

Not everything that counts can be counted

By Michael Kearney SC
Chair of the NSW Bar Association's Family Law Committee

Australia's family law system has found itself at the centre of another two parliamentary inquiries in 2020, and the NSW Bar has been actively involved in representing the interests of our members, and the broader community, in response to each.

A Commonwealth Joint Select Committee, led by Kevin Andrews MP and Senator Pauline Hanson, is currently investigating eleven broad terms of reference including information sharing between the family law system and state child protection systems and any reform that may be needed to the Family Law and Family Courts' structures.

Meanwhile, the Senate's legal and constitutional affairs committee is considering another iteration of the Government's fundamentally flawed merger proposal, reintroduced on the last day of parliament in 2019.

There is widespread agreement among court users, the legal profession, the parliament and judiciary that Australia's once world-leading family law system is not serving the best interests of children and families as well as it could or it should at this time.

The fundamental question is how can we work together to improve it?

The New South Wales Bar Association believes the path to reform need not be complicated, costly or lengthy. Instead, the solution requires two primary commitments from the Federal Parliament, neither of which is particularly novel.

First, a commitment to resourcing parts of the family law system that work well when adequately funded and resourced but have been starved by successive governments of the support they require to function effectively.

Second, a commitment to implementing improvements identified by stakeholders, and supported by landmark research, to strengthen a standalone, specialist Family Court to promptly and appropriately resolve matters including those involving family law, family violence and safety.

At the core of so many of the issues confronted by the system is a chronic and sustained lack of proper funding and



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resources for the Family Court and the Federal Circuit Court. The impacts are borne by children and families already at their most vulnerable, and by judicial officers faced with unsustainable, crippling workloads and unsafe workplaces.

Failures by successive governments of both persuasions to properly support and invest in the system have resulted in unacceptable delays and costs that directly impact on the accessibility and quality of justice.

Some families are having to wait up to three years, or longer, to have their family law disputes resolved. Broader costs and impacts to the community also result from family breakdowns not being determined in a timely manner.

Underfunding legal assistance has meant a significant number of parties cannot afford legal representation in family law matters and appear by necessity unrepresented in court. These factors have contributed to crippling judicial workloads. Both courts now have backlogs of more than a year's worth of cases. Many Federal Circuit Court judges have between 400–500 cases in their dockets, some as many as 630.

There is understandably much frustration with the current state of Australia's family

law system. This frustration is shared by the New South Wales Bar, whose members assist and represent families, children and survivors of family violence in the broader family law system – not only in the courts but in the provision of advice and in various forms of alternative dispute resolution – and witness first-hand the impacts of a system in crisis each day.

The vast majority of family law matters do not involve direct engagement with the court system. But for those matters and for the most intractable of matters that cannot otherwise be resolved – such as those involving allegations of family violence, child abuse or complex financial issues – the courts have a critical role to play.

Barristers play an important role in facilitating the just and efficient resolution of matters at all stages. Barristers in NSW appear on a daily basis assisting clients in the Federal Circuit Court and the Family Court, on an extensive pro bono basis as well as in matters funded by Legal Aid NSW and on private retainers. We both act as mediators and arbitrators and assist and represent clients in all forms of Alternate Dispute Resolution. Barristers contribute voluntarily, unpaid, to the development of the law and procedure of both courts.

Barristers also make an important contribution to relieving pressures on judicial officers and the courts. One judge told a research study in 2000 after a very full duty list one day that the time taken to hear nine matters involving self-represented litigants would have been halved had they been represented.

We recognise the cost of accessing justice can be prohibitive, and this remains a great concern to us. Costs appropriately form a specific term of reference of Joint Select Committee's inquiry, which is currently holding public hearings in states and territories around the country. We reject, however, the broad assertions levelled on occasion as to inappropriate and excessive charging by the Bar.

The legal profession is a profession, not a business. It is unlawful for a barrister in NSW to charge more than is 'fair and reasonable