Royal Commission
into Family Violence

WITNESS STATEMENT OF ANDREW IAN MCGREGOR

I, Andrew Ian McGregor, Lawyer, of 70 Dudley Street, West Melbourne 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 a practicing lawyer and Principal of Dowling McGregor Pty Ltd law firm. I am an accredited Children's Law specialist.

3 I work as a solicitor advocate, with four other lawyers who make up Dowling McGregor, in the Children's Court of Victoria (**Children's Court**), on matters such as bail applications and pleas in the Criminal Division of the Children's Court and submissions contests, negotiations and appearance work in the Family Division of the Children's Court.

Background and qualifications

4 I started my career as a duty lawyer working for Victoria Legal Aid (**VLA**) in approximately 1986. I practiced in Children's Court representation and adult crime. I would be dealing with the occasional adult charged with offences of a violent nature towards their partner, as well as child protection matters.

5 I continued at VLA for 13 years. From approximately 1992 I had responsibility for the VLA Youth Legal Service.

6 From approximately 1999 I have been in private practice working with another four lawyers as set out above. I am a duty lawyer in the Children's Court, for adults and children.

7 I hold a Bachelor of Arts/Laws.

Children's Court of Victoria

8 The Children's Court of Victoria is a specialist court constituted under section 504 of the *Children, Youth and Families Act 2005* (Vic) (**Act**), comprising four divisions dealing with cases involving children and young people.

8.1 The Family Division hears applications relating to the protection and care of children and young persons at risk, and applications for intervention orders.

8.2 The Criminal Division hears matters relating to criminal offending by children and young persons.

8.3 The Children's Koori Court (Criminal Division) hears matters relating to criminal offending by Koori children and young persons, other than sexual offences.

8.4 The Neighbourhood Justice Division hears matters for clients that have a connection with a particular municipal district.

Child protection functions of the Children's Court

9 In Australia, the major responsibility for investigating and responding to child protection issues falls to state and territories rather than the Commonwealth. Child protection issues, as I stated above, fall within the jurisdiction of the Children's Court.

10 Section 183 of the Act allows anyone who reasonably believes that a young person is in need of protection to report the circumstances to the Department of Health and Human Services (**DHHS**) or to the police. If there has been a protective intervention report of suspected abuse, the DHHS must investigate the subject matter of the report, pursuant to section 205 of the Act.

11 Pursuant to section 515 of the Act, the Family Division of the Children's Court has jurisdiction to hear and determine applications for, among other things, a finding that a child is in need of protection, interim accommodation orders, permanent care orders, therapeutic care orders and a finding that there is a substantial and presently irreconcilable difference between the person who has custody of a child and the child to such an extent that the care and control of the child are likely to be seriously disrupted.

12 I note that there have been amendments to the Act pursuant to the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014,* the majority of which will come into effect in March 2016. I comment on those amendments below.

Victoria Legal Aid funding

13 In the Children's Court Family Division, there is a duty lawyer service which includes both lawyers from VLA (who usually prioritise acting for children) and private practitioners who are members of a VLA-managed panel. Via that service

VLA funds, without any means test, duty lawyer representation for the first day for people who have had no chance to secure legal representation in advance.

14 For representation beyond the first day of the proceeding, it is necessary for people to either make application to be eligible for legal aid from VLA for legal representation or to secure privately-funded representation. In my experience, the Children's Court is an overwhelmingly VLA-funded jurisdiction. It is rare for there to be privately-funded lawyers in the Family Division. There are a bedrock of clients who, for reasons of intergenerational poverty and the like, will be financially eligible for VLA assistance.

15 VLA's guidelines have been maintained pretty proudly in the Children's Court Family Division jurisdiction. Provided they meet the means test (which, as I have said, nearly all of them do), people who need lawyers for contested proceedings have those lawyers paid for by VLA. There are some issues in the funding guidelines, in that there is effectively a cap on appearances, which either relies on the law firm to appear pro bono in additional appearances, or at times for adult clients to appear unrepresented. Grants of aid are expressed to anticipate a maximum of four court events apart from Conciliation Conference and final hearing. This is quickly exhausted in the more litigious matters. Unlike the family law jurisdiction, for example, the Children's Court is still reasonably accessible as a result of the VLA funding arrangements.

Voice of children in protection jurisdiction

16 In the Children's Court, children the age of ten and over are entitled to their own representation, with the lawyer acting on their instructions. It is also open to the court, in all circumstances, to appoint a Best Interests Representative for a child. The Best Interests Representative is a borrowing from the family law model and is anticipated to entail, where appropriate, the chance for the child to speak to their representative so that their views can be conveyed to the court. This can be for a child of any age up to ten, or older if the child's capacity to give instructions is impaired.

17 If, for example, there is a child aged 11 who has serious disabilities and does not have the communication capacity to operate on the instructions model, then it would be possible for the Best Interests Representative to meet that child and see whether he or she can express a view.

18 Whether in the Best Interests Representative or the instructions model, the weight the court attaches to the views of the child will connect to the age, maturity and sophistication of the child. It is the job of the advocate to ensure that when they are relaying the child's instructions, they can give the court some contextual

understanding of those instructions that will give the court an insight into the way in which the child thinks and functions.

19 There are some cases where the child's view is very persuasive, we act on their instructions and their view carries great weight in the magistrate's final assessment. In others, we are required to tease out the issues and test the instructions. For example, you might have a 13 year old female client who has gone into care as a result of making accusations about her mum's boyfriend behaving inappropriately towards her. Two weeks later, the child retracts her story. As her lawyer you would not just accept those instructions uncritically. You might tease out the issues if you suspect that she is retracting her story because she hates being in care and is missing home. You test the child's story in the same way you would if you had a 25 year old client with a story about why they had a blood alcohol reading of more than .05.

20 The cases where the child wants a parent to be removed are some of the most delicate cases we are involved in as advocates for children. I will always check with the child about how they want me to approach the issue, and discuss how we go about approaching the conversation in a way that is not attributable to the child and so forth. We will be really careful about making sure that the ongoing impact on the family's life is something taken into consideration. The court intervention may go for a period of time; the family is their family for their entire life.

21 One of the trickiest situations is where the child has expressed a preference for the person not to be part of the household and the court has decided differently. Telling the child this outcome is difficult. We emphasise that the child protection worker will come to the house and they will have the chance to speak with the child in private. However, it is not hugely comforting that at times we suspect that that case will become a de-allocated case and that in fact there will be no follow up from a child protection work to ensure that the child is kept safe.

Family violence

22 It is very rare for a matter to come to court on a single issue, but family violence would be a significant theme of the matters that come before the Children's Court. From my experience, I would estimate that family violence issues would arise in approximately 30% of matters before the court (including children witnessing violence between parents or a parent and their partner, or being at risk of violence being perpetrated against them). The largest component is the situation of children being exposed to violence between their parents or one parent and their partner. Feeding into this statistic, we have the current contribution of the ice

epidemic, with the impact of disinhibition in terms of acts of violence and children being exposed to that.

Threshold for DHHS intervention

23 Where family violence is part of the matrix, the protection grounds that DHHS will rely upon to bring an application vary. Pursuant to section 162 of the Act, there are multiple grounds on which a child is said to be in need of protection, including:

23.1 the child has been abandoned by his or her parents and after reasonable inquiries—

i the parents cannot be found; and

ii no other suitable person can be found who is willing and able to care for the child;

23.2 the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;

23.3 the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

23.4 the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

23.5 the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type; and

23.6 the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.

24 In relation to children being exposed to violence, the ground DHHS will rely on to bring an application will be that the child has suffered or is likely to suffer emotional or psychological harm. Where there is a concern that children will themselves be subject to the violence, the relevant ground will be that the child has suffered, or is likely to suffer, significant harm as a result of physical injury.

25 Over the period of time in which I have been practicing, we have gone from the stage where police failed to intervene in family violence situations on the basis that the incident was 'just a domestic', to a situation where we intervene where there is minimal concern that the child themselves will be subject to violence but there is concern that the child will be in an environment that is "charged" with family violence and that may have a psychological or emotional impact. That is enough to constitute a concern that will result in a matter coming to court.

26 We often have to explain this to clients. The client will often say, 'This is ridiculous; I know for a fact my children were asleep at the other end of the house". Our response is, "We understand that, and in the old days we might have thought of that as entirely okay, but we don't think that is okay anymore." There is a magistrate in the Children's Court whose strategies incorporate asking parents to watch an excerpt from a well-known film about family violence called 'Once Were Warriors', to assist parents to understand that while children might, as far as the parents are aware, be asleep in a corner of the house, this doesn't mean they are unaware of the impacts of the violence.

27 On this issue, I think we are at the opposite end of an arc in terms of social policy. I am somewhat wary of the learnings that are being touted in relation to the impact that witnessing family violence can have on children. In some cases, I suspect that we have swung too far the other way. I recently attended training targeted at multi-disciplinary groups – protection workers, lawyers and the like. There was a speaker who talked about the impact of exposure to deprivation on the development of the brain of the infant child, which is a very popular way of communicating the message. The illustration showed a normal size brain contrasted with a dramatically smaller sized brain, which belonged to a child who had been subject to emotional deprivation. However, the speaker failed to discuss the effects of malnutrition, which I understand was another factor impacting on the brain development of that child and was relevant to that illustration in particular. I think we have come to a point where we are oversimplifying, and illustrating the relevant concepts in a dramatic way, and I worry about our mastery of that neuroscience.

28 In my experience, when a parent requests assistance from DHHS, DHHS can be reluctant to get involved, as an assumption is made that because one parent is concerned and is acting as a protective parent, the risk levels to the child are lower. It would be reasonable to surmise that in part that is because of staffing levels and capacity to respond. It can at times be a catch 22; the analogy that if you think you should be excluded from the war because you are mentally ill, you

must be sane. A parent who actively seeks out support from DHHS is maybe the least likely to get it.

Intervention orders made contemporaneously with child protection orders

29 As stated above, the Family Division of the Children's Court has jurisdiction to deal with both applications for intervention orders (**IVOs**) and matters relating to child protection. As a result, it is common in the Children's Court for an IVO to be sought contemporaneously with proceedings for child protection, resulting in orders being put into place which deal with both the IVO and the issue of the parents' contact with the child.

30 There is often a marked contrast between this dual-pronged approach and the approach of suburban Magistrates' Courts where matters are dealt with in isolation and there is often by omission no reference to contact with the children for the offending parent. In suburban Magistrates' Courts, very often an IVO will be put into place and the issue of contact with the children is not considered or dealt with in any way. This singular response to a situation of family violence, absent any arrangement for the parent the subject of the IVO to have contact with the children, is very often insufficient. Parents will often go behind the order. In my experience, it is not uncommon for the sympathetic parent to allow the excluded parent access to the children, on the basis that the parent does not wish to prevent access to the children altogether, but is not aware of any legal mechanism to allow the offending parent to have contact with the children.

31 Dealing with a matter solely by IVO is not a sufficiently rounded or comprehensive response. In the circumstances, it would be preferable if IVO matters were dealt with contemporaneously with protection order proceedings in the Children's Court, rather than at the suburban Magistrates' Court

32 There is something of a protocol that says if children are involved, the matter should come to the Children's Court. That is, if a mother is applying for an IVO on behalf of herself and her children, the expectation is that she could either make that application in the Children's Court or the application is made in the local Magistrates' Court but the return date is for a hearing in the Children's Court.

33 Part of the responsibility for remedying that situation also lies with DHHS taking up applications rather than just advising people to apply for intervention orders.

Interaction between family law courts and Children's Court

34 There are occasions on which it becomes necessary for matters that commence in the Family Court of Australia (**Family Court**) or the Federal Circuit Court to be taken up in the Children's Court and vice versa. For example, it sometimes

happens that cases commence in the Children's Court, but protective concerns are subsequently allayed so that ultimately there is no jurisdiction to make an order. However, there are contact and access issues which continue to exist, and those matters are taken up in the Family Court or Federal Circuit Court. Alternatively, proceedings may commence in the Family Court or Federal Circuit Court and after a time, child protection issues arise which necessitate the commencement of proceedings in the Children's Court.

35 For example, there may be a matter that has run in the Family Court for a number of years when an application for an intervention order is made in the Children's Court, on the basis that the mother has a new partner and one of the children has made an allegation that the new partner hits him. The whole of the proceedings in the Family Court are relevant, but we don't have immediate access to any of those documents in the Children's Court.

36 In addition, it appears at times that clients may be shopping between forums. People have come to the conclusion that they have run their race in one jurisdiction and failed, and so move onto the next; the Children's Court can be seen by some people as a Court of Appeal (through IVO applications or a notification to child protection).

37 At present, the Family Court/Federal Circuit Court and Children's Court operate differently and have different resources available to them. There are also significant cultural differences between the Family Court and Children's Court, and differences in the perceptions of the different jurisdictions. The Family Court is seen as leisurely-paced and legalistic, whereas the Children's Court is seen as 'palm tree justice', a jurisdiction in which you roll up your sleeves and get stuck in.

38 One of the criticisms that has been made about the current Children's Court model is the extent to which Children's Court lawyers do nothing but Children's Court work and associated criminal work. Similarly, there is a sense that family lawyers are unfamiliar with the Children's Court jurisdiction. As a result, when cases move between jurisdictions, there is often a need for new representation.

39 One of the reasons that, at times, there has to be an outcome of new personnel is if the matter has come from the Family Court in which the Independent Children's Lawyer has argued for an outcome which is at odds with what the young person wants. The legal representative can't then come to the Children's Court and act on instructions, because the young person will not have confidence in that person performing in that different model.

40 In my experience, the Children's Court work is fairly all-consuming and in most cases, where a matter moved to the Family Court, I would not continue to act for the client but would instead provide a referral.

41 In saying that, there are obviously lawyers who are proficient in both jurisdictions and there is no reason that practitioners cannot master both. I am on the Law Institute of Victoria Children and Youth Issues Committee (**Committee**) which is made up of both Children's Court and Family Court lawyers. The purpose of the Committee is to assist each jurisdiction to be aware of what the other is doing where there are issues of mutual interest. For example, drug testing of parents in the respective courts.

42 Further, in order to properly advise clients (for example, in the situation where the client might be benefitted by seeking orders in the Family Court rather than the Children's Court), Children's Court practitioners need to have a rudimentary understanding of that jurisdiction, and vice versa. In my view it is quite incorrect to say each operates in ignorance of the other; links do already exist.

Children's Court Clinic

43 The Children's Court Clinic is an independent organisation which conducts psychological and psychiatric assessments of children and families for the Children's Court. The function of the Children's Court Clinic is to provide the court with an expert opinion where requested to do so by the court.

44 The Children's Court Clinic is a particularly useful resource in a child protection context where DHHS has chosen not to intervene. For example, we will often come up against a situation where there is serious violence between siblings but DHHS is of the view that no protective issues arise. Another example is where a 17 year old child is affected in some way by family violence. Again, DHHS might refuse to intervene on the basis that the child will soon turn 18 and be outside its jurisdiction. The clinic is able to assist the court by providing an evaluation of the situation.

Upcoming reforms to child protection laws

45 On Tuesday, 2 September 2014, the Victorian Parliament passed legislation in a bid to strengthen Victoria's response to children and young people in out-of-home care. The *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (**Amendment Act**) received Royal Assent on 9 September 2014. The majority of the reforms introduced by the Amendment Act are due to come into effect in March 2016.

46 The reforms were passed largely without consultation with the Children's Court and the sector. Further, they are based on what we have been told is a report based on 1000 case studies but which has only recently been made available to us. They are not based on the 2012 Report of the Protecting Victoria's Vulnerable Children Inquiry (also known as the Cummins Inquiry). The Amendment Act reduces the range of options available to the court in terms of child protection outcomes. For example, it removes the interim protection order which effectively provides a three month test period in which perpetrators can show that they have made changes before the magistrate makes a final order. This mechanism is highly valuable and well-utilised and in my view should not have been removed as an available option.

47 With respect to the impact of the legislative changes due to take effect in March, 2016 I would refer anyone seeking more information to the publications of the *Standing Committee on Legal and Social Issues, Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*.

48 Potential impact from these changes are many and significant. The most concerning issue is the restriction on the capacity of the Court to manage matters in a way intended to give maximum opportunity to parents to achieve reunification where appropriate.

49 The clock is likely to be ticking in a way that says if parents do not access services in a timely way, do not take up family violence counselling, relationship counselling, anger management counselling sufficient to enable the Court to oversee reunification these matters will become issues for the discretion of the DHHS.

50 There is also the implication that notwithstanding the unavailability of the services accessible during the time of the operation of a Court Order the window of opportunity will close and the DHHS proceed expeditiously towards out of home placement.

51 Another significant issue of concern is the limitation of the Court's ability to make rules with regard to frequency and arrangements for contact for the non-custodial parent. It is in just such circumstances that the victim of domestic violence may succumb to the persuasions of the perpetrator to allow unsanctioned contact to occur and thereby place the entire arrangement in jeopardy. If a parent who seeks contact knows it is possible to obtain an outcome through a Court there is less danger of illicit contact occurring.

What does the system need so that it can always work well?

52 I think it is important to ensure the current systems work effectively. There are practical problems with some of our current systems. A simple example is in relation to drug screening tests. Often our clients will be ordered to comply with a drug screening regime. To do so, they need paper slips to take to the lab. However, these slips will not be present in court and will instead be posted to the client whereupon they become lost or do not arrive. Similarly, clients will present at the lab as required but will not be in possession of photo identification. We could address these issues simply by ensuring the slips are present at the courtroom, and ensuring there is a photo booth at the courtroom so we can create photo identification.

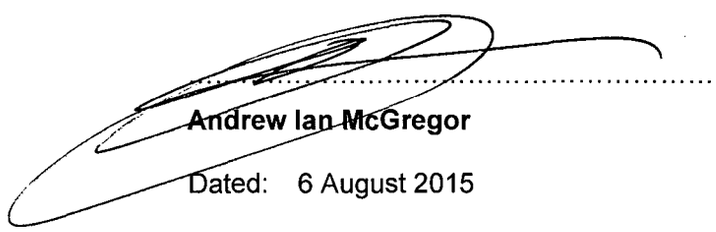
53 We need to ensure there is a coordinated and unified response across jurisdictions. One example of this, as I have discussed above, would be ensuring that we have consistency in how we tackle matters requiring both intervention orders and a child protection response across suburban Magistrates' Courts and the Children's Court.

54 Another issue is our resourcing of appropriate spaces in which we can facilitate parents' visitation to their children when children have been the subject of child protection orders. Previously there was a facility for children who were in the care of the State called Allambie Reception Centre (**Allambie**). Allambie closed in 1990 and is no longer considered good practice in terms of a model for the care of children. However, it had the incidental benefit that parents could regularly visit their children as there were always carers on hand to act as supervisors. The situation now is that children are generally placed with foster carers and allowed a limited amount of contact each week at the local DHHS office. Newborn children, in particular, have poor outcomes in these circumstances. Courts frequently have to determine applications for daily contact of breastfeeding mothers where the DHHS oppose this on the basis of the resources involved in transporting the supervision. Often the protective concerns relate to the perceived risk of domestic violence between the parents to which the child may otherwise be exposed. Our resourcing of these issues is hugely problematic and requires greater expenditure and prioritisation.

55 Overall, we need to properly resource the services.

56 There is a phenomenon of young people being the subject of IVO applications, protection applications and criminal proceedings in circumstances where the protection sought or the victim of the conduct is the parent. In my experience, it is rare for these matters to reach Court without other assistance being sought by the

family first. There are some circumstances in which we argue that seeking to characterise these problems as appropriate to deal with in the criminal law is ill considered. One example involves a client who has ultimately been determined to lack capacity and whose progress through the Courts has involved intervention orders and bail conditions, both of which would appear to be inappropriate strategies to apply in circumstances where ultimately prosecution and defence have accepted that the young person's level of functioning indicates an inability to, at a fundamental level, make any sense out of what these processes entail. In some situations the state appears to respond to repeated cries for help from a family by suggesting an IVO, it is rare for the Children's Court to accept this solution as the simple and appropriate remedy. In any matter where there are more complicated undercurrents the Court will seek assistance from the Children's Court Clinic. In circumstances where there are criminal matters the Court can make use of the capacity to seek intervention of child protection if that has not already been accessed by the family.



Andrew Ian McGregor

Dated: 6 August 2015