



SUBMISSION | NEW SOUTH WALES
BAR ASSOCIATION

Senate Standing Committee on Foreign Affairs,
Defence and Trade: Inquiry into the Issues facing
Diaspora Communities in Australia

24 August 2020

Promoting the administration of justice

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

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

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

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,380 barristers who principally practice in NSW. Currently, 212 of our members report practicing in the area of family law and guardianship. We also include amongst our members judges, academics, and retired practitioners and judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Family Law Committee. If you would like any further information regarding this submission, please contact the Association's Director of Policy and Public Affairs, Elizabeth Pearson, at first instance on 02 9232 4055 or epearson@nswbar.asn.au.

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A. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the Senate’s Foreign Affairs, Defence and Trade References Committee (**the Committee**) for the opportunity to make submissions to the inquiry into issues facing diaspora communities in Australia (**the Inquiry**).
2. Multiculturalism is a great strength of Australian society. In 2016 one in two Australians were either born overseas or had at least one parent born overseas.¹ In 2019 thirty percent of Australia’s resident population, and thirty percent of the population of NSW, were born overseas.²
3. The Rule of Law provides that all are equal before the law. However, the reality in contemporary Australia is that people from culturally and linguistically diverse (**CALD**) backgrounds may face unique legal needs and challenges in accessing the justice system to enforce their rights, whether in civil, criminal and family law matters. These include language barriers, unfamiliarity with or mistrust of Australia’s legal system, services and conventions, and a lack of properly funded culturally appropriate services. The barriers and disadvantages faced by CALD communities have the compounded impact of placing CALD women and children in a high risk group of family violence.³
4. This submission addresses the Inquiry’s terms of reference (a), (b), (c) and (e) by examining access to justice challenges for diaspora communities in Australia. This submission considers three issues:
 - a. barriers to diaspora communities in engaging with Australia’s justice institutions;
 - b. the need to fund specialist, culturally competent legal assistance and Legal Aid; and
 - c. the importance of properly funded specialist services, including a stand-alone Family Court, in dealing appropriately with family violence.
5. Ensuring that members of diaspora communities in Australia can have timely access to properly resourced courts, specialist and culturally safe legal services, information and assistance is essential to protect their rights and safety at all times.
6. CALD community members should not be treated as second class citizens by being denied equitable access to essential services and infrastructure, including Australia’s justice system.

¹ Australian Bureau of Statistics, ‘2017.10 – Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016’ (2017)

[https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0-2016-Main%20Features-Cultural%20Diversity%20Article-60#:text=In%202016%20nearly%20half%20\(49.generation%20Australians%20\(born%20overseas\)>](https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0-2016-Main%20Features-Cultural%20Diversity%20Article-60#:text=In%202016%20nearly%20half%20(49.generation%20Australians%20(born%20overseas)>)

² Australian Bureau of Statistics, ‘Australia’s population: over 7.5 million born overseas’ (Media Release, 28 April 2020)

<https://www.abs.gov.au/ausstats/abs@.nsf/lookup/3412.0Media%20Release12018-19#:text=3412.0%20%2D%20Migration%2C%20Australia%2C%202018%2D19&text=More%20than%207.5%20million%20people.the%20Australian%20Bureau%20of%20Statistics>>; Australian Bureau of Statistics, *3412.0 – Migration, Australia 2018-19* <<https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3412.0Main%20Features42018-19?opendocument&tabname=Summary&prodno=3412.0&issue=2018-19&num=&view=>>.

³ inTouch, Multicultural Centre against Family Violence, *Submission*, Senate Standing Committee on Finance and Public Administration Inquiry into Domestic Violence in Australia (2014) 2.

B. Recommendations

7. The Association recommends that:
 - a. This Committee advocate to the Parliament to properly fund and resource Legal Aid and specialist, culturally safe legal assistance and other services for CALD communities in 2020-21 and over the forward estimates;
 - b. This Committee advocate to the Parliament to properly fund and resource the federal courts and family law system in 2020-21 and commit to doing so on an ongoing basis over the forward estimates;
 - c. This Committee advocate to Parliament to consistently and adequately resource domestic violence support services in 2020-21 and over the forward estimates;
 - d. A specialist, stand-alone and properly resourced Family Court be maintained in Australia to continue to provide specialist assistance to children, families and survivors of family violence;
 - e. The Federal Circuit and Family Court of Australia Bill 2019 (Cth) and accompanying transitional amendments bill (**the Amended Merger Bills**) should not be passed by the Parliament;
 - f. This Committee advocate to the Parliament to adopt the Association's Family Court 2.0 Model and relocate judicial officers hearing family law matters and the family law jurisdiction of the Federal Circuit Court into a second division within the Family Court.

C. Barriers to diaspora communities in engaging with Australia's justice institutions

8. The Association acknowledges that CALD communities are extremely diverse and that equity or access barriers may not arise for all members. However, it is widely recognised that some members of diaspora communities can face substantial and different challenges, which may give rise to diverse legal needs. If culturally safe legal information, support and assistance cannot be accessed in a timely manner, these legal needs may go unaddressed, with significant and sometimes life-threatening consequences.
9. The Australian Government's *Multicultural Access and Equity Policy Guide for departments and agencies* identified the following CALD community members as facing barriers to access and equity, and requiring support to achieve access and equity to government services and programs:⁴
 - a. migrants with low levels of English language proficiency;
 - b. refugee and humanitarian entrants;
 - c. visibly different migrants;
 - d. newly arrived communities and individuals with low levels of knowledge of the Australian system; and
 - e. other migrants experiencing difficulties in accessing services based on age, gender, sexuality, disability, youth or coming from collectivist cultures.
10. The Law Council of Australia's 2018 *Justice Project* identified that newly arrived communities and individuals from CALD backgrounds can experience challenges and legal needs including:⁵
 - a. exploitation in the workplace;
 - b. unfair consumer practices;
 - c. driving infringements;
 - d. specific family violence issues;
 - e. housing-related issues;
 - f. visa cancellations; and
 - g. discrimination.
11. The Family Law Council's 2012 report on *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* also recognised that newly arrived families faced "significant challenges... including strained relationships, increased likelihood of family breakdown and a

⁴ Australian Government, *The Multicultural Access and Equity Policy Guide for Australian Government departments and agencies* (2018) 5 <<https://www.homeaffairs.gov.au/mca/PDFs/multicultural-access-equity-policy-guide.pdf>>.

⁵ Law Council of Australia, 'Recent Arrivals to Australia', *Justice Project* (2018) <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Infographics/Recent%20Arrivals_FINAL.pdf>

heightened need for legal and family support services”.⁶ The report “raised concerns about family violence within new and emerging communities, as changing gender roles within families after settlement in Australia threaten traditional power relations and family stability.”⁷

12. Further, the Victorian Royal Commission into Family Violence acknowledged there are “some specific forms of family violence experienced by women in some CALD communities—for example, forced marriage, female genital mutilation, and dowry-related violence”.⁸
13. The Federation of Ethnic Communities’ Councils of Australia (FECCA) noted in a recent submission to the House of Representatives inquiry into family, domestic and sexual violence that:⁹

Women from CALD backgrounds are made even more vulnerable based on a range of factors including: a greater likelihood of not being a permanent resident, having limited or no access to social services; lower levels of English proficiency that can impact employment, education and the ability to form connections with the larger community; being overrepresented in casualised sectors which leads to financial instability and dependency. These vulnerabilities can be amplified for older women, women with disabilities, and those who identify as LGBTIQ+.

14. Accessing support or legal services to address such issues can be further complicated by factors including, as identified by the Victorian Multicultural Commission:¹⁰
 - Interpreter and translation needs - language barriers and low levels of literacy (including in native language and English);
 - Limited computer literacy, limitations of smart phone usage and information presented in English;
 - Cultural barriers - distrust of authority figures following experiences in country of origin or in pre-settlement journeys;
 - Additional complexity of the legal system - lack of awareness of avenues for alternative dispute resolution; and
 - The financial burden of accessing legal remedies.
15. It is vital that the cultural and social circumstances of CALD clients are understood and appropriately accommodated in the provision of services and legal assistance, including services to assist in combatting family violence. Cultural competency training must be provided in the justice system to ensure the needs of CALD clients are catered for, so that interactions with CALD communities result in positive outcomes informed by the unique family dynamics of diaspora communities. As outlined below in sections D and E of this submission, ensuring culturally safe service providers are accessible and properly resourced is critical to support CALD community members in need of legal support or assistance, whatever the form their legal need may take.

⁶ Family Court of Australia and Federal Circuit Court of Australia, *Multicultural Plan 2013-15* (2013) 4, citing Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012) 3.

⁷ Ibid.

⁸ Royal Commission into Family Violence, *Summary and Recommendations* (2016) 34.

⁹ *Submission 47*, Standing Committee on Social Policy & Legal Affairs, *Inquiry into Family, Domestic and Sexual Violence* (2020) 1.

¹⁰ *Submission 104*, Law Council of Australia, *Justice Project Consultations* (2017) 2.

D. The need to fund specialist, culturally competent legal assistance and Legal Aid

16. Equal and fair access to the law is undermined by the reality that, without Legal Aid or legal assistance, many people are not able to afford legal representation in criminal, civil or family law matters. It is critical to ensure that specialised, culturally safe legal assistance is properly resourced and readily accessible for all people experiencing legal need, especially where there is a risk to health and safety in circumstances of family violence.
17. The Senate acknowledged in May 2018 that while 14 percent of Australia’s population live below the poverty line, just six percent would actually qualify for Legal Aid under the contemporary tests imposed due to a chronic lack of resourcing.¹¹ The Association acknowledges the Federal Government’s May funding announcement of \$63.3 million to support frontline legal services in response to further pressures placed on legal assistance providers arising from the COVID-19 pandemic, including \$20 million to address domestic violence.¹² In June, the Federal Government announced that the National Legal Assistance Partnership 2020-25 will distribute over \$2 billion in funding for Commonwealth assisted legal services, with Legal Aid Commissions receiving \$1.2 billion, Domestic Violence Units/Health Justice Partnerships \$51 million and Family Advocacy and Support Services \$20 million.¹³
18. While this funding is very welcome and urgently needed, such investment must be proactive and ongoing to ensure the justice system and those who perform essential services within it are best equipped to respond to and support victims of family violence at all times, including during crises. This must include adequate, sustained funding for specialised legal assistance providers, such as Women’s Legal Services, CALD-specific family law support services and family violence service providers, including emergency and crisis accommodation.
19. The Law Council’s *Justice Project* found that:¹⁴

A number of different forms of family violence are insufficiently recognised, and responses are not always tailored to the particular circumstances and needs of diverse victims, including culturally and linguistically diverse (‘CALD’), LGBTI+ and Aboriginal and Torres Strait Islander people. In addition to funding specialist and community-controlled services, ongoing cultural competence training, designed in consultation with representative organisations, should be provided to personnel across the justice system and related agencies and services.
20. Similarly, FECCA identified that:¹⁵

¹¹ 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>>.

¹² Commonwealth Attorney-General, the Hon Christian Porter MP, ‘Funding boost to ensure struggling Australians can get legal assistance’ (Media Release, 6 May 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/funding-boost-ensure-struggling-australians-can-get-legal-assistance-6-may-2020>>.

¹³ Commonwealth Attorney-General, the Hon Christian Porter MP, ‘\$2 billion partnership to deliver legal assistance services for Australians’ (Media Release, 30 June 2020) <<https://www.attorneygeneral.gov.au/media/media-releases/2-billion-partnership-deliver-legal-assistance-services-australians-30-june-2020>>

¹⁴ Law Council of Australia, ‘People who Experience Family Violence’, *The Justice Project Final Report – Part 1* (2018) 5.

¹⁵ FECCA, above n 9, 3.

There is a serious and urgent need for the Government to invest in FDV [family and domestic violence] services that are tailored specifically for CALD women. Currently, there are very limited multicultural service providers that cater to CALD women and their children. Those that do provide crisis accommodation and case management services are often working to deliver numerous other services, such as legal representation, resettlement, and employment, without sufficient funding. Moreover, organisations that provide CALD specific FDV services... are based in city centres and are less accessible to women in rural and regional areas. These organisations need additional funding to provide for the growing number of CALD women in Australia...

CALD women, especially those from new and emerging communities (NEC), are less likely to be aware of the resources and FDV services that are available to them. According to FDV services, there is a significant demand for well-trained interpreters and cultural competency training to benefit their CALD clients. Interpreter services support these claims, while also adding that CALD women have reported feeling embarrassed and uneasy at the idea of narrating their experiences of violence to a member of their community. Moreover, women have reported having their words translated incorrectly or being interrupted by translators who are not trained to manage family violence situations... FECCA strongly recommends that translators, counsellors, and case workers working in family violence undertake sufficient and ongoing cultural competency training.

21. Chronic under-funding of Legal Aid and legal assistance in family law has meant that already complex and emotionally-fraught matters are made more difficult by high rates of unrepresented litigants. During 2018-19, the volume of cases in the Family Court in which neither party had representation more than tripled during that year from 4% to 14%, while the proportion of cases in which at least one party was represented was 15%.¹⁶ Most litigants who are unrepresented cannot afford legal representation.¹⁷ Unrepresented litigants generally have a wide range of needs including: information about support services and court processes; advice such as on form-filling, preparing court documents or rules of evidence; emotional and practical support.¹⁸
22. For any litigant, appearing without representation is intimidating, time-intensive, imposes significant stress and emotional strain, and may carry a financial cost if a person is required to take time off work to attend court. These pressures are compounded for CALD clients, who may be unfamiliar with Australia's legal system or principles, and survivors of family violence who may be placed at greater risk of harm through exposure to re-traumatisation or further abuse at the hands of their perpetrator through behaviour or signaling in a courtroom. In addition, Women's Legal Services Australia has previously noted that "it is common for a victim-survivor to not report family violence", including because of:¹⁹

concerns that reporting the violence can lead to further risk of harm (from the perpetrator directly but also further trauma from participating in the family law system itself), feelings of shame and convictions of not being believed, as well as cultural and/or language barriers to reporting and fear or lack of trust in legal systems for some groups of victim-survivors, including... culturally and linguistically diverse (CALD) victim-survivors.

¹⁶ Family Court of Australia, *Annual Report 2018-19* (2019) 25.

¹⁷ John Dewar, Barry Smith, Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 1.

¹⁸ *Ibid.*

¹⁹ Women's Legal Services Australia, *Submission 22*, Legal and Constitutional Affairs Committee's Inquiry into the Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018 (2018) 6.

23. The COVID-19 pandemic has underscored the importance of securing adequate Legal Aid and legal assistance funding to assist vulnerable people at all times. While platforms like Microsoft Teams have enabled some court hearings to continue remotely during COVID-19 lockdowns, the use of such technology has raised important considerations as to whether it is in the interests of justice and the parties for all matters to proceed through video-conferencing. It is difficult for virtual hearings to be conducted effectively if litigants are self-represented because they may not, for example, be able to access to sufficient technology, and virtual hearings compound communication difficulties, especially if assistance is required from an interpreter.
24. Legal Aid and legal assistance providers, and the federal courts hearing migration and family law matters, were already over-worked, chronically under-funded and severely under-resourced before the pandemic struck. Despite best efforts, this has inevitably impacted upon their ability to respond swiftly to community need. Crises like natural disasters, the 2019-20 bushfires and the COVID-19 pandemic place further pressures on these critical services.
25. Studies have shown a significant increase in the incidence of family violence during and following crisis and post-disaster recovery.²⁰ For example, one study found a 98 percent increase in violence against women as measured from before and after Hurricane Katrina.²¹ Research by Women’s Health Goulburn North East (WHGNE) following the 2009 Black Saturday bushfires evidenced an increase in domestic violence in bushfire affected communities.²² During the 2019-20 bushfire season, family violence service providers in NSW reported increased assaults in regions severely impacted by the fires.²³ This placed strain on front line services responding during and following the fires, including legal support groups such as Legal Aid and Women’s Legal Services.²⁴ Over four weeks in March and April, the number of urgent applications filed during the COVID-19 pandemic increased 39 percent in the Family Court and 23 percent in the Federal Circuit Court.²⁵
26. WHGNE’s recommendations included that family violence services should be “a visible and engaged part of disaster recovery” and funding for these services and women’s groups should be increased when demand increases post-disaster.²⁶ The Association supports these recommendations and further recommends that Governments should proactively budget for the downstream justice impacts and demands on legal and support services for all community members, including CALD clients.

²⁰ See, eg, R Maguire, D Bozin, G Mortimer, ‘Domestic violence will spike in the bushfire aftermath, and governments can no longer ignore it’, *The Conversation* (online) 18 November 2019 <<http://theconversation.com/domestic-violence-will-spike-in-the-bushfire-aftermath-and-governments-can-no-longer-ignore-it-127018>>.

²¹ Ibid, citing Schumacher, Coffey, Norris, Tracy, Clements and Galea, ‘Intimate partner violence and Hurricane Katrina: Predictors and associated mental health outcomes’ (2010) 25(5) *Violence Vict.* 588, 588-603.

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

²³ See, eg, Yoni Bashan, ‘Bushfires: Agencies report post-natural disaster spike in domestic violence incidents’, *The Australian* (online), 16 January 2020 <<https://www.theaustralian.com.au/nation/politics/bushfires-agencies-report-postnatural-disaster-spike-in-domestic-violence-incidents/news-story/ea822344afac37cb4796ff3e4735759b>>.

²⁴ See, eg, Maguire, Bozin, Mortimer, above n 20.

²⁵ Family Court, ‘The courts launch COVID-19 list to deal with urgent parenting dispute’ (Media Release, 26 April 2020) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr260420>>.

²⁶ Women’s Health Goulburn North East, above n 22.

27. Whilst the Association recognises the discrete funding initiatives announced by Government,²⁷ such initiatives fail to acknowledge or address the sustained reduction and inadequacy in recurrent expenditure on the core services of the courts. These initiatives do not provide an answer to the serial cuts to funding, and consequently services, that have been imposed upon the courts and do not permit the courts to maintain, let alone strengthen, the resources necessary to deliver its core services to the Australian community. In some instances, stand-alone initiatives actually divert resources otherwise allocated to the delivery of core services to the support of such initiatives, at the expense of the ability to maintain core services. The Association is unaware of any business case being advanced as to the merits of the initiatives, any consultation with stakeholders (including the legal profession) as to the utility and benefits of these initiatives, or of any consideration of the impact of such initiatives on the core operations of the court.
28. By way of example, in the case of the property pilot and property mediation pilots,²⁸ such expenditure is unlikely to advance the protection afforded to victims of family violence or CALD community members in need of assistance. To the contrary, without a sustained and proper commitment to ensuring that victims are able to receive proper advice and representation, such diversions may well leave victims more vulnerable and exposed. Unless community members have access to legal advice and representation that is available in a linguistically and culturally appropriate way, there is a risk such projects can become barriers to proper participation in the justice system and to attaining proper rights and protections available to others at law. There is a further risk that without access to culturally appropriate information or advice, such processes may only serve to reinforce entrenched cultural stereotypes or expectations, to the disadvantage of vulnerable parties.
29. Funding to conduct a pilot for the establishment of a systemic approach to identifying and managing family safety risks and for family violence training is laudable and much needed. However, it is of limited utility if, once identified, the courts lack the resources to deal with the identified issues in a timely and appropriate manner, or clients cannot access the information or appropriate assistance required to engage safely and effectively.

²⁷ See evidence to Senate Legal and Constitutional Affairs Committee, *Senate Estimates*, Canberra, 3 March 2020, 60 (Mr Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department).

²⁸ *Ibid*, 60-1.

E. Resourcing specialised services, including a stand-alone Family Court, in dealing appropriately with family violence

30. The Family Court and Federal Circuit Court recognised in their *Multicultural Plan 2013-15* that:²⁹

The courts have a significant role in ensuring services are accessible and culturally appropriate, and that information is provided to recently arrived and more established communities. To do this, the courts acknowledge the importance of engaging and working with organisations that support and represent migrant communities. Further, as a participant in the broader family law system, the courts must maintain and strengthen relationships with other agencies to ensure CALD clients can move between organisations with ease and without disadvantage.
31. The alarming prevalence of family violence in the system makes specialisation critical to promote safe engagement for all survivors of family violence with the courts and the justice system, from the time a matter is filed, through appropriate triage, active case management and expedited resolution. It is particularly important that CALD communities are able to access culturally safe services, legal information and legal assistance, to overcome the barriers identified above. Crises place further pressure on critical services, which simply cannot respond effectively to need if they have not been appropriately resourced beforehand to build resilience and responsiveness.
32. Even before the pandemic, at any given time, Family Violence Prevention Legal Services had to turn away between 30 to 40% of people contacting them for support because they simply did not have the resources to meet community demand.³⁰
33. Almost 70% of matters before the Commonwealth family courts involve allegations of family violence.³¹ Delayed access to the family law courts, primarily caused by chronic under-funding and under-resourcing, can be used by perpetrators of family violence as a further tool of abuse. Once accessed, chronic delays in the determination of issues by the courts exacerbate those issues. Some families are having to wait up to three years,³² or longer, to have their family law disputes resolved. Delays of more than six months have also been experienced in accessing interim hearings which, although abridged, can provide significant practical relief. This relief can include exclusive occupation of a home to ensure the safety of victims of family violence, including children. It can also include specific orders to prohibit contact by a perpetrator, orders for financial support for a spouse and children, and orders protecting children in circumstances of family violence.
34. Different combinations of frontline services may be called upon at different times, to provide both immediate and sustained support in the longer term to assist survivors of family violence. These

²⁹ Family Court and Federal Circuit Court, *Multicultural Plan 2013-15* (2013) 4.

³⁰ Australian Women Against Violence Alliance, 'Women's lives will be at risk because of decision not to act today – domestic violence experts' (Media Release, March 2020) <https://awava.org.au/2020/03/13/media-release/womens-lives-will-be-at-risk-because-of-decision-not-to-act-today-domestic-violence-experts?doing_wp_cron=1589642604.5754508972167968750000>.

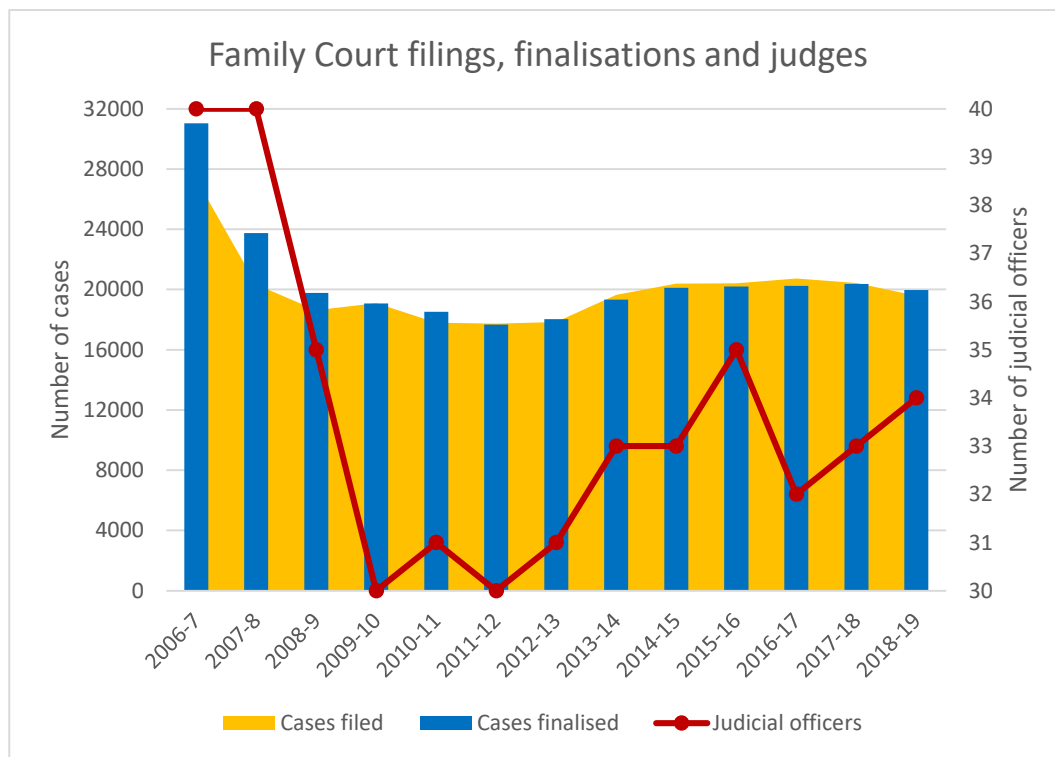
³¹ Women's Legal Services Australia, Safety first in family law (2019) <www.wlsa.org.au/campaigns/safety_first_in_family_law>; see also House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (2017) [1.6].

³² Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018, [53]; Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2019, [59].

services must be resourced to provide support on initial contact and an ongoing basis for as long as that support is required.

a Chronic under-funding and under-resourcing of the family law system by successive governments

35. The family law system and its courts are a critical piece of social justice infrastructure that has been neglected, by successive governments for decades, despite their important role in protecting children and families impacted by domestic violence, in concert with State courts. Counselling and support services in the court are also necessary services for CALD clients which underpin and complement judicial action.
36. At the core of so many of the issues confronted by the system is a chronic and sustained lack of proper funding and resources for the Family Court and the Federal Circuit Court, and a mismanagement of those resources. This includes a failure to appoint and maintain sufficient, appropriately experienced judicial officers and associated staff and insufficient funding to maintain the counselling and assessment services previously provided by the courts.
37. Failing to invest in the system has produced unacceptable delays and costs that directly impact on the accessibility and quality of justice for survivors of family violence. Well before the COVID-19 pandemic, the Family Court and Federal Circuit Court were each already facing backlogs of more than a year’s worth of cases.³³ As of November 2019, Judges in the Federal Circuit Court had “workloads of anywhere up to 600 cases on a docket”^{34, 35}

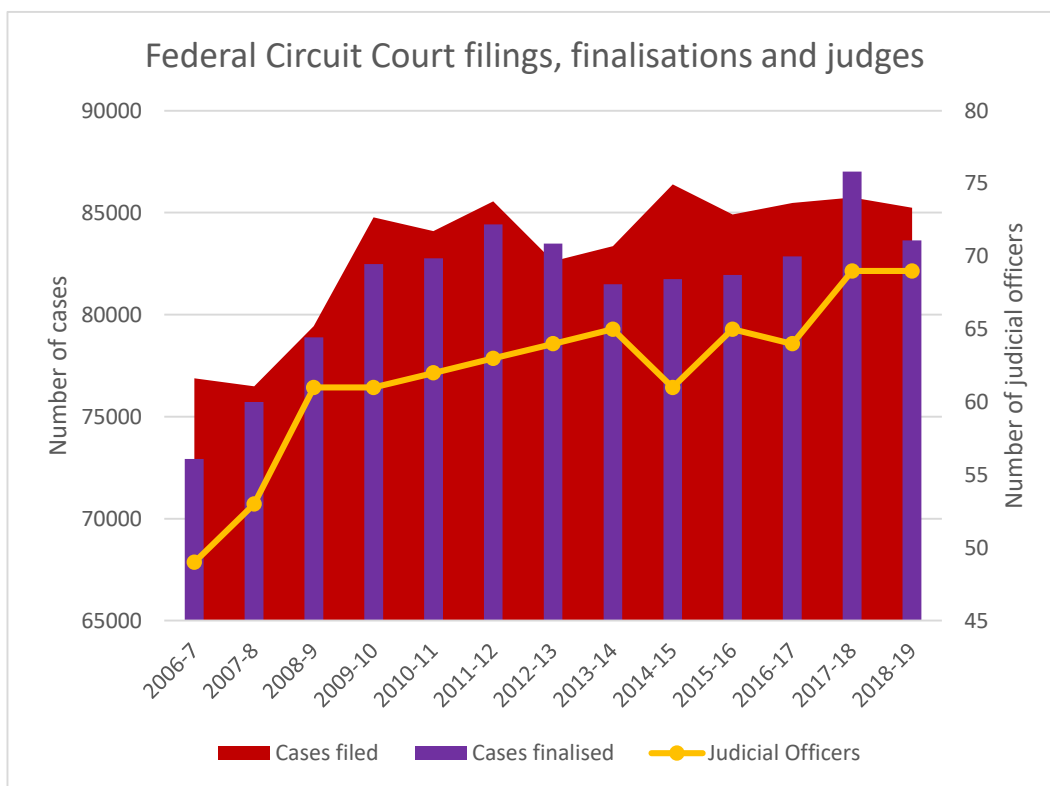


³³ Nicola Berkovic, ‘Courts reject questions over delays and judges’, *The Australian* (online) 23 October 2019, citing Family Court and Federal Circuit Court *Annual Reports 2018-19* (2019).

³⁴ A docket is the list of active cases before the Court that a Judge is managing and will eventually hear and decide.

³⁵ Chief Justice Alstergren, quoted in Tony Keim, ‘A family (court) affair’, *Proctor* (November 2019) 29.

38. The Productivity Commission’s *Report on Government Services*, released in January 2020, reported that the backlog of all pending non-appeal applications in the Family Court has grown from 4,997 to 6,720 (34 percent) since 2012-13, while the backlog of all pending applications in the Federal Circuit Court has grown from 31,067 to 50,791 (63 percent).³⁶
39. Despite achieving a clearance rate of 102 percent in 2018-19,³⁷ and finalising more cases than were filed during the year,³⁸ the Family Court had a backlog of 2,979 cases.³⁹
40. The family law backlog in the Federal Circuit Court increased from 17,088 cases in 2017-18 to 17,478 cases in 2018-19.⁴⁰ Further, the Federal Circuit Court disposed of 62 percent of final order applications within a year, falling significantly short of its target of 90 percent.⁴¹



41. In addition to the strain of its family law work, 11 percent of the Federal Circuit Court’s workload comprises other general federal law.⁴² Concerningly, the number of migration cases filed continued to rise for the fourth year, up from 5,312 in 2017-18 to 5,591 in 2018-19.⁴³ In late February 2020, the Federal Circuit Court had 11,000 pending migration cases to manage,⁴⁴ in

³⁶ Australian Productivity Commission, ‘Part C – Justice’, *Report on Government Services 2020*, table 7A.21.

³⁷ Family Court of Australia, *Annual Report 2018-19* (2019) 5, 16.

³⁸ *Ibid.*, 19.

³⁹ *Ibid.*, 17.

⁴⁰ Federal Circuit Court of Australia, *Annual Report 2018-19* (Cth) 30.

⁴¹ *Ibid.*, 27.

⁴² *Ibid.*, 30.

⁴³ *Ibid.*, 42.

⁴⁴ Law Council of Australia President, Pauline Wright, cited in Joe Kelly and Rosie Lewis, ‘Migration case load crushing Federal Circuit Court’ *The Australian* (online), 5 March 2020, <<https://www.theaustralian.com.au/nation/politics/migration-case-load-crushing-federal-circuit-court/news-story/68e4048e134d91e25319e4f337496>>.

addition to the family and general law matters. During 2018-2019 only 3,000 out of the 6,000 migration law filings were able to be resolved by the Federal Circuit Court.⁴⁵ The backlog of migration matters in the Federal Circuit Court is likely to increase due to the pandemic.

42. It is the Government's responsibility to resource and properly fund service providers and the courts to assist all in need of family law or migration assistance, including CALD clients.
43. The number of Judges available to hear matters directly affects disposition rates. A repeated failure over more than a decade to promptly replace retiring Judges has contributed to increased workloads for other Judges, put pressure on already crowded lists and cascaded increased disposition times over many years.⁴⁶ There has been a significant decrease in the number of judicial officers in the Family Court over the last 14 years, which has severely reduced the Court's capacity to manage its workload. The Federal Circuit Court has now been without a separate dedicated Chief Judge since December 2018. Two Judges have recently retired from the Sydney Registry of the Family Court. These Judges have not yet been replaced and there has been no indication from the Government as to if and when this will occur. These positions are already funded and should not incur any additional cost to fill. The courts have consistently warned of, comprehensively recorded and clearly tracked the adverse, ongoing impacts of delayed and insufficient judicial appointments on court backlogs through annual reporting over the last fourteen years.⁴⁷
44. Resourcing was identified as an area in need of urgent reform by the House of Representatives 2017 Inquiry, which 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".⁴⁸ Further, the Family Court advised in 2018 that:⁴⁹

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.** (emphasis added)
45. It is disappointing that despite Parliament's awareness of the issue, and the Government's first-hand knowledge of the impact that increasing funding, judicial and support staff has in reducing family court backlogs, sufficient resources have not been provided to the courts to address their workload or delays. It is also extremely concerning and unacceptable that whilst a large proportion of family law matters allege family violence, the courts are not properly resourced to effectively and appropriately manage their caseloads.
46. Despite best efforts, the challenges faced by judicial officers struggling to meet these caseloads adversely affect the quality of outcomes delivered for parents and children.

⁴⁵ Ibid.

⁴⁶ Family Court of Australia, *Annual Report 2008-09* (Commonwealth of Australia, 2009), 4.

⁴⁷ See, eg, Family Court of Australia, *Annual Report 2008-09* (Commonwealth of Australia, 2009), 4, 35; Family Court of Australia, *Annual Report 2009-10* (Commonwealth of Australia, 2010), 12, 41; Family Court of Australia, *Annual Report 2010-11* (Commonwealth of Australia, 2011) 46, 51; Family Court of Australia, *Annual Report 2011-12* (Commonwealth, 2012), 50.

⁴⁸ 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].

⁴⁹ Family Court of Australia, *Submission 44*, 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.

47. The practical, wellbeing and financial consequences of these delays are numerous and profound for the parties involved. There are also broader costs and impacts to the community, resulting from the consequences of family breakdowns not being determined in a timely manner.
48. The Association recommends that the Committee advocate to Parliament for a significant increase in funding and resources, including additional judicial officers, to assist in overcoming significant backlogs and case management and better support CALD clients and survivors of family violence.
- b) The importance of maintaining a stand-alone, specialist Family Court*
49. Family law is factually and legally complex, emotionally-charged and produces life-altering consequences for families and children. It is the area of law by which most people will come into contact with the justice system.⁵⁰
50. Judges working in this area not only require specialist technical knowledge, legal reasoning, fact finding and analytical skills, they also require highly effective communication and interpersonal skills and experience in social dynamics. One of the Family Court's most admired features is the fact that only those who "by reason of training, experience and personality"⁵¹ are suited to deal with family law cases are appointed as its Judges. By contrast, Federal Circuit Court Judges need not satisfy that same requirement.⁵²
51. A specialist stand-alone family court is important to ensure specialist knowledge and training for judicial officers, registrars and court staff to equip them to identify and manage risk, and protect children and victims in need of the courts' assistance. Importantly, a specialist court consists of more than just its Judges. It also includes support services, resources and processes. It is important to provide specialised court infrastructure to support children and families experiencing violence, and to coordinate and locate legal and non-legal support services. Currently, the Family Court is a part of a holistic, specialist system of interrelated and co-located services and resources. When properly resourced, the Family Court has excelled at the provision and application of specialist conciliation and assessment services. Registrars and family consultants, when properly resourced and deployed, are an integral part of case management, particularly the early identification, narrowing and resolution of issues.
52. The Amended Merger Bills would give effect to a proposal originally announced by the Government in April 2018 to abolish the stand-alone, specialist Family Court as we know it and collapse the Family Court into the generalist, overworked and under-resourced Federal Circuit Court. Although current Judges of the Family Court would be transferred to 'Division 1' of the merged court under the proposal, the Amended Merger Bills would nonetheless result in the abolition a stand-alone specialist, multi-disciplinary court ecosystem dedicated exclusively to family law matters, to the detriment of those in need of its services including victims of family

⁵⁰ Justice Abella, 'The Challenge of Change', (1998) Speech to the 8th National Family Law Conference, Hobart Tasmania, 25 October 1998, 2-3.

⁵¹ *Family Law Act 1975* (Cth) s 22(2)(b).

⁵² Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (House of Representatives, 2017) [8.21], citing Professor Patrick Parkinson AM, Private Capacity, *Committee Hansard*, Canberra, 17 October 2017, 1.

- violence. Departing from a stand-alone, specialist family court model with co-located legal and non-legal support services, as the merger entails, is contrary to the advice of experts and research and is not in the best interests of survivors of family violence in need of family law assistance.
53. Instead, the Association proposed in July 2018 the creation of a ‘Family Court 2.0’ to bring Judges currently hearing family law matters in, and the jurisdiction currently exercised by, the Federal Circuit Court into a second, lower division within the specialist, stand-alone Family Court.⁵³ This structural model has been in force for many years in the state of Western Australia, and was recommended by the 2008 *Future Governance Options for Federal Family Law Courts in Australia* report by Des Semple (**the Semple Report**).⁵⁴ The Association’s Family Court 2.0 model has subsequently been endorsed by stakeholders including Women’s Legal Services Australia and the Law Council of Australia.⁵⁵ The Association’s model does not, of itself, involve any greater revenue implications than the Government’s proposal.
 54. The Government’s merger proposal did not pass the 45th Parliament and has been strenuously opposed by stakeholders including the legal profession. One of the key reasons for this consistent opposition is that the merger will result in the loss of specialisation from the family law system which is critical to protect the safety and wellbeing of children, victims of family violence, CALD clients and families at their most vulnerable. Families within diaspora communities, and especially those dealing with challenges such as family violence, form part of the most vulnerable people who come into contact with the family law system.
 55. Unlike the Government’s proposal to merge the Family Court into the generalist Federal Circuit Court, the Family Court 2.0 model would have the significant advantage of promoting safety for children and adults by preserving access to services of a specialist Family Court.
 56. A family law system that values and operates on the basis of specialisation provides for the community to use expert assistance, which is crucial in circumstances of domestic and family violence. A specialised Family Court provides services which allow people from diverse cultures to access the family law system, such as culturally competent liaison officers, interpreters and other court staff. The family law system must move to consolidate and strengthen, not undermine, specialisation.
 57. By virtue of its very nature, the merger proposal would result in the Family Court ceasing to exist as a separate, stand-alone entity and being merged into a generalist court. In 1974, the Senate Standing Committee on Constitutional and Legal Affairs considering the Family Law Bill 1974 (Cth) “emphasised the need for a federal court of record which could deal *exclusively* with family law matters”⁵⁶ (emphasis added).

⁵³ New South Wales Bar Association, *Time to talk about a Family Court of Australia 2.0* (2018) <https://nswbar.asn.au/docs/mediareleasedocs/Family_Court_MR2.pdf>.

⁵⁴ Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (2008).

⁵⁵ Women’s Legal Services Australia, *Submission 18*, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Federal Circuit and Family Court of Australia Bill 2018* (Cth) (2018) 7; Law Council of Australia, *Submission 52*, Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Federal Circuit and Family Court of Australia Bill 2018* (Cth) (2018) 7, recommendation 4(d).

⁵⁶ The Hon Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, ‘Family Law and the Family Court of Australia: Experiences of the First 25 Years’ (2000) 24(3) *Melbourne University Law Review* 756, citing Senate Standing Committee on

58. Further, in 2000, former Chief Justice of the Family Court, the Hon Alastair Nicholson and Margaret Harrison noted:⁵⁷
- It is undoubtedly bewildering, costly and inefficient to deliver fragmented services through a plethora of courts, tribunals and social welfare agencies... Moreover, experience in Australia and overseas suggests that where a family court is a division of a generalist court, or where family law cases are simply assigned to judges or magistrates in a generalist court, the quality of performance suffers greatly.
59. The House of Representatives 2017 Inquiry recommended an increase in the specialisation of Judges undertaking family law work.⁵⁸
60. Former Chief Justice of the Family Court, the Hon Elizabeth Evatt AC, said in evidence to the Joint Select Committee inquiry into Australia’s Family Law System in July that:⁵⁹
- ... I believe it's imperative now to re-establish the idea of a two-tier Family Court with judges which deal only with matters of family law. I think that would strengthen the court and its operations. There shouldn't be any diminution of the specialisation, which I think is for the benefit of families when they come into dispute... The other thing is that a single two-tier court was intended to have qualified and trained counsellors who could help the parties resolve their problems in regard to children. At the present time there are insufficient specialised court counsellors, and that leads to endless delays for parties in getting their matters dealt with...
61. The former Chief Justice submitted that “The Family Court should be converted into a two-tiered court, so its lower tier deals with the matters that are now under the jurisdiction of the Circuit Court”⁶⁰ and stated her support for the Association’s Family Court 2.0 proposal to achieve this.⁶¹ The Association recommends that the Amended Merger Bills should not be passed and a specialist, stand-alone and properly resourced Family Court should be maintained in Australia to continue to provide specialist assistance to survivors of family violence.

Conclusion

62. Thank you again for the opportunity for the Association to make a submission to this Inquiry. The Association appreciates the significant budgetary pressures facing the Government at this time. However, failing to invest in the justice system or specialist culturally safe legal assistance and family violence support services is a false economy and only creates additional, unacceptable pressures on the courts and community. The Association would be pleased to assist the Committee with any questions it may have. If you would like any further information, or to discuss this submission, please contact the Association’s Director of Policy and Public Affairs, Elizabeth Pearson, via epearson@nswbar.asn.au .

Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parl Paper No 133, 1974) 10 [33] <https://nla.gov.au/nla.obj-840875983/view?partId=nla.obj-842436336#page/n21/mode/1up>.

⁵⁷ The Hon Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, ‘Family Law and the Family Court of Australia: Experiences of the First 25 Years’ (2000) 24(3) *Melbourne University Law Review* 756.

⁵⁸ See *ibid*, [8.76] – [8.84] and recommendations 27-29.

⁵⁹ Evidence to Joint Select Committee Inquiry into Australia’s Family Law System, 22 July 2020, 4 (Ms Evatt AC).

⁶⁰ *Ibid*, 2.

⁶¹ *Ibid*, 4.