NEW SOUTH WALES
BAR ASSOCIATION

4 November 2020

Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Legislation Committee

By email

Dear Chair

Joint supplementary submission to the inquiry into the Federal Circuit and Family Court of Australia Bill 2019 (Cth)

Thank you for the opportunity for the Law Council of Australia (**Law Council**) and the New South Wales Bar Association (**the Association**) to appear on 9 October before the Committee's inquiry into the Federal Circuit and Family Court of Australia Bill 2019 (Cth) (**the Amended Merger Bill**).

The appearances were conducted by teleconference and we appreciate that the Committee may have experienced difficulty in hearing the full testimony of all witnesses, as evidenced by references in Hansard to sections of "inaudible" evidence. To best assist this important inquiry, we provide the following joint supplementary submissions which address issues raised by the Committee in the course of questioning.

a Filing trends in the Family Court and evidence of backlogs in the family law system

Pages 7-9 of the draft Hansard record several questions by the Chair concerning the trend in recent filings in the Family Court and a request for evidence to substantiate the "enormous explosion in backlog".[1]

In oral testimony, the Law Council and Association referred to findings of the Productivity Commission's *2020 Report on Government Services* which revealed the following pending case load backlogs for the Family Court and the Federal Circuit Court.[2]

Family Court (non-appeal)			
	Pending case load	Cases > 12 mths	Cases >24 mths
2018-19	6720	2586	1508
2017-18	6589	2207	1045
2016-17	6343	2048	911
2015-16	5844	1635	706
2014-15	5644	1486	593
2013-14	5321	1357	567
2012-13	4997	1475	560

[1] Draft Hansard, Senate Legal and Constitutional Affairs Legislation Committee, 9 October 2020, 9 ('*Draft Hansard*').

[2] Productivity Commission, 'Part C – Justice', *Report on Government Services 2020* (January 2020) table 7A.21 'Backlog indicator', citing as the source Australian court authorities and departments (unpublished).

Federal Circuit Court			
	Pending case load	Cases > 6 mths	Cases >12 mths
2018-19	50791	22976	12834
2017-18	49670	19933	11006
2016-17	46864	18442	8534
2015-16	42724	16164	7563
2014-15	39452	13272	5475
2013-14	34010	11598	4769
2012-13	31067	10688	4117

Subsequently, on 16 October 2020 the Family Court and Federal Circuit Court released their *2019-20 Annual Reports*. These provide more up to date information on filings and court backlogs and may be of assistance to the Committee on this issue. The *Annual Reports* paint an extremely concerning picture of grave backlogs in the Family Court and in both the migration and family law jurisdiction of the Federal Circuit Court.

The Family Court's *2019-20 Annual Report* revealed that 21,054 applications were filed in 2019-20, the highest filings in five years.[3] The Family Court received a seven percent increase in the number of Final Order Applications filed, an eight percent increase in the number of Applications in a Case filed and a 7.5 percent increase in the number of Applications for Consent Orders filed during 2019-20.[4] There was a 10 percent increase in the number of Magellan cases filed in the Family Court in 2019-20, up from 77 in 2018-19 to 85.[5] Magellan cases "involve serious allegations of physical abuse and/or sexual abuse of a child and undergo special case management" in the Family Court, involving "a small team consisting of a judge, a registrar and a family consultant" and interagency coordination with state and territory child protection agencies.[6]

The number of appeals filed in 2019-20 also increased by 11 percent from 2018-19, from 400 appeals filed in 2018-19 to 445 appeals filed in 2019-20.[7]

Another critical indicator, as outlined by the Law Council and the Association in evidence to the Committee, is the pending caseload backlog.[8] The Family Court's *Annual Report 2019-20* confirmed there continues to be a backlog of more than a year's worth of cases, with more final orders applications pending at the close of 2019-20 than were finalised within the financial year.

To be clear, the result is that at 30 June 2020 there were a total 6,347 applications pending, up from 6,210 at the end of 2018-19 (an increase of two percent).[9]

This included 2,952 Final Orders Applications pending (by comparison, in 2019-20 there were 2,382 Final Orders Applications filed and 2,394 finalised by the Family Court).[10] At the close of 2018-19, 2,979 Final Orders Applications were pending (compared with 2,225 applications

3 Family Court of Australia, *Annual Report 2019-20* (2020) x.
4 Family Court of Australia, *Annual Report 2019-20* (2020) 17.
5 Family Court of Australia, *Annual Report 2019-20* (2020) 28, figure 3.19.
6 Family Court of Australia, *Annual Report 2019-20* (2020) 28.
7 Family Court of Australia, *Annual Report 2019-20* (2020) x, 37.
8 Draft Hansard, above n 1, 4, 9.
9 Family Court of Australia, *Annual Report 2019-20* (2020) 17, 19, figure 3.5
10 Family Court of Australia, *Annual Report 2019-20* (2020) 20, figure 3.6.

filed and 2,395 finalised).[11] This represents a negligible impact in pending Final Orders Applications (a decrease of just 0.67 percent).

At the close of 2019-20, 1,860 Interim Applications in a case were pending, an increase of 11 percent from the 1,672 Interim Applications pending at the close of 2018-19.[12] 217 Other Applications were pending,[13] as compared with 131 at the close of 2018-19.[14]

During 2019-20 just 46 Magellan cases were finalised, down from 76 in 2017-18 (a 42 percent decrease since 2017-18) and from 68 in 2018-19 (a 32 percent decrease since 2018-19).[15]

At the close of 2019-20, 65 percent of cases pending conclusion were less than 12 months old, falling short of the Family Court's performance target that 75 percent of cases pending conclusion be less than 12 months old.[16]

The pending and growing caseload and backlogs in the Federal Circuit Court are even more concerning. The Federal Circuit Court's *Annual Report 2019-20* reported "extraordinary growth in filings in migration, as well as an increase in filings in the fair work jurisdiction".[17]

There was a significant spike in the Federal Circuit Court's pending migration caseload, which has increased by 58 percent from 7,674 applications in 2017–18 to 12,158 applications in 2019–20.[18] At 30 June 2020, the clearance rate for migration applications was 62 percent.[19] The *Annual Report* stated that:[20]

> ***To put that in perspective, without further resources, on current filing rates, the pending migration caseload will surpass the pending family law caseload in less than two years****.* This is impacting the Court broadly, but is having a particular impact on the judges who are trying to accommodate hearing more migration cases in a finite amount of available judicial time, which ***necessarily comes at the expense of their other work***. (emphasis added)

The Federal Circuit Court disposed of 62 percent of Final Order Applications within 12 months, falling significantly short of its target of 90 percent, for the second year in a row.[21]

The backlog of pending family law Final Orders Applications in the Federal Circuit Court continued to increase, up from 17,088 cases in 2017-18 to 17,478 cases in 2018-19 to 18,177 in 2019-20.[22] Further, the backlog of pending family law Interim Orders Applications continued to increase, up from 8,662 in 2017-18 to 9722 in 2018-19 to 10,577 in 2019-20.[23]

Family law filings in the Federal Circuit Court increased from 85,234 in 2018-19 to 85,563 in 2019-20, while the number of finalisations in family law dropped from 83,640 in 2018-19 to 82,887 in 2019-20.[24] The number of Fair Work applications filed increased from 1,295 in 2018-19 to 1,563 in 2019-20,[25] and the number of intellectual property applications also increased from 43 in 2018-19 to 57 in 2019-20.[26]

---

[11] Ibid.
[12] Family Court of Australia, *Annual Report 2019-20* (2020) 20, figure 3.7.
[13] Family Court of Australia, *Annual Report 2019-20* (2020) 17, table 3.2.
[14] Family Court of Australia, *Annual Report 2018-19* (2019) 17, table 3.1.
[15] Family Court of Australia, *Annual Report 2019-20* (2020) 28, figure 3.19.
[16] Family Court of Australia, *Annual Report 2019-20* (2020) 16.
[17] Federal Circuit Court of Australia, *Annual Report 2019-20* (2020) 3.
[18] Ibid.
[19] Ibid.
[20] Federal Circuit Court of Australia, *Annual Report 2019-20* (2020) 4.
[21] Federal Circuit Court of Australia, *Annual Report 2019-20* (2020), 23, Cf Federal Circuit Court of Australia, *Annual Report 2018-19* (2019), 27.
[22] Federal Circuit Court of Australia, *Annual Report 2019*-20 (2020) 28, figure 3.4.
[23] Federal Circuit Court, *Annual Report 2019-20* (2020) 28, figure 3.5.
[24] Federal Circuit Court, *Annual Report 2019-20* (2020) 2, table 1.1.
[25] Federal Circuit Court, *Annual Report 2019-20* (2020) 45, figure 3.12.
[26] Federal Circuit Court, *Annual Report 2019-20* (2020) 47, figure 3.14.

The Family Court warned that the impacts of COVID-19 will continue to be felt on the system, litigants and judges in 2020-21.[27]

Hearings that had been scheduled months in advance to occur in 2020 are now being cancelled by email and rescheduled, with some final hearing dates not being available until 2022 at the earliest in some registries of the Federal Circuit Court.

Proceeding with the Amended Merger Bill at a time when the Federal Circuit Court is already struggling through chronic under-resourcing and under-funding to manage its family law load alongside a crushing – and growing – migration workload is reckless and will put both litigants and judges at significant risk.

While a spokesperson for the Federal Circuit Court recently stated it was "misleading to conflate migration issues with family law",[28] as outlined above the Federal Circuit Court's *Annual Report 2019-20* itself acknowledged that the burgeoning migration caseload:[29]

> is impacting the Court broadly, but is having a particular impact on the judges who are trying to accommodate hearing more migration cases in a finite amount of available judicial time, which necessarily comes ***at the expense of their other work***" (emphasis added).

Further, in a submission to the Senate Legal and Constitutional Committee's 2018 inquiry into the original merger bill, the Federal Circuit Court acknowledged that:[30]

> It is also important to consider the effect of any reform proposal on the general federal law work of the FCC, which is approximately 10 per cent of the Court's filings ***but substantially greater in terms of judicial time and effort.***
>
> The FCC currently has jurisdiction across a broad spectrum of general federal law areas derived from more than 90 Acts. The FCC has jurisdiction to award unlimited damages in admiralty and trademarks, and a limit of $750,000 across a range of other consumer actions. The FCC also conducts significant work in areas of migration, bankruptcy, industrial law, human rights and privacy. ***All areas present undoubtedly complex and challenging work, particularly for the Court's judges who maintain both family law and general federal law dockets.***
>
> These general federal law areas were previously exclusively the work of the FCA, and retained by the FCA for a number of years after the FCC was established. Now, with the exception of certain intellectual property matters and certain matters under the *Corporations Act 2001* (Cth), the jurisdiction of the FCC is co-terminus with that of the FCA in matters of general federal law, notwithstanding its significant family law workload. The FCC also has jurisdiction to hear any matter within the jurisdiction of the FCA that the FCA transfers to the FCC. Additionally, the FCC hears judicial review applications and appeals including under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), child support matters and appeals from the Administrative Appeals Tribunal remitted by the FCA. ***The migration jurisdiction represents by far the Court's most significant general federal law workload, being the primary court of judicial review.*** (emphasis added).

---

27 Family Court of Australia, *Annual Report 2019-20* (2020) 16.
28 Nicola Berkovic, 'Judge makes ruling after seven years in family law case', *The Australian* (online), 23 October 2020.
29 Federal Circuit Court, *Annual Report 2019-20* (2020) 4.
30 Federal Circuit Court, *Submission 104*, Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Federal Circuit and Family Court of Australia Bill 2018 (Cth) (2018) 5-6.

Despite the significant pressures facing the system, several judicial positions that were already budgeted for have inexplicably not been filled. For example, despite funding being set aside in the 2018-19 Mid-Year Economic Fiscal Outlook for the appointment of a judge to hear family law appeal matters, it was confirmed in Senate Estimates in October than an appointment still has not occurred to date.[31] This is concerning in view of the significant workload and backlogs facing the Family Court, including the fact that the number of appeals filed in 2019-20 increased by 11 percent from 2018-19.[32]

Two judges have retired, one in 2019 and in 2020, and are yet to be replaced in Sydney. In addition, arrangements have not been made to compensate for judges on long, indefinite leave, such as in the Parramatta Registry.

b Impact of call-overs on court backlogs

Page 12 of the draft Hansard records a question by Senator Henderson concerning the effectiveness of call-overs in addressing the backlog of cases in recent years. The 2017 House of Representatives *Inquiry into a better family law system to support and protect those affected by family violence* quoted the Chief Judge as stating at a ceremonial sitting of the Federal Circuit Court on 29 November 2017 that:[33]

> Change is needed, and as many of you know, the Court is in the process of embarking on a number of initiatives to make an immediate difference, including:
>
> - Major Call Overs in all registries;
> - Ordering cases to mediation or ADR sooner, not later;
> - The establishment of a number of case management pilots for new work and
> - The establishment of a working group to examine how best to use registrars and judicial mediation.
>
> The Court is also working on establishing a series of divisions in general federal law work to emulate the Federal Court. The aim of these steps is to reduce the docket sizes to something like 100 cases per judge and significantly reduce delays.

Many of these initiatives have been implemented by the Family Court and Federal Circuit Court over the last three years. Unfortunately, these initiatives have not had the stated aim of reducing docket sizes to anywhere close to 100 cases. Instead, even before COVID-19, Federal Circuit Court judges had between 400 to 600 cases in their dockets, and more than 600 in some NSW registries.

Further, and as the Productivity Commission's *Report on Government Services 2020* and the Courts own *Annual Reports 2019-20* record, the pending cases in the Family Court and Federal Circuit Court have continued to increase notwithstanding the success (or otherwise) of such initiatives.

To put it bluntly, the initiatives implemented have had no material impact in reducing the pending case load of the Family Court or the Federal Circuit Court but nor could they reasonably be expected to given both the overwhelming volume of work to be dealt with and the redirection of judicial time to such initiatives at the expense of applying that time to hearing outstanding cases.

Such initiatives do, however, provide a ready analogue for the Amended Merger Bill. Without a sound and evidence-based justification, which each lack, neither can reasonably be expected to have any material impact upon the crisis being encountered by Australian families and children who need and deserve access to the Court system.

---

[31] Commonwealth, *Estimates*, Senate Legal and Constitutional Affairs Legislation Committee, Canberra, 21 October 2020, 47 (Dr Smrdel) ('*October Estimates*').

[32] Family Court of Australia, *Annual Report 2019-20* (2020) x.

[33] 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) 153 [4.250].

c Adequacy of funding announced during the 2020-21 Budget

Questions were asked by Senator Chisholm concerning the impact of the funding announced in the 2020-21 Budget for the family law system and by Senator Henderson regarding the increased legal assistance funding provided by the National Legal Assistance Partnership announced on June 2020.[34]

While any funding to the system is urgently needed and gratefully received, regrettably the funding contained in the 2020-21 Budget is insufficient to address the significant unmet need in the system and the Courts. The Law Council and Association maintain that one-off injections cannot rectify a decade of chronic under-resourcing and under-funding.

Specifically, the funding recently announced is insufficient for five reasons.

First, the Budget announced $35.7 million over four years for "additional resources and judges for the Federal Circuit Court (FCC) to assist with the timely resolution of migration and family law matters".[35] The Attorney-General's Department confirmed in Senate Estimates on 21 October that only a third of this funding - $12.8 million – will support family law, through the appointment of one judge and five registrars.[36]

This is patently inadequate and falls well short of the statement made in November 2019 by the Chief Justice that adding "an extra judge in every major registry would make a massive difference" to backlogs.[37]

Second, the Treasurer indicated in a Budget press release that the Government was providing "the Family and Federal Circuit Courts with an additional $10.2 million to manage the impacts of COVID-19".[38] However, the Attorney-General's Department confirmed in Senate Estimates on 21 October that the $10.2 million figure was arrived at by adding the $2.5 million allocated to maintain the COVID-19 list to money earmarked for improvements to the Launceston and Rockhampton registries.[39] The local legal professions had been campaigning for the Launceston and Rockhampton work to be undertaken for some time before COVID-19. While welcome measures, these can hardly be described as COVID-19-related initiatives and will not address the growing backlogs and delays experienced in the courts more broadly as a result of increased need arising in connection with the pandemic and shadow pandemic of family violence.

Third, the Attorney-General's Department could not explain when asked at Senate Estimates why $4.1 million previously earmarked for expenditure in the Family Court had been removed from budgeted expenses for the Family Court under program 2.1 over the next three years in the Attorney-General's Budget Statement.[40]

Fourth, as outlined above, the Attorney-General's Department confirmed that despite funding being set aside in the 2018-19 Mid-Year Economic Fiscal Outlook for the appointment of a judge to the appeal division, this appointment still has not occurred to date despite significant workload and backlogs facing the Family Court.

Fifth, the 2020-21 Budget made no additional provision for legal assistance. The Attorney-General's Department confirmed in Senate Estimates on 21 October that the 2020-21 Budget provided no further funding to Women's Legal Services above the funding previously provided in response to COVID-19.[41] This also reflects the evidence provided by the National Aboriginal and Torres Strait Islander Legal Service, Community Legal Centres Australia and Women's

---

[34] Draft Hansard, 4.

[35] *Budget Paper No 2* (2020) 56.

[36] October Estimates, above n 31, 46 (Mr Gifford).

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

[38] Treasurer of the Commonwealth of Australia, 'Guaranteeing essential services' (Media Release, 6 October 2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/guaranteeing-essential-services-0>.

[39] October Estimates, above n 31, 50 (Mr Gifford).

[40] Ibid; *Attorney-General's Portfolio Budget Statement 2020-21* (October 2020) 242, table 2.2.1 Cf *Attorney-General's Portfolio Additional Estimates Statement 2019-20* (February 2020) 87, table 2.2.1.

[41] October Estimates, above n 31, 24 (Mr Anderson).

Legal Services Australia to the Committee's hearing on 9 October.[42] This is despite indications that the impacts of COVID-19 will continue to be felt by the court system in years to come.[43]

Before COVID-19, families were already having to wait three years, sometimes longer, to have their matters resolved,[44] while judges in the Federal Circuit Court had up to 600,[45] sometimes more, cases in their dockets.

There is a direct causal link between resourcing and the timeliness and quality of justice delivered by the courts.

The Attorney-General has previously acknowledged the critical nexus between funding, judicial resourcing and reducing backlogs in family law matters.[46]

In 2018 the former Chief Justice of the Family Court, the Honourable John Pascoe AC CVO, confirmed that "many of the difficulties apparent with the system, and particularly with the Family Court, can be solved by an injection of funds, and particularly into legal aid".[47]

The current Chief Justice of the Family Court and Chief Judge of the Federal Circuit Court said in April 2019 that "There is no doubt that there are unacceptable delays in both courts and an unacceptable backlog… there's no doubt there is a need for further resources".[48] This need is even more acute following the COVID-19 pandemic.

The Amended Merger Bill will not address any of these issues created by a sustained lack of funding, and will only exacerbate the pressures already facing the Family Court and particularly the Federal Circuit Court. The Law Council and Association submit that the Amended Merger Bill should therefore not proceed.

d Whether legislation is necessary to create a single point of entry

Page 4 of the draft Hansard records a question from Senator Henderson as to whether legislating a single point of entry would ensure that such an entry point is not discretionary.

The Amended Merger Bill would not make it mandatory for a single entry point to be created. Instead of mandating this desired outcome, clauses 70, 75, 193 and 216 of the Amended Merger Bill simply require the Chief Justice and Chief Judge to "work cooperatively" with an "aim" - but not a requirement - to ensure common approaches to "case management", "common rules of court and forms", and "common practices and procedures". The Amended Merger Bill is silent as to any consequences that would flow if agreement were not able to be reached, or these initiatives given effect to.

It is not necessary to implement the merger proposal to create a single point of entry. This work is already underway by the Common Rules Project of the Family Court and Federal Circuit Court. The Senate Legal and Constitutional Affairs Committee inquiring into the Federal Circuit and Family Court of Australia Bill 2018 (Cth) received evidence from the then Acting Chief Executive Officer of the Family Court, Warwick Soden, which confirmed that legislation was not required to create a single point of entry.[49]

Nevertheless, as submitted by the Law Council and Association,[50] if Parliament did wish to direct the Courts to create a single point of entry, this could be achieved through a separate

---

42 Draft Hansard, above n 1, 18-21.
43 See, eg, Family Court of Australia, *Annual Report 2019-20* (2020) 16.
44 Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018, [53]; Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2019, [59].
45 Chief Justice Alstergren, quoted in Tony Keim, 'A family (court) affair', *Proctor* (November 2019) 29.
46 See Attorney General of Western Australia, 'State budget 2012-13: Supporting our Community – Family Court funding boost' (Media Statement, 23 May 2012).
47 Family Court of Australia, Submission by the Honourable John Pascoe AC CVO, Chief Justice of the Family Court of Australia (18 May 2018) [8] <https://www.alrc.gov.au/sites/default/files/subs/family-law_-68._family_court_of_australia_-_submission_revised_redacted_version_14.06.18.pdf>
48 Quoted in Nicola Berkovic, 'Family law reform: Priority for next Australian government', The Australian (online) 23 April 2019.
49 Evidence to Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Federal Circuit and Family Court of Australia Bill 2018 (Cth), Sydney, 12 December 2018, 14 (Mr Soden).
50 In the hearing on December 2018 and again on 8 October 2020

piece of legislation comprising two simple amendments to the existing *Family Law Act 1975* (Cth) and *Federal Circuit Court of Australia Act 1999* (Cth). Such a bill is a very different proposition to the flawed merger proposed by the Amended Merger Bill and would have none of the devastating and long-lasting impacts the subject of submission by multiple stakeholders.

e Key Performance Indicators

The Committee expressed an interest in the Key Performance Indicators of the Courts and judicial officers.

The Family Court's *Annual Report 2019-20* stated that "but for the impacts of the COVID-19 pandemic, the Court is likely to have met" its 100 percent clearance rate target.[51] Instead, the Family Court recorded a clearance rate of 99 percent for all application types and 101 per cent for final order applications.[52]

As noted above, by contrast the Federal Circuit Court disposed of 62 percent of final order applications within 12 months, falling significantly short of its performance target of 90 percent, for the second year in a row.[53]

These are both "Performance Criteria" targets also reported in the Attorney-General's Portfolio Budget Statements.[54]

f Structural, Systemic and Judicial Specialisation

Several questions were asked by the Committee on the issue of specialisation, in view of the volume of family law work already undertaken by the Federal Circuit Court. The Committee also enquired about the rate of cases involving family violence, as compared with pure property matters. It is important to recognise at the outset that quantity or volume of cases does not equate to specialisation, for the reasons outlined below. The Law Council and Association have consistently emphasised that there are two distinct forms of specialisation, both of which are critical: structural or systemic specialisation and judicial specialisation. These are considered in turn.

i) Structural and systemic specialisation

As outlined in the Law Council's and the Association's testimony, a specialist court is more than just its judges. Structural or systemic specialisation of the Family Court refers to its stand-alone nature as an exclusive family law court, at the heart of a specialised ecosystem of inter-related and co-located services. This stand-alone and exclusive character is critical to providing the best protection to families, children and survivors of family violence.

It is patently obvious that it is impossible for an entity to "stand-alone" if it has been "merged" or "unified" with something else. Yet this important distinction has consistently been overlooked by those seeking to advance the merger proposal.

Department officials recently gave evidence to Senate Estimates that "People are misrepresenting what the bills actually do. For example, they don't abolish the Family Court. They don't decrease specialisation in family law…"[55]

To be clear, the Law Council and Association have consistently said that the merger would abolish the Family Court *as we know it*.[56] This is not a misrepresentation, as the Attorney-General's Department have suggested, nor a comment on the expertise of judges in the Federal Circuit Court. It is a simple statement of fact about the structural reform proposed by the Government.

---

[51] Family Court of Australia, *Annual Report 2019-20* (2020) 16.
[52] Ibid 16, 21.
[53] Federal Circuit Court of Australia, *Annual Report 2019-20,* 23 Cf Federal Circuit Court of Australia, *Annual Report 2018-19* (2019) 27.
[54] *Attorney-General's Department Portfolio Budget Statement 2020-21* (October 2020) 243, 245.
[55] Estimates, above n 31, 40 (Mr Anderson).
[56] See, eg, Draft Hansard, above n 1, 2 (Ms Wright); New South Wales Bar Association, *Submission 10*, [4], [168], [175], [315].

For 45 years the Family Court has operated as a stand-alone court dedicated exclusively to family law matters.

The Attorney-General and the Attorney-General's Department have variously described the proposal contained in the Amended Merger Bill in such ways as are directly incompatible with maintaining its stand-alone, independent and exclusive nature.

In the Second Reading Speech of the Amended Merger Bills, the Attorney-General described the bill as creating a "unified identity of the Federal Circuit and Family Court" and a "unified" structure.[57] While the Amended Merger Bill's Explanatory Memorandum states that it "in no way would constitute either court absorbing the other", the Explanatory Memorandum nonetheless uses the adjective "unified" to describe the new entity's identify and structure on no less than four occasions.[58]

This is inimical to maintaining the stand-alone, independent nature of a Family Court dealing exclusively with family law matters.

The Attorney-General has referred variously to the proposal outlined in the Amended Merger Bill and the original proposal as a "merger",[59] explaining it would create a "new merged court",[60] "single merged court",[61] "new single court structure"[62] and "amalgamated structure".[63]

It is clear from this deliberate and sustained choice of language used by the Government that if implemented, the Amended Merger Bill will result in the Family Court losing its character as stand-alone specialist court dedicated exclusively to family law matters.

The Family Court will be subsumed into a generalist court which, in the Federal Circuit Court's own words, has:[64]

> jurisdiction across a broad spectrum of general federal law areas derived from more than 90 Acts. The FCC has jurisdiction to award unlimited damages in admiralty and trademarks, and a limit of $750,000 across a range of other consumer actions. The FCC also conducts significant work in areas of migration, bankruptcy, industrial law, human rights and privacy. ***All areas present undoubtedly complex and challenging work, particularly for the Court's judges who maintain both family law and general federal law dockets.*** (emphasis added)

---

57 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 December 2019, 7054 (Mr Porter, Peace – Attorney-General).

58 See Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2019 (Cth) [4], [63], [66].

59 See, eg, Attorney-General, 'Court reforms to deliver better outcomes for families' (Media Release, 5 December 2019); Attorney-General, *Transcript – ABC News 24 with Patricia Karvelas* (25 July 2019) <https://www.attorneygeneral.gov.au/media/transcripts/abc-news-24-patricia-karvelas-25-july-2019>; Attorney-General, 'Speech at the opening plenary session, The State of the Nation', 18th Biennial National Family Law Conference Brisbane, 3 October 2018 <https://www.attorneygeneral.gov.au/media/speeches/speech-opening-plenary-session-state-nation-18th-biennial-national-family-law-conference-3-october-2018>.

60 See, eg, Attorney-General, 'Speech to the Australian Bar Association and NSW Bar Association Biennial Conference', International Convention Centre Darling Harbour, 17 November 2018 <https://www.attorneygeneral.gov.au/media/speeches/australian-bar-association-and-nsw-bar-association-biennial-conference-international-convention-centre-darling-harbour-sydney-17-november-2018>; Attorney-General, 'Speech at the opening plenary session, The State of the Nation', 18th Biennial National Family Law Conference Brisbane, 3 October 2018 <https://www.attorneygeneral.gov.au/media/speeches/speech-opening-plenary-session-state-nation-18th-biennial-national-family-law-conference-3-october-2018>.

61 See, eg, Attorney-General, 'Speech at the opening plenary session, The State of the Nation', 18th Biennial National Family Law Conference Brisbane, 3 October 2018 <https://www.attorneygeneral.gov.au/media/speeches/speech-opening-plenary-session-state-nation-18th-biennial-national-family-law-conference-3-october-2018>.

62 Attorney-General, 'Court reforms to deliver better outcomes for families' (Media Release, 5 December 2019).

63 Attorney-General, 'Family Court and Federal Circuit Court Plenary – Opening Address', 7 August 2019 <https://www.attorneygeneral.gov.au/media/speeches/family-court-and-federal-circuit-court-plenary-opening-address-7-august-2019>.

64 Federal Circuit Court, *Submission 104*, Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Federal Circuit and Family Court of Australia Bill 2018 (Cth) (2018) 5-6.

In summary, the veracity of the legal profession's submissions concerning the risk of the loss of structural and systemic specialisation can be assessed through two questions.

First, will the Amended Merger Bill result in the Family Court ceasing to exist as a stand-alone entity?

Second, if so, will the Family Court be merged into a "unified" or "amalgamated" court or structure whose workload involves a significant workload of non-family-law matters?

The answer to both questions is undeniably yes – not as a matter of opinion but as a matter of fact. By virtue of its very nature, the merger proposal would result in the court ceasing to exist as a separate, stand-alone entity and being merged into a generalist court.

The importance of this cannot be underestimated. It is not a mere matter of semantics. This is a crucial distinction and point of difference, as the Amended Merger Bill will result in the loss of structural and systemic specialisation. It is extremely concerning that the importance of this nuance continues to be lost on the purported architects of this proposal.

Former Chief Justice of the Family Court of Australia, Elizabeth Evatt AC, has warned that:[65]

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

Chief Judge Alstergren has also acknowledged that:[66]

> A specialist court and profession provides obvious benefits and allows for a specialist knowledge and the development of specialist jurisprudence… In my view, there will always be a need for superior level family law Judges to hear complex family law trials and appeals, particularly in parenting cases.

The Family Court was established as a "specialist multi-disciplinary court, incorporating the creation of an in-house counselling section staffed by psychologists and social workers with child welfare expertise, and the requirement to place the interests of children at the forefront of parenting disputes. This was followed by the establishment of mediation as a fundamental part of the system, and provision for less adversarial trial proceedings in child-related proceedings."[67]

---

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

[66] Chief Judge of the Federal Circuit Court of Australia, the Honourable Will Alstergren, 'State of the Nation' (Speech delivered at 18th National Family Law Conference, Brisbane, 3 October 2018) <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conferencepapers/2018/speech-cj-nflc>.

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

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".[68] The Report observed that:[69]

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

Writing in 2000, former Chief Justice of the Family Court, the Honourable Alastair Nicholson AO QC RFD and Margaret Harrison noted:[70]

> The relative paucity still of specialist family courts around the world prompts queries about their strengths and weaknesses and the will of governments for their establishment. There are obvious arguments for and against such courts. It is undoubtedly bewildering, costly and inefficient to deliver fragmented services through a plethora of courts, tribunals and social welfare agencies. Nevertheless, Australia has recently added another, the Federal Magistrates Service, which exercises jurisdiction largely concurrent with that of the Family Court. It is also apparent, as occurred before the establishment of the Family Court, that in a generalist jurisdiction many judges and magistrates do not like family law work and will either hear these matters last or avoid them. A divisional structure is a slight improvement, but judges working in the family law area tend to be transferred into other areas, or a rotation system is employed which has the effect of removing the best family law judicial officers after they have attained competence in the area. Because some senior judges and magistrates in a generalist court regard family law as less important than other areas of their jurisdiction, family law tends to suffer when there are budget cuts and workload

---

[68] The Honourable Chief Justice Alastair Nicholson AO RFD and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24(3) *Melbourne University Law Review* 756, citing Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parl Paper No 133, 1974) 10 [33] <https://nla.gov.au/nla.obj840875983/view?partId=nla.obj-842436336#page/n21/mode/1up>.

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

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

> increases. **Moreover, experience in Australia and overseas suggests that where a family court is a division of a generalist court, or where family law cases are simply assigned to judges or magistrates in a generalist court, the quality of performance suffers greatly.**
>
> The principal argument that can be advanced *against* a specialist family court is that because of the nature of family law, the court is never a popular institution. In Australia disaffected persons constantly attack the system on the basis of gender bias, arguing that either mothers or fathers gain an unfair advantage in parenting disputes, because judges have particular preferences which the discretionary nature of the legislation accommodates. Other criticisms are that the Family Court shows no understanding of the needs of children and their parents, and that the non-financial contributions of a spouse (usually, but not necessarily, a wife) are undervalued, thus perpetuating a systemic bias in the distribution of matrimonial property. Because nearly all of the Family Court's decisions are discretionary, it is not hard to produce 'evidence' (which is difficult to rebut) of alleged inconsistencies in approach. Although it is the legislation which creates the discretion, and not the Court, it is easy to criticise the Court in this regard. Specialist courts are placed in a more difficult position than generalist courts, as they are isolated from the so-called 'legal mainstream' and are thus not defended with the same vigour. When public attacks arise, there is a right and a duty for judges — and particularly a Chief Justice — to defend their court. (citations omitted, emphasis added)

Chief Justice Nicholson argued that "the advantages of specialist courts far outweigh the disadvantages", observing that:[71]

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

For these reasons, in a joint statement on 23 October 2020, the Law Council, Women's Legal Services Australia, Community Legal Centres Australia and the National Aboriginal and Torres Strait Islander Legal Services called on the Parliament to abandon the bill once and for all, reiterating concern that:[72]

---

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

[72] 'Dire Federal Circuit Court backlogs prove family court merger a risk to families, judges' (Joint Media Release, 23 October 2020) < https://www.lawcouncil.asn.au/media/media-releases/dire-federal-circuit-court-backlogs-prove-family-court-merger-a-risk-to-families-judges>.

the merger would abolish the existing specialist, stand-alone, multi-disciplinary Family Court system dedicated exclusively to family law matters. This is not a misrepresentation, as some have suggested.

What currently exists as a stand-alone, superior court ecosystem would be collapsed into a division of an inferior, generalist, over-worked and under-resourced Federal Circuit Court, to the detriment of families' wellbeing. The Federal Circuit Court already struggles to manage the workload of less complex family matters alongside nine other diverse areas including migration and workplace law.

Finally, the original version of the Bill (and indeed the amended version now under consideration) does not provide any assurance that Division 1, which is to absorb the existing Family Court commissions, will in fact be maintained over time. Up until recently, the Attorney-General proposed to do away with Division 1 of the proposed merged court altogether by failing to reappoint any new judges. The Attorney-General stated in May 2018 that:[73]

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

In October 2018, the Attorney-General confirmed that this remained his view:[74]

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

In response to sustained criticism the Attorney-General has announced an intention to set a minimum number of judges for Division 1 by regulation. However, even now, the regulation that has been suggested to create a minimum number of judicial officers in Division 1 is exercisable entirely at the discretion of the government of the day. Clause 9(3) of the Amended Merger Bill provides that:

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

Use of the word "may" in this clause, rather than "must" which appears elsewhere in the Amended Merger Bill indicates there is Executive discretion as to whether to prescribe any such a requirement.

It is notable that no draft of the proposed regulation has been made available for consideration. Further, and whilst trite, such a method provides no assurance that Division 1 will be maintained in any event given the ability of future governments to amend any such regulation. If there is any real commitment to and recognition of the need to maintain Division 1 for the benefit of all Australians, it would reasonably be expected that such a proposal would form a central part of the proposed Bills, which it does not.

ii) Judicial specialisation

During the hearing on 8 October the Chair stated that "The submission I'm kind of making is that in circumstances where the overwhelming volume of the work that is currently going through the Federal Circuit Court is of a family nature anyway, those people are in effect family law specialists, even in the registry?"[75]

Respectfully, this statement is incorrect because it does not acknowledge the complexity of the family law work undertaken by the Family Court as a key differentiating factor. The Family Court's *Annual Report 2019-20* explained the Family Court's jurisdiction as to determine cases

---

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

[74] Ibid.

[75] Draft Hansard, above n 1, 6.

"with the most complex law, facts and parties",[76] "often involving serious allegations of risk and family violence, complex financial arrangements, and disputes arising under the regulations implementing the Hague Convention on the Civil Aspects of International Child Abduction".[77] Similarly, the Productivity Commission noted that:[78]

> The more complex and entrenched Family Law disputes commence with the Family Court so a higher proportion of its cases require more lengthy and intensive case management... As the Federal Circuit Court undertakes a higher proportion of simpler Family Law matters, the more complex and entrenched disputes remain with the Family Court and therefore a higher proportion of its cases now require more lengthy and intensive case management.

Further, on 21 October Department Officials sought to suggest in Senate Estimates that "When people talk about the specialisation of the Family Court, they don't often appreciate that the Family Court hears more matters involving property than matters involving children, so the specialist expertise is about property to a greater extent than it is about children".[79]

This statement is not substantiated by the Family Court's *Annual Report 2019-20*, which revealed that of the issues sought on final orders applications filed in 2019-20, 49 percent were financial only while the same number - 49 percent - were parenting or parenting and financial matters, and two percent related to other issues.[80]

This statement mistakenly suggests that specialisation is no more than a quantitative measure. The Family Court's *Annual Report 2019-20* also explained that:[81]

> in 2019–20, ***the number of Notices of Child Abuse, Family Violence or Risk of Family Violence filed were sustained at a high level, indicating the complexity of the caseload before the Court. There is an upward trend in the number of Notices of Child Abuse, Family Violence or Risk of Family Violence filed each year,*** indicated by the trendline shown in Figure 3.18. This reflects the Court's understanding of the prevalence of family violence in family law proceedings. It also reflects the growing awareness of family violence within the community and the need for litigants to raise family violence in conformity with the 2012 amendments. ***It also reflects the increasing complexity of the Court's cases and the extent to which child abuse and/or family violence is an element in many of them.*** (emphasis added).

As noted above, there was also a 10 percent increase in the number of Magellan cases filed in the Family Court in 2019-20, up from 77 in 2018-19 to 85.[82]

g Self-represented litigants

The Law Council and the Association were asked by Senator Henderson about the rate of self-represented litigants.

The Family Court's *Annual Report 2019-20* indicated that the percentage of litigants where neither party had representation at any stage in proceedings rose from three percent in 2016-17 to four percent in 2017-18 to five percent in 2017-18 and 2019-20.[83]

Importantly, one or both parties did not have representation at some stage in the proceedings in one in five cases (22 percent) in the Family Court in 2019-20.[84] One or both parties were unrepresented in two out of five trials in 2019-20 (39 percent).[85]

---

[76] Family Court of Australia, *Annual Report 2019-20* (2020) 9.
[77] Chief Justice Alstergren, 'The year in review' in Ibid, 2.
[78] Productivity Commission, 'Part C – Justice', *Report on Government Services 2020* (January 2020) table 7A.21 'Backlog indicator', footnote (e).
[79] October Estimates, above n 31, 40 (Mr Anderson).
[80] Family Court of Australia, *Annual Report 2019-20* (2020) 17 figure 3.2.
[81] Ibid, 27.
[82] Family Court of Australia, *Annual Report 2019-20* (2020) 28, figure 3.19.
[83] Family Court of Australia, *Annual Report 2019-20* (2020) 26, figure 3.16.
[84] Ibid.
[85] Family Court of Australia, *Annual Report 2019-20* (2020) 27, figure 3.17.

The Federal Circuit Court's *Annual Report 2019-20* indicated that during 2019-20, one or both parties did not have representation at some point during proceedings in 26 percent of matters.[86]

However, the Report warned that this data "does not describe the length of time for which a party retained legal representation. A litigant who was unrepresented from filing until the trial but engages legal representation at the trial stage is recorded the same as a litigant who had legal representation for the entirety of the proceeding".[87] The Federal Circuit Court's *Annual Report* warned that "at any given time, the number of matters where both parties have legal representation is *likely to be much lower than 74 percent*".[88] (emphasis added)

The experience of the legal profession, and indeed of the judiciary,[89] is that cases involving one or more parties without legal representation take significantly longer to conduct properly and justly.

Dewar, Smith and Banks' 2000 *Litigants in Person in the Family Court of Australia* research study identified that unrepresented litigants have a wide range of needs and assistance, including:[90]

a. Information, including about relevant support services, court procedures and stages of the litigation process;

b. Advice, for example on form-filling, court etiquette, preparation of court documents, formation of legal argument and the rules of evidence; and

c. Emotional and practical support.

Dewar, Smith and Banks' Report concluded that self-represented litigants "consume more Court resources than represented parties"[91] and reported amongst those consulted "almost unanimous agreement that *so long as they remain in the system* those matters [involving a self-represented litigant] are more demanding of the time of judicial officers and registry staff, and can be wasteful of the time of the other party and their legal advisers".[92]

One Judge surveyed in preparation of Dewar, Smith and Banks' Report remarked at the time, after a very full duty list, that collectively the time taken for nine matters involving self-represented litigants would have been reduced by more than three hours, or half the time, if they had been represented.[93]

Therefore, it is widely recognised that unrepresented litigants require more assistance and support from the courts, which means cases necessarily take longer to determine fairly.

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

The layer of complexity added by self-represented litigants means that a disproportionate amount of Court resources is taken up in dealing with parties who appear without the assistance of a lawyer.

Whilst there are some people who choose to represent themselves, most have no choice as they cannot afford representation and do not qualify for legal aid. It has long been understood

---

[86] Federal Circuit Court of Australia, *Annual Report 2019-20* (2020) 31, figure 3.8.
[87] Federal Circuit Court of Australia, *Annual Report 2019-20* (2020) 31.
[88] Ibid.
[89] In a Presentation in NSW in 2011 Entitled "The Challenge of the Self Represented Litigant viewed from the Bar and the Bench" Justice Forrest of the Family Court cited a number of examples of cases taking vastly longer to conduct due to the lack of representation caused by the lack of access to Legal Aid including a case set down for 21 days that took 60 days with a self-represented applicant.
[90] John Dewar, Barry Smith, Cate Banks, *Litigants in Person in the Family Court of Australia* (2000), Research Report No 20, 1.
[91] Ibid, 3.
[92] Ibid, 2.
[93] Ibid, 51.

that there is a clear link between the lack of access to legal aid and the incidence of self-represented litigants.[94]

h Legal fees and reservation fees

The Law Council and Association were asked by Senator Henderson about the cost of legal fees and the impact on access to justice.

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

The consequences of delay include increasing complexity of cases over the period spent waiting for trial, as the lives of children and their parents continue to change, new partners and children often become involved and financial positions change. If the proceedings involve allegations of abuse, violence and risk, the determination of those allegations become all the more difficult with the passage of time. Cases are not simply dormant while awaiting trial – interim determinations are often required to be made in this period with an increasing and compounding effect on delay, where Judges have to devote time to holding the lives of children and families together until a final hearing date can become available.

The Law Council and Association were also asked their position in relation to reservation fees but were disrupted in answering by divisions in the Senate.

A barrister is not entitled to charge a “reservation fee” unless it is covered by the fee disclosure and costs agreement with the client. Reservation fees are not charged by all barristers and are intended to promote the administration of justice by ensuring Counsel set aside sufficient time to exclusively prepare for and appear in the client’s case, for the duration of the client’s matter.

Settlements late in the piece are not uncommon and are actively encouraged by barristers where appropriate to best promote clients’ interests. If a barrister is able to obtain further work for the remainder of the unused days, the barrister will not charge for that period. If, however, the barrister is not able to obtain alternative work, the commercial opportunity to generate fees which would otherwise have been generated has been lost. Reservation fees therefore seek to promote access to justice by offering improved certainty and comfort to clients that a barrister will be exclusively available to them for the duration of the matter, while providing greater certainty for self-employed practitioners.

For example, the *Legal Profession Uniform Law* (NSW) provides that barristers may not charge fees which are not “fair and reasonable” or “proportionately and reasonably incurred and proportional and reasonable in amount”, and must comply with strict disclosure requirements.

Conceivably the legal profession are the only stakeholder that would benefit from the Amended Merger Bill proceeding. Nevertheless, the Law Council and Association continue to oppose the merger because it is not in the best interests of the families or the courts our members serve.

Instead, there has been widespread support expressed for the Association’s proposal for a *Family Court 2.0*, including from the former Chief Justice the Hon Elizabeth Evatt AC.[95] The *Family Court 2.0* proposal would maintain the stand-alone, specialist, exclusive nature of the Family Court and “lift and shift” the family law jurisdiction, and judges exercising that jurisdiction, from the Federal Circuit Court into a lower tier of the Family Court.

In October 2018 the Attorney-General dismissed the *Family Court 2.0* proposal as “radical”.[96] That observation is a curious one in circumstances where the proposal is one that not only reflects the Semple recommendations but is a structure that is already in place in the Attorney’s home state of Western Australia, and one for which the Attorney was responsible

[94] See, eg, Access to Justice Taskforce Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).
[95] Evidence to the Joint Select Committee on Australia’s Family Law System, 22 July 2020, 4.
[96] Attorney-General for Australia, above n 59.

for four years in his role as Attorney General of Western Australia from 2008 to 2012. The Family Court of Western Australia comprises effectively two divisions, of magistrates and Judges, seamlessly operating to determine family law issues in that state.

It has been suggested that the proposal poses some constitutional issues in being implemented. To date, such suggestions have not been developed in a manner which permits them to be examined. We do not accept that there are any impediments of substance to the implementation of its proposal, as opposed to that presently proposed by the Government; and stand ready to meet any such suggestion should it be advanced in a manner capable of being met.

There should be nothing radical about the idea that critical social justice infrastructure, let alone a Chapter III Court, should not be irrevocably altered without reasoned consideration of other tried and tested methods. No reasoned basis has ever been advanced by proponents of the Amended Merger Bill as to why the *Family Court 2.0 Model*, which has attracted universal support from all stakeholders, ought not be preferred or at least the subject of evident and reasoned consideration.

We would be pleased to assist the Committee with any further questions it may have.

Yours sincerely

Pauline Wright President, Law Council of Australia	Tim Game SC President, NSW Bar Association