Royal Commission
into Family Violence

WITNESS STATEMENT OF ARIE FREIBERG

I, Arie Freiberg, Emeritus Professor, of [redacted] in the State of Victoria, say as follows:

1. I make this statement on the basis of my own knowledge, save where otherwise stated. Where I make statements based on information provided by others, I believe such information to be true.

Current role

2. I am an Emeritus Professor at Monash University. I was appointed to this role in 2013.

3. I am Chair of the Victorian Sentencing Advisory Council (**VSAC**). I was appointed to this position in July 2004. In this position I am responsible for overall governance of the Council and for oversight of its activities.

4. I am also Chair of the Tasmanian Sentencing Advisory Council (**TSAC**). I was appointed to this position in February 2013. In this position I am responsible for overall governance of the Council and for oversight of its activities.

Background and qualifications

5. I hold a Bachelor of Laws (Hons) and a Diploma in Criminology from the University of Melbourne (1973), a Master of Laws from Monash University (1984) and a Doctor of Laws from the University of Melbourne (2001).

6. I am a fellow of the Academy of Social Sciences in Australia and the Australian Academy of Law and I hold an Adjunct Faculty appointment in the Australia and New Zealand School of Government.

7. I was appointed to the Foundation Chair of Criminology at the University of Melbourne in January 1991 where I served as Head of the Department of Criminology between January 1992 and June 2002.

8. Between 1996 and 1998, I was President of the Australian and New Zealand Society of Criminology.

9. I was Dean of the Faculty of Arts at the University of Melbourne in 2003 and Dean of the Faculty Law at Monash University from 2004 to 2012.

10. In 2009, I was made a Member of the Order of Australia for my service to law, particularly in the fields of criminology and reform related to sentencing, legal education and academic leadership.

11. My particular areas of expertise are sentencing, non-adversarial justice and regulation. I have been a Visiting Scholar at Harvard Law School (2014) and Tel Aviv University (2008).

12. I have served as a consultant to the Royal Commission into Institutional Responses to Child Sexual Abuse, to Federal, Victorian, South Australian and Western Australian governments on sentencing matters, as well as the Australian and South African Law Reform Commissions.

13. In 2002, I completed a major review of sentencing for the Victorian Attorney-General published as Pathways to Justice (Department of Justice, 2002).

14. As set out above, in July 2004, I was appointed Chair of the Victorian Sentencing Advisory Council and in February 2013 I was appointed Chair of the Tasmanian Sentencing Advisory Council. I am a member of the Council of the Australasian Institute of Judicial Administration.

15. I have over 130 publications in areas such as sentencing, confiscation of proceeds of crime, tax compliance, corporate crime, juries, juvenile justice, sanctions, victimology, superannuation fraud, trust in criminal justice, commercial confidentiality in corrections, dangerous offenders, the role of emotion in criminal justice and public policy, drug courts, problem-oriented courts, non-adversarial justice and regulatory theory.

Purposes of sentencing

16. The purposes of sentencing generally are, in broad terms, to impose a 'just' and appropriate punishment on the offender. The *Sentencing Act 1991* (Vic) (**Sentencing Act**), s 5(1) requires a court to impose a sentence for the following purposes:

    16.1. to exact a form of retribution/punishment;

    16.2. to deter the offender or others from committing similar offences;

16.3. to attempt to rehabilitate the offender;

16.4. to denounce the type of conduct in which the offender engaged; and

16.5. to protect the community

17. Any attempt to evaluate the appropriateness or effectiveness of sentencing practices must take into account the extent to which they achieve one or more of these purposes. In logic, all of these purposes cannot co-exist, but the courts attempt to reconcile them by balancing the various purposes and factors in the context of the facts of each case and the circumstances of each individual offender.

Detection vs sentencing

18. The imposition of a sentence occurs at the end of a series of decisions such as those of the victim to report a crime, by police to record, investigate and prosecute it, by courts or juries to convict or acquit and only then, by a judicial officer to decide upon the type and quantum of the sentence. In relation to most offences, there is a process of attrition such that only a relatively small number of offenders are sentenced. The rate of attrition will vary from offence to offence.

19. Criminological research generally holds that it is the certainty of detection rather than the certainty or severity of punishment that is the most powerful factor in deterring offenders.

20. Accordingly, and positing this proposition in abstract terms, the higher the certainty of detection the less severe a sanction needs to be in order to achieve a deterrent outcome. Conversely, the lower the certainty of detection, the greater the severity of the sanction required to deter potential offender, although this theoretical equation is limited by the principle of proportionality that requires that the punishment imposed must be proportionate or commensurate with the seriousness of the offence.

21. Measures such as electronic monitoring bracelets, safety cards and interlock devices, which can detect blood-alcohol levels, have proven to be relatively effective deterrents. Where such measures are used, sanctions may be less severe but still be effective.

22. Certainty of detection coupled with the immediacy of the imposition sanction has proven to be highly effective in reducing offending. Celerity, or speed, is also an important element of deterrence.

23. In summary, in terms of deterrence only, rather than asking whether sentences are sufficiently severe, the appropriate question is whether an offender can be detected and sanctioned with a high level of certainty and speed.

24. However, in terms of the purposes of sentencing as stated in the Sentencing Act, issues such as the just and proportionate punishment of the offender and the prospects of rehabilitation must also be taken into account.

Sanctions for family violence offences

25. Celerity or speed does not feature in many of the current sanctions for family violence offences. For example, one immediate response to an allegation of a family violence intervention order breach offence is that the offender may be arrested and brought before a court, often to be released on bail until the charges against him or her are heard. Given the delays in the Magistrates' Court, the charges may not be determined for a considerable period of time. In practice, therefore, there is no immediate substantive sanction.

26. Breach of family violence intervention orders is a major and growing problem. To reduce offending, family violence intervention orders need to have a clear and effective mechanism for compliance. One option is to impose immediate gaol time, even if only for a short period, which may act as a strong deterrent in this regard.

27. However, until a person is sentenced, a court has no power to impose an immediate gaol term. Currently, the only power available to Magistrates in Victoria is a power to revoke bail and take an offender into custody. This is not a sentencing power and it is debatable whether the bail power should be used as a de facto sentencing option. There is a need to consider whether and how courts should have the power to take an offender into custody as soon as practicable once an offender commits, or is found guilty of, a breach offence so that the sanction for breach is swift and certain.

28. As well as the jurisprudential problems, there are practical problems in Victoria in sending more people to gaol at a time of increasing prisoner numbers when corrections facilities are operating at capacity and under considerable strain. Immediate gaol terms also place immense pressure on the courts, Legal Aid and police in terms of time, money and resources.

Swift and certain justice programs

29. Ultimately, the function of a family violence intervention order is to protect the victim from future harm. Therefore, in sentencing an offender for breaching an order, the protection of the community, which encompasses ensuring the future safety and protection of the victim, should be the central purpose against which other sentencing purposes are balanced.

30. Australia should consider principles of swift and certain justice in the context of sentencing. A highly successful example of this is Hawaii's Opportunity Probation with Enforcement (**HOPE**) program, a pilot of which was launched in 2004 by Judge Steven Alm in response to Hawaii's pervasive methamphetamine problem. Hawaii has the highest rate of 'ice' use in the United States.

31. HOPE is swift, certain, consistent and proportionate. The program swiftly imposes jail time for offenders who return positive drug tests while on probation. The program therefore deals with offenders who have already been found guilty of, and sentenced for, an offence. The program received an Innovation in American Government Award from Harvard University in 2013 and an Outstanding Criminal Justice Program Award from the National Criminal Justice Association in 2014.

32. There are currently approximately 160 swift and certain justice programs operating in 21 states across the USA.

33. In an article entitled ‘Swift and certain sanctions: does Australia have room for HOPE?’, published on 17 June 2015 on the website of independent, not-for-profit media outlet, *The Conversation*, Lorana Bartels, Associate Professor, School of Law and Justice at University of Canberra, noted HOPE adopts a ‘good parenting model’ and works as follows:

    33.1. The judge gives a 15 – 20 minute ‘warning hearing’ to a group of HOPE participants.

    33.2. Offenders are told that they can count on a short jail sanction for every violation.

    33.3. Offenders are given a colour code and must call a hotline every morning to hear which colour has been selected.

33.4. If their colour is chosen, they must appear at the probation office before 2pm that day for a drug test. Compliance and a negative test results in the assignment of a new colour associated with less regular testing.

33.5. If an offender fails to appear, a bench warrant is issued and served immediately.

33.6. Offenders who fail the drug test are arrested immediately and brought before a judge within 72 hours.

33.7. Offenders who are found to have violated their probation (by missing an appointment or returning a positive drug test) are immediately sentenced to a short jail stay, with sentences increasing for successive violations.

33.8. Drug treatment is provided for those who request it or who cannot stop using drugs or alcohol on their own.

A copy of that article is attached to this statement and marked **'AF 1'**.

34. The article also referred to evaluations of HOPE, noting that in 2009, the United States of America's (**USA**) National Institute of Justice published a randomised-controlled trial evaluation comparing 330 high-risk drug offenders on HOPE with 163 similar offenders on standard probation. Compared with the control group, HOPE offenders were:

34.1. 55% less likely to be arrested for a new crime;

34.2. 53% less likely to have their probation revoked;

34.3. 72% less likely to test positive for illegal drugs; and

34.4. 61% less likely to miss appointments with their probation officers.

35. Offenders on HOPE also spent 48% fewer days in prison.

36. A process evaluation found that probation officers, offenders and defence lawyers were enthusiastic about the program. However, prosecutors and court employees were less pleased, with court staff reporting increased workloads.

Application of swift and certain justice programs in Australia

37. Australian researchers have been been looking at HOPE and similar programs to investigate whether the swift and certain justice model could be used, including people who breach domestic violence intervention orders.

38. Further to *The Conversation* article referred to above (**'AF 1'**) Associate Professor Bartels also published an article entitled 'Swift and certain sanctions: Is it time for Australia to bring some HOPE into the criminal justice system?' in the Criminal Law Journal ((2015) 39 Crim LJ 53). A copy of that article is attached to this statement and marked **'AF 2'**.

39. During a segment discussing HOPE with journalist Anita Barraud, Judge Alm and Associate Professor Bartels on the Australian Broadcasting Authority's (**ABC**) *Law Report* radio program on 30 June 2015, former Victorian Attorney-General, Rob Hulls, called for swift and certain sanctioning like 'flash incarceration' of domestic violence perpetrators who breach their orders. A copy of the transcript of that interview is attached to this statement and marked **'AF 3'**.

40. There are questions as to whether HOPE could be as successful in Australia as it has been in the USA due to significant differences in the American and Australian criminal justice systems. Again, the issue of availability of prison beds, the absence of an appropriate sentencing power and the due process implications of subjecting an offender to incarceration without a court order must first be addressed. One possibility for utilising such programs is to apply them to offenders who have already been sentenced for at least one offence of breach and who have been place on some form of conditional order such a community correction order.

41. I am of the view that swift and certain justice programs warrant serious consideration in relation to family violence intervention order breach offences.

The Victorian Sentencing Advisory Council (VSAC) and family violence

42. In my role as Chair of the VSAC, I have overseen the production of four reports based on reviews of sentencing practices in Victoria for breach of family violence intervention order offences:

    42.1. *Breaching Intervention Orders* – published on 24 June 2008;

42.2. *Sentencing Practices for Breach of Family Violence Intervention Orders* – published on 23 June 2009;

42.3. *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* published on 4 September 2009; and

42.4. *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention* published on 24 September 2013.

43. *Breaching Intervention Orders* (2008) focused on the maximum penalty for the offences of breach of a family violence intervention order, breach of a stalking intervention order, and breach of a police-issued family violence safety notice. It considered the types of intervention orders available in Victoria, the penalties for breach, current sentencing practices, and the functions of a statutory maximum penalty in the context of these offences. A copy of that report is attached to this statement and marked **'AF 4'**.

44. *Sentencing Practices for Breach of Family Violence Intervention Orders* (2009) considered approaches to sentencing breaches of family violence intervention orders under the *Crimes (Family Violence) Act 1987* and issues raised in consultation regarding the inadequacy and inconsistency of sentences. The report included guiding principles for use by those sentencing for breach of family violence intervention orders. A copy of that report is attached to this statement and marked **'AF 5'**.

45. The Guiding Principles were published separately as *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders*. A copy of that report is attached to this statement and marked '**AF 6**'.

46. *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention* (2013) examined sentences for contravention of family violence intervention orders over two periods: 2004 – 2005 to 2006 – 2007 and 2009 – 2010 to 2011 – 2012. It also considered sentences for contravention of family violence safety notice offences under the *Family Violence Protection Act 2008* (Vic). A copy of that report is attached to this statement and marked **'AF 7'.**

47. Extensive data collected by the VSAC demonstrates that sentencing outcomes for contravention of family violence intervention orders have changed significantly. Fines, adjourned undertakings and community orders remained the most common

sentences for intervention order contravention, but the distribution of these sentences changed markedly:

47.1. Fines were imposed in 25.8% of cases (a decline of 30.5%), adjourned undertakings were imposed in 23.4% of cases (an increase of 27.1%) and community orders were imposed in 19.2% of cases (an increase of 9.1%).

47.2. The sentencing outcomes for safety notice contravention were very similar to the sentencing outcomes for intervention order contravention.

47.3. The use of fines declined by 34% in cases where the contravention offence was the only offence sentenced, and by 32% in cases where co-occurring offences were sentenced alongside the contravention offence. Accordingly, there was a shift away from fines even when controlling for wider criminality.

47.4. For repeat intervention order contraventions (that is, where an offender had previously been sentenced for contravening an intervention order), the use of fines almost halved and custodial sentences increased. As a result, imprisonment became, by a small margin, the most common sentence in repeat contravention cases (21.7% of cases).

47.5. The shift away from fines was unique to contravention offences and did not reflect broader sentencing trends in the Magistrates' Court.

48. Based on consultations with stakeholders, the VSAC concluded that a change in sentencing practices – rather than a change in the nature of the contravention behaviour – is responsible for the most recent sentencing outcomes.

49. Stakeholders consistently remarked on a cultural shift in the response to family violence by key criminal justice institutions, particularly the courts and police. Stakeholders also commented that there is now a deeper understanding of the nature of family violence on the part of magistrates and police, which has in turn affected the sentences imposed for intervention order and safety notice contravention.

Sentencing for non-breach family violence offences

50. A concept often raised as a potential solution for sentencing in relation to family violence is the creation of specific family violence offences. Based on my experience, I think that this may be only a very partial solution, for reasons I expand upon below.

51. This concept was introduced in Tasmania in 2004, and is currently the subject of a draft report by the Tasmanian Sentencing Advisory Council (**TSAC**), of which I am Chair, regarding sentencing for family violence offences. The report will be published at a later date but I am authorised by the TSAC to release some of its findings in advance of publication.

52. Under the *Family Violence Act 2004* (Tas) (**Family Violence Act**), s 4 a 'family violence offence' is defined as '*any offence the commission of which constitutes family violence'.* 'Family violence' is in turn defined in s 7 as:

    (a) any of the following types of conduct committed by a person, directly or indirectly, against that person's spouse or partner:

        (i) assault, including sexual assault;

        (ii) threats, coercion, intimidation or verbal abuse;

        (iii) abduction;

        (iv) stalking within the meaning of section 192 of the Criminal Code;

        (v) attempting or threatening to commit conduct referred to in subparagraph (i), (ii), (iii) or (iv); or

    (b) any of the following:

        (i) economic abuse;

        (ii) emotional abuse or intimidation;

        (iii) contravening an external family violence order, an interim family violence order, a family violence order (**FVO**) or a police family violence order (**PFVO**).

53. Economic and emotional abuses are defined in ss 8 and 9 of the Family Violence Act and, like the behaviours listed in s 7(a), are restricted to actions against one's spouse or partner. 'Spouse or partner' is defined in s 4 as a person with whom one is, or has been, in a 'family relationship'. The term 'family relationship' is defined (in simple terms) as a marriage or significant relationship within the meaning of the *Relationships Act 2003* (Tas).

54. The process of listing behaviours within this definition of family violence does not create new offences. Most of the behaviours listed are already criminal offences under Tasmanian law and some are new offences.

55. The practical effects of identifying an offence as a 'family violence offence' under the legislation are that other provisions of the Family Violence Act are invoked, for example:

55.1. the right of a police officer to enter premises without a warrant;

55.2. the right of police to issue a police family violence order;

55.3. the basis of a private (non-police) application for an FVO from a Court; and

55.4. a more stringent approach to bail.

56. A review of the Tasmanian system revealed that since the commencement of the legislation in 2004 there have been seven convictions for emotional abuse, all of which were combined with other charges. There have been no charges for economic abuse.

57. In relation to the offence of assault, in respect of which there was sufficient data to compare family violence assaults and non-family violence assaults, the TSAC found that sentencing patterns were generally similar. However, there were differences in relation to the proportion of immediate custodial sentences (12.7 % for family violence convictions compared to 8.3 % for non-family violence convictions), fines (22.2% for family violence convictions compared to 33.0% for non-family violence convictions) and probation orders (no non-family violence offenders were ordered to serve a term of probation as opposed to 3.8% of family violence offenders). These differences suggest that a family violence assault is treated more severely than a non-family violence assault. A custodial sentence is more likely, offenders are more likely to be subject to post-release supervision, and fines, which occupy a more lenient position in the sentencing hierarchy, are less likely to be imposed.

58. However, a comparison of custodial sentence shows no significant differences between the length of prison sentences imposed for a family violence assault and non-family violence assault.

59. Contravention of a family violence order is an offence under s 35 of the Family Violence Act. The offence is prosecuted summarily. The legislation provides for

incremental increases in penalty for second and subsequent offences. S 35(1) states:

> A person who contravenes an FVO, PFVO or interim FVO, as made, varied or extended, is guilty of an offence and is liable on summary conviction to –
>
> (a) in the case of a first offence, a fine not exceeding 20 penalty units or to imprisonment for a term not exceeding 12 months; or
>
> (b) in the case of a second offence, a fine not exceeding 30 penalty units or to imprisonment for a term not exceeding 18 months; or
>
> (c) in the case of a third offence, a fine not exceeding 40 penalty units or to imprisonment for a term not exceeding 2 years; or
>
> (d) in the case of a fourth or subsequent offence, to imprisonment for a term not exceeding 5 years.

60. The Tasmanian study was unable to determine whether sentencing practices reflected the legislative direction to increase sentences for subsequent offences.

61. One of the theories behind creating a separate family violence offence is that it would promote information sharing so that agencies such as Victoria Police and Corrections Victoria will be aware of family violence issues. Data from the Tasmanian system indicates that this is not the case and that Magistrates often were not provided with sufficient information as to whether specific instances of prior offending were family violence offences. The TSAC has concluded that it is important that the history of family violence offending be available to the sentencer.

Judicial practices in relation to sentencing for family violence in Australia

62. If sentencing practices practises for family violence offences, particularly for offences of breach of family violence offences, are considered to be too low to meet some or all of the purposes of sentencing, there is a question as to how such practises could be changed.

63. I am not in favour of mandatory sentencing for a number reasons including ineffectiveness, unfairness and their undesirable restriction of judicial discretion.

64. The High Court of Australia has stated that the appropriate sentencing methodology is that of an ‘instinctive synthesis’ according to which a judge is required to arrive at

a just and appropriate sentence by taking into account all considerations relevant to the instant case simultaneously. Under this system, guiding judicial behaviour is a difficult and sensitive exercise.

65. In my view, one method of guidance that does not unduly restrict judicial discretion is a guideline judgment. Under the Sentencing Act, the Victorian Court of Appeal has the power to issue guideline judgments, either on its own initiative or on an application by a party to an appeal. A decision as to whether to hand down a guideline judgment must be a unanimous decision of all members of the court hearing the application.

66. Pursuant to s 6AC of the Sentencing Act, a guideline judgement may set out:

(a) criteria to be applied in selecting among various sentencing alternatives

(b) the weight to be given to the various purposes specified in s 5(1) for which a sentence may be imposed;

(c) the criteria by which a sentencing court is to determine the gravity of an offence;

(d) the criteria which a sentencing court may use to reduce the sentence for an offence; and

(e) the weighting to be given to relevant criteria.

67. The Court of Appeal handed down Victoria's first guideline judgment on 29 December 2014, providing guidelines for courts to take into consideration in sentencing an offender to a community correction order (**CCO**). The guideline judgment was issued at the request of the Director of Public Prosecutions in the appeals of *Boulton v The Queen, Clements v The Queen and Fitzgerald v The Queen* (**Boulton appeals**). The Sentencing Advisory Council, Victoria Legal Aid and the Attorney-General made detailed written submissions regarding the DPP's application in accordance with the provisions of the Sentencing Act.

68. When issuing the guideline judgment, the Court stated that the purposes of such judgments were to promote consistency of approach in sentencing and to promote public confidence in the criminal justice system by articulating elements that must be taken into account in a particular sentencing context; Sentencing Act, s 6AE.

69. The guideline judgment has seen a significant change in sentencing practises.

Application of guideline judgements to family violence offences

70. In my view, the statutory guideline process could be applied in relation to offences of breach of family violence intervention orders or other family violence related offences as the Royal Commission may identify.

71. To the extent the Royal Commission forms the view that changes in sentencing can be achieved, this could be done by way of a recommendation that an application be made by one of the statutory parties or on the Court of Appeal's own initiative for a giving of a guideline judgement. As most family violence offences are heard in the Magistrates' Court, some mechanism would need to be found to bring an appeal before the Court of Appeal.

72. An informal attempt by the VSAC for formulate guiding principles for sentencing for contraventions of family violence intervention orders is found in the *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* (**'AF 6'**). A more formal process that would involve submissions by the DPP, Victoria Legal Aid and the VSAC would be far more comprehensive, thorough and authoritative.

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Arie Freiberg

Dated: 30 July 2015