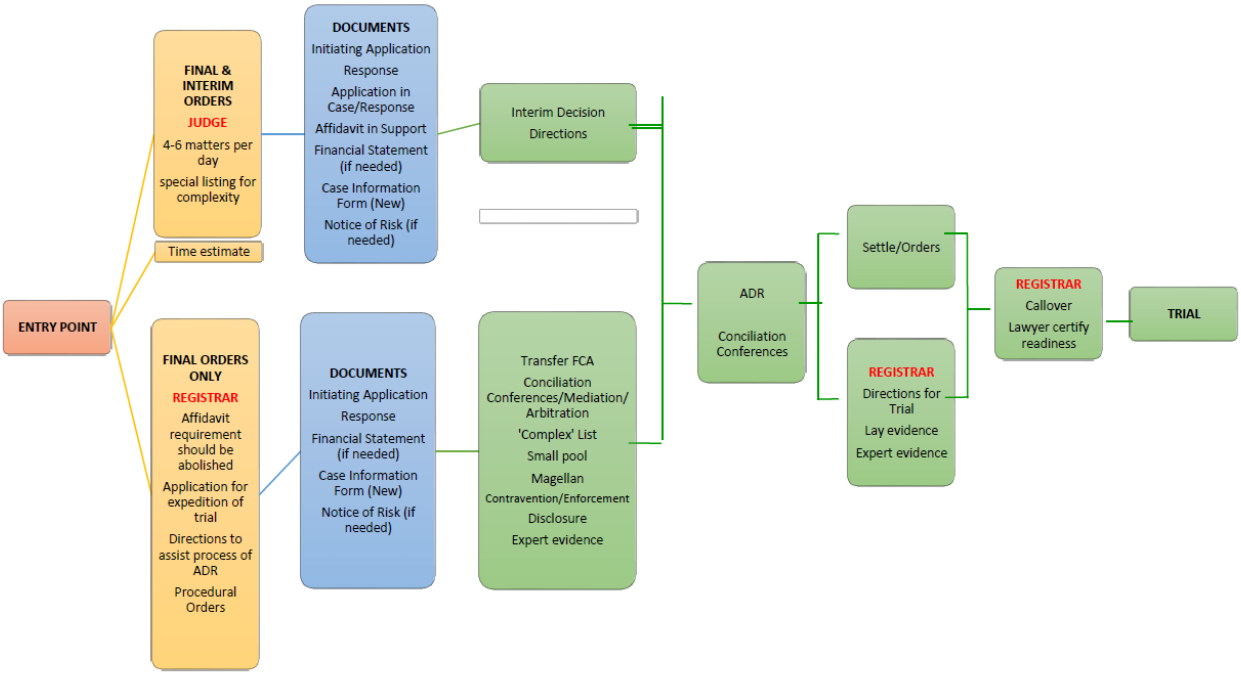
> *QLS supports the Law Council of Australia's view that the existence of two separate courts, with different rules, procedures and processes produces unnecessary complexity. QLS has consistently advocated for the creation of a single, specialist court for determining family law matters with one set of rules, procedures and processes. In our view, this would better facilitate timely and cost-effective resolution of disputes.*
>
> *However, the amalgamation of the Family Court and the Federal Circuit Court, as proposed in the Bills, does not achieve this. The structure proposed in the Bills continues to separate the Courts into two divisions, Division 1 and Division 2.*

[53] Christian Porter, Attorney-General, 'The State of the Nation' (Speech, 18th Biennial National Family Law Conference, 3 October 2018).
[54] Alastair Nicholson CJ 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.

In effect, there is no true amalgamation of the courts. It is therefore unclear how the issues around the complexity of the system will be properly resolved through the proposal. While we acknowledge the intention for a common case management approach to be adopted across both divisions, the structure does not appear to assist in reducing complication for those engaged in the system to a substantial extent.

19. The docket system that has been operational in the FCC since its inception was developed for a vastly different court, with lesser workload and more limited jurisdiction. Its 'judge heavy' case management system whereby each case is docketed to a judge throughout its time in the family law system does not now (if it ever did) make efficient and proper use of judicial hearing time, which is an incredibly valuable resource and which should not be unduly utilised in dealing with matters of a procedural, basic interlocutory or administrative nature and which could be better undertaken, and at less cost, by experienced court registrars.

20. The LCA notes that its FLS has previously prepared and provided to the FCC the draft model as set out below as to how it envisaged that case management could more efficiently be undertaken in the FCC through better use of Registrars and changes to the documents that needed to be filed when proceedings were commenced. The structural diagram below highlights a management system for use of Registrars at the front end and along the court pathway at critical points, with Judge time preserved for dealing with interlocutory hearings and final trials.



21. The LCA notes that this or a similar case management model could be applied to that court model put forward by the NSWBA in its July 2018 Discussion paper.[55] It involves a single entry point, with a decision to be made upon filing as to whether the matter was in the superior or trial division of the FCoA.

[55] New South Wales bar Association, *A Matter of Public Importance: Time for a Family Court of Australia 2.0* (Discussion Paper, July 2018).

22. The LCA notes the comments made in 2018 by the LIV (in relation to the 2018 Bills) in respect of the single point of entry:

> *The LIV notes this recommendation reflects the recommendations made by the House of Representatives Standing Committee on Social Policy and Legal Affairs' report,* A Better Family Law System to Support and Protect Those Affected by Family Violence.[56]
>
> *The LIV recommends the single point of entry consist of specialist case management Registrars to appropriately direct and triage family law matters. Matters should be assessed by the Registrar and sent to the FCoA or the FCC, as may be appropriate for the individual case. In addition, a judicial officer such as an FCC judge should be available to hear any urgent interim matters that require immediate judicial determination.*

[56] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 154 [4.254]; Chief Justice Pascoe, 'The State of the Nation' (Speech, 18th Biennial National Family Law Conference 2018, 3 October 2018).