Royal Commission into Family Violence

WITNESS STATEMENT OF CAROLINE MARITA ANNE COUNSEL

I, Caroline Marita Anne Counsel, Accredited Family Law Specialist of Level 7,365 Queen Street, 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 the founding partner of the boutique Family Law practice Counsel Family Law. I established the firm in 1999, initially in partnership and then in sole practice since 2004 to the present day. My clients include both victims and perpetrators of family violence who are involved in family law proceedings. In recent times, this has included providing clients with collaborative and mediation based dispute resolution services as well as the more traditional court based services.

Background and qualifications

3. I started my career in a suburban then city practice initially working in multiple areas of law and then working exclusively in family law within the first 3 years of practice. I was made a non-equity partner in approximately 1990. In 1991 I worked at Clancy and Triado for a period of 11 months and during that time, I worked for approximately 6 weeks at the Family Court of Australia as part of an exchange program with the profession. In 1992 to 1999 I worked as a family lawyer at Coltmans, a city based commercial firm and was made a non-equity partner in approximately 1995. This firm then merged with Middletons who did not wish to expand their family law practice and I made the decision to establish a city based family law practice.

4. Accordingly, in 1999 I established Counsel & Kelly Family Lawyers as a boutique specialist family law practice. In 2004, this partnership was dissolved and I established Caroline Counsel Family Lawyers, now known as Counsel Family Lawyers and have practised in this firm ever since.

5. In 1990 I became an Accredited Family Law Specialist and have been in practice in excess of 30 years, with extensive experience in many aspects of family law including court proceedings in the Family Court and the Magistrates' Court. I also have

particular experience in intervention orders and protection order applications in the Family and Magistrates' Courts.

6. In recent years, I have been actively involved in developing methods of alternative dispute resolution in family law including Collaborative Practice. I believe that wherever possible non court based solutions should be explored to assist families' transition through separation and a multidisciplinary team best affords families the support they need to make this change. With highly skilled professionals, this is feasible even where some family violence is present. I have approximately 9 years' experience working as a collaborative practitioner.

7. I also hold a Graduate Diploma of Family Dispute Resolution Practice (**FDRP**).

8. During my career, I have also held a number of positions, relevant to family law, at the Law Institute of Victoria including Chair of the Family Law Section, Chair of the Education Committee, Chair of the Children and Youth Issues Committee, Chair of the Collaborative Practice Section, Chair of the Property and Maintenance Section. I was President of the Law Institute of Victoria (**LIV**) in 2011. In addition, I currently hold the following positions and memberships:

   8.1. Member of the Council of the LIV

   8.2. AGM Representative of the LIV at the Law Council of Australia

   8.3. Council Liaison Family Law Section of the Law Institute of Victoria

   8.4. Board Member of the Victorian Legal Admissions Board

   8.5. Member of the Victorian Legal Admissions Committee

   8.6. Member of Collaborative Professionals Victoria

   8.7. Chair of the Collaborative Practice Executive Law Institute

   8.8. Founder and Chair of the LIV/Bar Residential For Family Lawyers – Law Institute of Victoria

   8.9. Member of the Ethics Committee of the Law Institute of Victoria

   8.10. Member of IACP (International Academy of Collaborative Professionals)

9. For approximately 15 of my 30 plus years in private legal practice, I represented children in the Family Court as an Independent Children's Lawyer.

Our system can't effectively deal with family violence

10. Having worked extensively in the family law system and in various roles, including the neutrality of the Independent Children's Lawyer, I have been able to assess what works and what does not. Although we know what works, and we do have examples of best practice in operation in Victoria today particularly in the Magistrates' Court, the current system as a whole does not deal with family violence as effectively as it could.

11. Across the system, there are different approaches to how family violence is regarded and this is the by-product of the existence of different court cultures. This can be extremely confusing and distressing to the client whose journey through the separation may entail interaction with a number of courts. The client may experience how one court weighs, views and manages the issue of family violence. The client's matter may then progress through other courts or jurisdictional avenues such as a criminal case or through to the Family Courts. From the client perspective when they experience that different court culture, it is challenging for lawyers to help that individual understand why their personal experience is being, at best, homogenised or at worse, ignored, in another Court setting, why their very real fears and concerns are not being acknowledged or do not seem to factor into the decision making of that court.

12. One of the reasons for different court cultures emerging is the segmentation of the work between the Courts and an assumption in the Family Courts that family violence has been effectively dealt elsewhere i.e. in the Magistrates' Court.

13. The Magistrates' Court has developed an advanced culture as is evidenced by the expertise that has evolved when dealing with family violence. There is ongoing training and whilst not all Magistrates are created equal, there is a commitment to training and universality in approach. This does allow this Court to effectively deal with family violence issues more broadly. However, there are unnecessary restrictions in that capacity in applications under the Family Law Act.

14. For instance, in an application for parenting orders, the Magistrates' Court has power to make both interim orders and final consent orders. The court's power to make final unopposed orders is ambiguous. The difficulty arises when there is no appearance

by the alleged perpetrator and; in the absence of consent, the power for Magistrates to make final orders under the Family Law Act is ambiguous. In practice, as I understand it, final orders are not made unless there is consent. The Magistrate transfers the matter to the Family Courts and there is delay in having the proceedings next heard in the Family Court. If, for instance, there is a suspension of FL parenting orders as part of intervention orders made under the FVPA, the suspension will not exceed 21 days.

15. In my opinion the 21 day restriction should be removed. If the Magistrate is best placed, in a family violence triage situation, to make appropriate parenting (including suspension of time between a perpetrator and children), financial and family violence orders then they should be able to do so. These powers should be unambiguous and flexible which would enable safer outcomes for the family at a time of crisis and would ensure fewer time gaps when the matter is listed in the Family Courts.

16. As to how long such orders should last, the Magistrate hearing the family violence evidence would be best placed to make this decision initially and provided there is good liaison between the Magistrates' Court and the Family Courts, an assessment as to transfer of the matter and timing of the further listing of the matter in the Family Courts could be addressed. The Magistrate should also be able to order the preparation of an urgent Family Report (s11F Report) pending this matter being transferred to the Family Courts. This would ensure by the time that the matter is transferred, the file management continues seamlessly between the Magistrates' and the Family Courts. The Magistrates' Court's challenges lie predominantly in resourcing issues, training issues to ensure cohesion of thinking between it and the Family Courts and the sheer weight of the volume of their work.

17. In summary, there is a need for legislative reform given there is a question regarding the lack of clarity about the Magistrates' Court's powers to make final unopposed orders (as distinguished from final consent orders); or the lack of ability to case manage the proceedings after the respondent puts in a response seeking different orders from that sought by the applicant (usually the applicant mother who alleges family violence). Section 69J of the Family Law Act confers summary jurisdiction and S69N restricts that jurisdiction.

18. There are resourcing issues that cause delays in the seamless and timely transfer and case management between jurisdictions – Magistrates' Court to Family Courts.. Delays are increasing in the FCCA exponentially even in relation to urgent parenting

matters due to demand and retiring judicial officers not being replaced. The other provisions - 68R and T - give rise to different issues, the main concern being the limit of 21 days on suspension of parenting orders when it is practically impossible for a victim to get their case before one of the Family Courts in time. If there were sufficient resources, both Court and legal representation, including legal aid funding, for Applications for orders to be made in the Magistrates' Court, that Court could then make interim orders where necessary. Funding would be paramount as this is likely to see, on an interim basis at the very least, the Magistrates Court expanding its work load and increase exercise of its jurisdiction under the Family Law Act.

19. In contrast, the Federal Circuit Court (**FCCA**) deals with the bulk of family law matters (as opposed to the Family Court of Australia). In short, it has a vast workload and enormous pressure due to limited judicial resources. The FCCA deals with the totality of the family breakdown including injunctive relief, parenting, maintenance and property issues. In covering the gambit of the vast array of issues the Court deals with, the consideration of family violence becomes one of many factors and as such the client perceives that violence as a concern has lost its importance.

20. Additionally, the FCCA does not have before it all the evidence that the Magistrates' Court had when making an interim or final intervention order. This can create the perception and experience among clients that family violence is not given appropriate weight. Ideally, information sharing between the Magistrates Court and the Family Courts and the latter's regard for that information (not the mere existence of violence) should become mandatory. At present, Notices of Risk are compulsorily filed in Family Courts and Intervention Orders are included but not the evidence which led to that order being made. Accordingly, it should also become compulsory that this evidence is also filed with the Intervention Order to ensure that the Family Court has access to all relevant information.

21. Part of ensuring that family violence is properly taken account of is having in place a good court culture, one that fully considers the violence, in the context of the history of the family, the immediate needs of the family to be protected from violence and what other orders should be made to give effect to best promoting family safety. In contrast, a poor court culture is one which shifts emphasis and focus onto the work at hand and does not have proper regard for the impact of family violence and orders made previously to deal with family violence issues. This siloed thinking leads to orders that are insufficient to counter that violence. It sends conflicting messages to the perpetrator. It telegraphs to the victim that their concerns are not shared by the

Court. The good court culture is perceived as rigorous by both victim and perpetrator and accountability is high. A poor court culture pays less attention to violence and its impacts and this inadvertently can send a message to the perpetrator that their actions are not serious. A poor court culture tends to focus on the aspects of the case which that court considers relevant to its decision making role on a given day. The family violence, whilst it may have initially preceded the court's involvement, is likely then to continue.

22. When a court culture fails to have due regard for family violence, this can give rise to a negative, cascading effect, albeit unintentional. Such a culture telegraphs to those who appear before it, lawyers and litigants in person alike, that violence is but one consideration and the work of the Court necessitates taking into account other considerations, such as the need to promote a parent/child relationship. Where a litigant in person has previously experienced a best practice court culture, this would be extremely distressing. Where a lawyer advocating for their client experiences this, the effect is equally concerning and indeed far more reaching due to the trickledown effect. Once family violence has been minimised or marginalised in court thinking, the lawyer will thereafter alter their advocacy. The lawyer may be reluctant to advocate as strongly as they might for fear their advocacy may rebound negatively on their client. With subsequent clients, the dye is then cast and in the interests of advocating for the client, the lawyer/advisor culture becomes an extension of the Court's culture before whom that lawyer appears.

23. Taking this one step further, a less than satisfactory court culture is one which ignores the import of family violence and is blatant in its communications to those who appear before it, that violence is not a relevant consideration for the court's purposes in relation to the matters before it on a given day.

24. Best practice would see uniformity in approach amongst all Courts when it comes to dealing with cases in which there have been allegations of violence. In the family law context, this means uniformity between the Magistrates Court, the Family Courts and the Children's Court when dealing such allegations and this necessitates the development of the same culture across the courts. This would address the real concern that when a matter moves from one jurisdiction to another, the import of violence is not lost. It would ensure uniformity of thinking and approach. It would minimise gaps in providing family safety. It would be less confounding and confronting for victims of family violence when that uniformity is legislatively

mandated. It would also ensure perpetrator accountability is assured due to consistent court cultures.

25. There would also need to be a clear mechanism for information sharing between the courts for the same reasons - ensuring uniformity and continuity in approach, to minimise gaps in family safety, to enhance perpetrator accountability and alleviate the necessity of the victims of violence having to repeatedly plead for their concerns about violence to be recognised. In short, best practice would see the Magistrates' Court, the Family Courts and the Children's Court having the same information before them and having the same regard for that information.

26. There are positive precedents in our criminal justice system where court culture has been altered through legislative change. One such precedent is the implementation of victim impact statements and the mandatory regard that the courts must have for such statements. This has led to a fundamental shift in court culture and a better outcome for a previously disaffected segment of our community. Mandatorily ensuring a uniformity of approach has led to a dissipation of that disaffection and has allowed a quantum of therapeutic justice to enter our mainstream criminal justice system.

27. In the Family Courts, there are a cohort of families that will need judicial intervention and ideally, the system should ensure that these families are identified as early as possible and resources are focussed on how best to manage those families as speedily as possible to a conclusion i.e. a Family Report and final hearing. The Family Court has developed expertise in its Magellan list which aims to fulfil that precise function - identifying, managing and finally resolving those cases which have allegations of child abuse. The Court has no option but to manage its limited resources and priorities have to be determined. Properly resourcing such file identification and management would be essential.

28. Clients in the family law system labour under the misapprehension that the Court will find one parent is in the "right" and the other in the "wrong" and that they will be vindicated. Other clients labour under the misapprehension that someone in the Court will "help" their family, that there will be a therapeutic approach or outcome to mend the wounds of separation or violence. Initially counselling, in a therapeutic sense, was offered to families as a part of the Family Court's resources. This is no longer the case. The counsellors who remain at the Court perform an assessment role. Most assessment work is outsourced and Family Reports are conducted by a

Family Consultant. Therefore once in adversarial system, all activity is focussed on advancing one person's case to the disadvantage of the other. There is no focus on a therapeutic outcome that would be in the long term best interests of children or the family as a whole. There is no exploration along the timeline of litigation about whether a family can be diverted into a therapeutic program. Again, there is a disconnect between client expectation and the current offerings of the family law system.

29. In a best practice model, once in the Family Courts, initial expert analysis could be conducted by experienced Family Consultants. As part of their assessment and depending on the specific needs of the given family, a review of options could be undertaken. Those options may include the implementation of a diversionary approach or a determination that the matter should be referred for early judicial consideration and ongoing judicial management. A diversionary approach would be cost and labour intensive and would require a collaborative approach of highly skilled team to work with such families. This team could consist of counsellors/psychologist, mediators, lawyers who are trained in family violence and conflict resolution.

30. Since the introduction of the Family Law Act, despite the process continuing to be an adversarial one, family lawyers have demonstrated a capacity to work with Family Consultants and other professionals to find better outcomes for families. Lawyers are often responsible for diverting families into therapy and out of the Court system. This sometimes comes as a result of a private Family Report whereby the report writer provides a report in a manner that gives a blue print for a non-court based outcome. This has happened through practice rather than through design. A best practice model would ensure that such opportunities are explored through design. This would require that all those who work with families who have experienced violence to have an identifiable set of skills and multidisciplinary training.

31. With best practice comes the ability to explore whether a therapeutic solution can be implemented to help address, lessen, remove or reduce family violence, so that the family can continue to function to some degree, even if the parents are separated. Dynamics of separation are highly volatile even when there is no family violence. It is an extremely precarious phase of a family's existence. Violence makes it more so. Families are complex units as are the relationships within a given family unit. They are not static. An exploration of therapeutic solutions are essential as it will be therapy not litigation that has the potential to minimise harm to everyone, children especially. The Court process does not teach parents better parenting skills, nor

does it teach them the adverse impact of their violent behaviour on their former partner or children. That is not the purpose of the Court. Sometimes, inadvertently, clients do acquire these skills. They may be educated by their lawyer about their behaviour and how it has impacted on their children. They may be referred to a counsellor to obtain therapy or support. The successes are dependent on individual experience rather than uniformity in approach or process.

32. If we accept that it is in the best interests of children for their parents to acquire or develop parenting skills and change their (violent) attitudes or behaviours, this will not happen without a dedicated program of support and education. Change in behaviour and thinking would be considered best practice as this must provide a better outcome to one where the perpetrator is not encouraged to identify their unacceptable behaviour or made to realise their failings in their responsibilities as a parent.

33. If the perpetrators refuse to engage in this transformation, if they refuse to acknowledge what they have done and change their behaviour or accept what they have done is unutterably abhorrent then in these extreme cases, there is no merit in them having a relationship with their children. In extreme cases, it is also questionable why the door of the court should remain open to him to have a relationship with their child. The question is what benefit is it to a child to be compelled to have contact or a relationship with such a father?

34. In summary the system is not broken. The current system needs to be reviewed, and where best practice exists, it should be implemented across all Courts in a consistent and legislatively mandatory manner and enshrined in behaviours of courts through an adoption of similar court culture. Where best practice needs to be identified, developed and implemented, then resourcing should be prioritised to achieve this.

35. To deal then with these issues and others, I see that the following critical changes need to be made to the family law system:

    35.1. information sharing between the Magistrates' Court, the Family Courts and the Children's Court;

    35.2. a triage method that directs matters and information from the Magistrate's Court to other jurisdictions, supported by a common assessment tool and a uniform approach and culture shared by the Courts as to how violence is regarded;

35.3. ongoing judicial education in family violence across all Courts;

35.4. specialist training and accreditation for legal practitioners and allied professionals working in the area of family violence;

35.5. development of Family Consultants - both internal and external to the Family Courts, to ensure that their skills and knowledge is current and their methods adhere to a best practice model and that they receive ongoing training in family violence;

35.6. A reinforcement in the Family Courts' culture that Family Reports are regarded as one part of the evidence and not the definitive or conclusive evidence of family dynamics before the Court;

35.7. additional funding for litigants to ensure that both perpetrators and victims of violence are legally represented and have access to wrap around services from the outset that enable the practicalities of the impacts of violence to be addressed;

35.8. ensuring that legal aid funding is available to both parties up to and including the final hearing in the Family Courts regardless of whether there is an Independent Children's Lawyer involved or not and that this not be prone to the vagaries of future financial constraints in legal aid funding;

35.9. the exploration of non-court based dispute resolution methods for families where appropriate screening occurs and the families are supported by an experienced, multidisciplinary team assembled according to the specific needs of a given family;

35.10. the reframing of the concept of what is in the best interests of children to ensure the dynamics of violence are taken into account by the Family Courts when applying this concept;

35.11. more resources and judicial appointments for all courts to manage the increase in demand in family violence cases.

36. I will deal with each of these points in turn below.

The need for information sharing of information between courts

37. As between the Magistrates' Court and the Family Courts, as well as the Children's Court, there is no automatic sharing of information. After the Magistrates' Court has made family violence orders, the other courts rely on processes that are predominantly client or lawyer dependent i.e. court form completion such as the Notice of Risk. Evidence that is relied upon by the Magistrates' Court at the time of granting an interim Intervention Order does not automatically form part of the other Courts' filing system.

38. As the family violence "evidence" remains the domain of the Magistrates' Court, there is a perception that once an Intervention Order has been obtained, the Family Courts need not overly concern themselves with family violence as an active issue. I say perception as there are judicial officers in both the FCCA and the FCoA that regard family violence as an extremely serious allegation and fully comprehend the necessity of managing the dynamic when dealing with the family before them.

39. Best practice in the Family Courts is evident when these judicial officers' case management and decision making is alive to violence issues regardless of the issue before them but particularly when determining what relationship an abusive parent should have with a child.

40. Best practice does not rely on a victim of family violence having to retell her story repeatedly because the course of her family's separation requires different jurisdictional interventions. The majority of judicial officers do care about the impact of family violence, it is the lack of process and lack of consistency in information sharing that leads to inconsistency in approach.

41. It is this lack of current information being in the right place at the right time that leads people to the despondent conclusion that the courts do not really care about family violence. An integration of systems and information sharing should be implemented in relation to family violence issues in all courts, (including the County and Supreme Courts). In this way, the courts can take full account of the granular aspects of the violence, not just that it exists.

Triage and a common assessment tool

42. In addition to having the right information in the right place at the right time, the system needs to be able to ensure that families are directed to interface with the court system in the most appropriate jurisdiction.

43. To achieve this, we need an effective triage method that can move people and their relevant family violence information from the Magistrates' Court where they often initially present, to the most appropriate court to deal with their particular matters, whether that is in the State or the Federal system. This approach is more realistic than the "one stop shop" idea, which may be difficult to implement given the existence of the federal system. The Magistrates' Court could utilise its jurisdiction under the Family Law Act to make interim parenting orders in addition to family violence orders before the family moves to the Family Courts for further determination.

44. However, for a triage system to work effectively, we need to combine it with a universal understanding of the dynamics of family violence, in the form of a universal risk assessment tool so that our different courts are assessing risk in the same way and thus ensure that consistency in court cultures.

45. This assessment of risk would need to be supported by an integrated information sharing system between courts and other services, as discussed, so that an assessment of risk at one point in the system would be shared with another part of the system. Everyone within this common system would then understand that risk assessment in the same way, and deal with the victim or child in the same way. This applies not only to lawyers and judicial officers but also to groups like the police and other family violence services.

46. However, a challenge in the current system is that practitioners apply differing legal tests in different jurisdictions. This highlights an important point - we need to do more than just create a universal understanding of information that is available to everyone who needs it. What we also need is the training of practitioners, police and allied professionals so that they can work across the different jurisdictions, with the nuanced aspects of family violence, to ensure that wherever families interact with the legal system, they are getting expert advice and guidance.

47. As dealing with family violence requires an integrated approach, it is critical that the work of the Family Violence Taskforce under the leadership of Chief Magistrate Lauritsen continue. This Taskforce provides a forum for information sharing between

stakeholders working in this area. The Taskforce should continue its work beyond the life of this Royal Commission and should provide ongoing information to those in government in relation to policy and funding.

48. What is also required is broad based professional development, including judicial training, so that those in the legal system understand the dynamics of violence, how the different tests are applied and what best practice is. This means education beyond just the statutory definition in a set of certain circumstances, but training on what the dynamics of violence are and what it looks like in a variety of situations.

The requirement for judicial and stakeholder training

49. Best practice, that ensures consistent court cultures, would require judicial officers to share a universality of understanding of family violence dynamics. As stated, training would ensure that universal understanding. If family violence were to be enshrined mandatorily in legislative considerations across family, child protection, criminal, civil and other areas of law, then this ensures future consistency in attitude and implementation but it does not guarantee universality of court culture.

50. Best practice therefore requires that judicial officers have access to ongoing, high quality training, similar to that which is already being implemented in the Magistrates' Court.

51. To secure consistent court cultures, these same educational opportunities must be extended and made compulsory to those who are involved in that system, such as lawyers and support workers. Without this universality of understanding, it will not be possible for us to effectively manage family violence cases to ensure that the system protects and considers opportunities for transformation and healing. Without this understanding, we will have for example judges who don't understand that a women's capacity to interact with the court following long term systematic abuse is almost entirely diminished, or to understand that what might be best for the child, given the high risk violent behaviours being engaged in by the father, is to have no contact with him.

The need for specialist practitioners

52. As a recent appointee to the Specialisation Board of the Law Institute of Victoria, I have been working on the concept of developing a sub-set of family law and other areas of accreditation specifically focussed on family violence. It would represent a

further layer of specialisation that an already highly skilled practitioner might obtain. For example, if a family law accredited specialist wanted to sit for and gain family violence accreditation, he or she would not only have to be an specialist in their area of family law, but they would also have to demonstrate competency in their understanding of the Magistrates' Court, the Family Court and the Children's Court, the criminal elements of family violence, the child protection system, and so on. This would ensure that family violence specialists would have to engage in cross-court, cross jurisdictional learning, which is essential to delivering best practice in the family violence area.

53. In addition to training on content, there should also be training around the approach lawyers take. Indeed, the role that a good interventionist lawyer's approach can play in moving that family forward into a future where family violence does not exist or does not exist to the same extent, should not be underestimated. Accordingly, it is important for lawyers working with perpetrators to have the skills to engage in re-framing the situation with those perpetrators and work to enable the perpetrator to develop insight into behaviour.

54. Again, a consistent court culture enables lawyers to be able to predict court attitudes and therefore start to work with their clients, victim or perpetrator, to manage the client expectation and also to better educate their client as to what is required of them. Lawyers are ethically compelled not to simply parrot their client's instructions and reminders through training of lawyers' ethical obligations when representing clients should form part of ongoing training.

55. By having predictable court cultures, a lawyer can work well and better assist a perpetrator to understand how the judicial officer or the Family Consultant is likely to regard their behaviour and therefore the likely consequences of that behaviour. Accordingly, it is not just about knowledge, but the skills to apply that to achieve higher value results.

56. There is a myth, which many lawyers believe, and thus allow their perpetrator clients to minimise their culpability, that an intervention order is a malicious act by their former partner. This is a myth because in actual fact, most intervention orders today are taken out by the police. In training lawyers, these myths would need to be addressed.

Funding must be given at all stages and in particular at court hearings

57. To ensure that victims and perpetrators can access lawyers at the right times during their interaction with the court system, appropriate funding is needed.

58. It often takes a woman, who has been the victim of family violence, years to regain her full capacity, to be de-programmed post a violent relationship. If she were forced to represent herself in court proceedings during this recovery period, she would have a diminished capacity to represent herself. These women are often too emotionally vulnerable and damaged at that point to navigate through the court process themselves. There must be funding throughout as women, who are at their most vulnerable, would otherwise find our legal system oppressive.

59. For different reasons but the same preferred outcome, perpetrators also require legal funding to ensure that they are appropriately legally represented and that they receive the right advice throughout their matter.

60. Legal aid funding should not be denied to a family that requires court based outcomes. In the past, aid has not been made available to litigants who have been victims of family violence, leaving those victims to be cross examined at final hearing in the Family courts by the perpetrators of such violence. The vagaries of State and Federal legal aid funding should never see a repetition of such funding decisions or policies.

61. A lack of funding for families where family violence has been evident, highlights the undervaluing of a good legal representative having the right input at the right time, and also underestimates what a difference that representation can make to both victim and perpetrator.

Family Consultants' skills to be updated and assessed

62. When the Family Court was first established, it included a model of in house counselling where families could explore the issues associated with separation prior to becoming litigants in the Court system. If those families then required Court determination, a Family Consultant would be appointed to provide a Family Report. Sometimes these reports were made early on in the matter and this concept continues today in the guise of the s11F Report. These early reports were then used to create understanding of the dynamics of a given family and court, legal practitioner

and client alike were able to use that report to shape their thinking or explore interim agreements in relation to children's issues.

63. Incidentally and most potently, the in house facility led to a highly specialised cohort of counsellors and report writers who were skilled in conflict identification and dynamics of separation including family violence. With funding and legislative changes, this cohort has been diminished. The impact is that the collective learning and shared knowledge has also been diminished. At times, this leads, at times, to vagaries in thinking, attitude and expertise amongst Family Consultants.

64. Given the critical importance of a Family Report in the context of a parenting case in the Family Courts, best practice for Family Consultants should see a highly skilled group who work predominantly if not exclusively in the area of family separation and have ongoing and compulsory group training and assessment to ensure that the skills of these experts are indeed capable of fulfilling the best practice brief. This is highly specialised work. It is not work that can constitute a small part of a private practitioners workload.

65. Unfortunately, there exists a poor report writing culture, which permeates through much of the report writer collective. A poor report writing culture is one in which skills are not assessed, there is no mandatory review of the relevance of their ongoing training, there is no universality in areas of training, there is siloed thinking, poor or no peer support or review. Such reports do not provide the insights into the family violence that the court requires to assist it in its decision making.

66. The consequence of this is that, where there exists an unsatisfactory court culture, with a time poor or under-resourced judiciary, a tendency may arise for judicial officers to place undue importance on the Family Report and use the Report to compel a settlement rather than have a matter proceed to judicial determination. Such compromised settlements do not in fact "resolve" matters. They simply push the unresolved family dynamic into another arena - an arena no longer under the scrutiny of the Courts. This dynamic is likely to result in this family resurfacing either in the court, welfare or family violence system. An unsatisfactory court culture also has the potential to impact on how the Family Report is regarded. The report, regardless of its merits, becomes the default position and adopts a mantle of inviolability to cross examination. It is leveraged beyond its role as one aspect of evidence and is perceived as conclusion or fact.

67. I have referred to the 11F report in the Family Courts. This is not a comprehensive report as would be prepared for a final hearing but it does provide some assistance to the Court in understanding what is happening in a given family. In best practice, these reports would be more comprehensively available or indeed provided compulsorily in cases involving family violence. Rather than limiting these reports to the most urgent of interim issues and therefore be curtailed or cursory, in cases of family violence, an early report more akin to the Family Report (prepared usually for final hearing) could be produced and if not in all cases, then for those cases whereby the violence has been screened and assessed as being of concern.

68. As the family violence dynamic is not always apparent at the commencement of a family court matter, as a case evolves and the violence is pleaded, there would also have to be capacity to apply to the Court to order such report or for the Court to order such a report of its own volition.

69. In an unsatisfactory Family Report writing culture, process, content, approach and thought are not consistent. This can lead to unpredictable results. Unpredictable results make it difficult for lawyers to advise their clients even when attempting to assist clients prepare for a meeting with the Family Consultant.

70. In a poor Family Report writing culture, Family Consultants are siloed in their thinking, can develop an arrogance in attitude or can rely on past experience or learning, neither of which is current or of assistance to the Court in its deliberations. As they are a "single expert" and as they are often the only person to have met the family, it becomes difficult to challenge the assumptions or conclusions reached in their reports. Whilst a Family Consultant's credentials may have been highly regarded at one stage, aberrant behaviours or attitudes can infiltrate and if not corrected, can lead to a perpetuation of that attitude across multiple families. This has a deleterious effect particularly when there is a pervasive perception by the Family Consultant that the contents of a report are unlikely to be challenged.

71. A poor report writing culture can lead inexorably to the production of poor reports. From the client perspective, a poor report writing culture can leave victims, perpetrators and children alike with, at best, unhelpful, and at worst, damaging reports.

72. Lawyers, when faced with an unhelpful or damaging report, face a significant dilemma. Does a lawyer in such a situation set out to challenge the authority of the

Family Consultant and persist in the cross examination of that individual and address the client and lawyer concerns of the Report? Is the risk of exposing the client to negative findings and a hardened attitude of the Report writer against the client too great?

73. In a best practice report writing culture, there would be a concerted program of ongoing learning to ensure consistency of capability across that system. You would require processes to ensure that only highly skilled individuals who understand the dynamics of family violence and other aspects that surround separation are working in that sphere. The effect of the in-house counselling service at the Family Court being drastically reduced and reports being referred out to those who work in private practice means that the scope and variety of their work as consultants may act to dilute and not enhance their skills. Couples therapy, for example, requires a completely different skill set to understanding conflict and family violence identification.

74. In a less satisfactory culture, we risk a system of mixed capabilities and understanding and at worst the evolution of the cult of the individual Family Consultant whose accountability is low. Such a culture sees families being treated differently, based on who they see for the preparation of a Family Report.

75. At present a lawyer can elect whether to issue in the FCoA or the FCCA. This decision can also affect the outcome for a given family where violence has occurred. For the time being, the ability to choose which of the two Courts, when we do not have clear consistencies in court cultures or report writing should be retained. The concern is that in a resource or time poor court, the violence being alleged may get lost in the morass of other families that have experienced violence and this can in turn lead to violence being homogenised.

76. The need for training and capability building for Family Consultants to be ongoing becomes clear when you consider that the statutory definition of violence has changed and been strengthened over the years. These positive legislative changes means that today's Family Consultants need a nuanced understanding of the various ways in which family violence might present, in the ways that children express exposure to that violence and in the narration that parents provide or indeed the inability of the victim to articulate their experiences. These skills and this depth of understanding is needed as the Family Consultants sift through the stories of each

party to find the grains of truth or insight. As stated, the court relies very heavily on these people. They are the social scientists. Judges are not. Lawyers are not.

77. In an effective report writing culture, the Family Consultant's role represents an effective delegation, but not abrogation, by the court of this very important insight finding function. Therefore, if their training is not ongoing and if they are no longer working at that best practice level, then they risk stagnation, and they cannot effectively provide the nuanced report required by the court to make appropriate orders.

78. A further area of concern is the lack of remedy against a poor report writing culture. There is no ability until the final hearing to cross examine the report writer to demonstrate whether or not the report writer has in fact addressed the nuances of a given case. There is no scrutiny placed on the material that they produce. As stated, what is written in a given report has enormous ramifications on the outcome of parenting cases. To challenge a report is an option not to be undertaken lightly. The potential for a given client to be seen as obstructionist, or that they are a difficult or hostile parent, can adversely affect the client's parenting outcome.

79. In a poor report writing culture, instead of providing the court with guidance and insight as to what may be occurring in the family dynamic, what the children's wishes may be, the risk is that we end up with a distortion of what is occurring.

80. Reports should also not determine whether or not a party is to receive ongoing legal assistance in the legal aid space. Reports have been used as a means of assessing whether or not a legal aid recipient's case has merit. In my opinion, in cases where family violence has existed, this should not be determinative of whether or not aid should be granted.

81. In a best practice situation, we would see the development and maintenance of a highly skilled body of Family Consultants who actively participate in uniform learning and skills based matrices, and actively scrutinise their work and each other's under supervision and undergo regular assessments and peer review.

The need to embrace non-court based solutions

82. In addition I believe there needs to be a greater focus generally within the family law system of creating a dispute resolution environment which is non-court based.

83. Unfortunately, there are funding issues in relation to mediation that have resulted in professionals limiting their work with families or presumptively exploring settlement opportunities particularly if there is family violence. In turn, this has reduced the overall use of these methods of dispute resolution. I think this is a missed opportunity. Having said that, if the mediation culture is poor, then it is undesirable to have families who have experienced violence being directed into this model.

84. Best case mediation practice would involve mediations where parties have been carefully screened as appropriate to participate and their capacity to work in this sphere has been critically assessed. In addition, participants must have access to and be able to mediate with the active participation of their chosen legal advisers. With these safeguards in place, and with participant consent, mediation can be a truly effective process.

85. Best case mediation practice would also involve carefully establishing safety plans, setting up safeguards during the process and would necessitate clear boundaries about what would and would not be discussed, how it would be discussed and when. Additional support in terms of counselling and therapy would be required. Prior to such mediation occurring, information and education of prospective participants must occur and the capacity of parties' to participate has to be assessed and reassessed throughout any process.

86. It would involve the most highly skilled and highly trained mediators and lawyers, counsellors or psychologists to ensure that the process is safe for the family and that safety remains paramount throughout the process.

87. In best practice mediation, if strict parameters are assured and the mediation involves highly skilled mediators (preferably in a co-mediation model) then mediation may be a viable alternative for some families. That is not to say that mediation or collaborative practice will be appropriate in all cases, particularly where there is very serious violence, or where there has been a lot of very coercive and manipulative behaviour, in such cases the only safe choice is a court based solution.

88. It would also require consistent assessment and screening tools, a uniform method of assessing risk and etc.

89. Best practice mediation would not be less expensive than Court. It may however present a family working through post violence family dynamics with a different

pathway to resolution. The end result however may be infinitely more valuable to that family then a purely court based solution might be.

90. Before a mediation or collaborative practice model is discounted, the question is in what circumstances is a court based solution less stressful and less confronting than mediation or collaboration. To screen out all families who have experienced violence may be denying those families a less intrusive, more flexible process to resolve their issues. To screen out may be the incorrect way to consider this issues. The better question is to ask how these types of processes, mediation, collaboration and negotiation, can be resourced to increase the number of people that can effectively be moved through them, in safety and with support.

91. As part of best practice, and to ensure safety, in a resourced mediation system, practitioners could work with men's behavioural change programs and/or assessing psychologists to understand whether the work that is being done in the mediation environment has resulted in transformative thinking, whether the perpetrator is capable of change or whether the perpetrator is paying lip service to a process, at best, or using the process to further abuse their former partner.

92. One of the most critical aspects of best practice mediation would be the professionals involved, their expertise, their accountability, the currency of skills, provision of ongoing training, their ability to use universal risk assessment tools.

The primacy of the child

93. In a best practice court culture, regardless of when violence occurred or who is perceived to have been the victim of such violence, decisions in relation to children must take into account that violence and the Court must consider the violence both historically and its impacts currently. Before concepts of parenting, live with orders or spend time with orders are considered, the violence issue is reviewed.

94. There may also be a preliminary and mandatory threshold impediment to any such order where there is evidence that the violence has been inflicted on, experienced by or children have been privy to such violence. The underlying question which would need to be addressed by the Court, is how it can benefit such children to have a relationship with a parent who has perpetrated violence upon them.

95. Further where there are denials by the perpetrator and a refusal or inability to acknowledge violence and its impacts, such behaviour must surely bear on the

question of whether or not that perpetrator should have contact with his child. If the perpetrator's refuses to acknowledge his behaviour, this goes to the heart of the parenting question and he has by virtue of his denial, disqualified himself from being able to perform the role of a parent. That person has abdicated their parental position through their own actions and they have forfeited the current and in certain circumstances, future parenting role until a time of the child's choosing to alter the relationship.

96. Whilst legislative reform to the Family Law Act has made it clear that the emphasis is on the rights of children to have relationships with parents, this has not filtered into community thinking.

97. The Family Courts are charged with the responsibility of making parenting orders that promote the best interests of the child. Incorporated into this decision making framework of the Act is the concept of primary considerations: the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence (s60CC(2)). s60CC(3) provides the additional considerations that the Court is to take into account and at (3)(j) and (k), emphasis is placed on violence, not only to the child but on any member of the child's family. Further at s60CF there is an obligation on the parties to inform the court of relevant family violence and at s60CG, the Court must consider must "*to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order: (a) is consistent with any family violence and (b) does not expose a person to an unacceptable risk of family violence*." So whilst the legislative framework and recognition of family violence and its impacts are amply provided for in the Family Law Act, there is still a cultural expectation that all must be done and all avenues of effort explored to ensure that children have a relationship with, and therefore either live with or spend time with, both parents. In part this is a result of the misunderstanding of the relevant sections relating to the presumption of equal shared parental responsibility when parenting orders are made. Again, although the Act makes it clear that family violence is a grounds for this presumption to be rebutted, (s61DA(2) (b)) this does not shift the cultural expectations.

98. Those cultural expectations (that child will be with both parents) places the lawyer representing the victim of violence in a dilemma. This is a risk that if you are representing a mother who has been or has alleged she has been the victim of violence at the hands of the father, if you client is not believed, the perceived stakes

of that gamble are great. In colloquial terms, as a family lawyer, there is a risk that if you read the situation incorrectly, and you can't produce the evidence that shows the court that there is no inherent benefit in allowing this child to be in contact with the father, your client could be cast into the "no contact mum" category. If a mother maintains that a child should not spend time with the other parent due to violence and that evidence is not made out to the satisfaction of the Court, then it is your client and her behaviour and her suitability as a parent that may come under the Court's scrutiny.

99. This situation is exacerbated by the assumption that all real victims of violence have family violence orders made protecting them. This is often not the case. The victims of violence who have not come to the attention of Victoria Police, may present to a family lawyer without the evidence of an Intervention order. They may also be severely debilitated by virtue of the violence they have experienced. It is often the case that the victims of violence are terrible witnesses, they are so incapacitated by the violence that has been inflicted upon them that they are paralysed when giving instructions and are unable to share their narrative. It is like dealing with a person that has been tortured or brainwashed, their capacity to function at that point is just so compromised. For example, when she seemed like she was dismissive, it was instead because she was disassociating. She was just trying her best to cope. However, the ravages of family violence are not readily identified and managed in the system.

100. In an unsatisfactory scenario, the dynamics of violence may be missed. If a woman has diminished capacity following violence and has trouble conveying her narrative, if there is insufficient evidence due to her entry point into the system without an intervention order, then her actions may be misinterpreted as malicious.

101. If a court process does not make allowances in that scenario, there is a real risk that children who should not be in contact with their fathers, end up having contact. Conversely at the other extreme, women who should have their children living with them, may be at real risk of having those children removed from their care

102. As a final point on this topic, I believe that if there was greater training it would enhance decision making in this area, in that it would ensure more consistency in decisions on a given set of facts. Consistency across the courts cultures and uniform training for all who work in the system may ensure that the woman is understood and supported as she moves from the Magistrates' Court to the other courts.

Law reform

103. In the main, most judicial officers understand family violence. Some courts, like the Magistrates' Court have worked to ensure a consistent approach and a definite court culture. To achieve change and create a consistent court culture across the jurisdictions, family violence must be mandatorily enshrined in the relevant legislation. We cannot hope to affect positive change by amending legislation. We must also address the court culture, education and information sharing.

104. In family law, it would be preferable if future legislative changes could be assessed firstly against the family violence best practice matrix and there be checks in place to ensure that family violence remains thus enshrined in the Family Law Act. Given the temptation to seek to drive change in this area of law, it sometimes becomes prone to political platforms or popularist exigencies. I would urge that regardless of which political party is in power, legislative reform is conducted with caution and after extensive consultation.

105. Consultation would ensure that those who work with expertise in the area and have been adhering to best practice are involved.

Reflections on the 2006 reforms to the Family Law Act

106. These reforms, including the presumption of equal shared parental responsibility when parenting orders are contemplated, led to a great deal of confusion amongst the legal community and also the broader community.

107. The 2006 changes made things very difficult for lawyers when working with clients and assisting clients to make informed parenting decisions.

108. The concept of the presumption of equal shared parental responsibility could be rebutted if there were reasonable grounds to believe that a parent of a child has engaged in family violence - s61DA(2)(b). Notwithstanding the specific exception of family violence, difficulties ensue in instances of women who have not reported family violence.

109. Although the threshold of "reasonable grounds" seems low, decisions in the Family Courts do not necessarily make or indeed have to make decisive findings of fact. Judgments rarely establish that one party is in the "right" and the other "in the wrong". More often than not, decisions are made on the basis that the Court cannot clearly ascertain whose version of events is likely to be the more accurate. This is a

jurisdiction where the grey of competing narratives dominants - the "he said/she said" phenomenon is sometimes the best or only evidence the Court has to rely on.

110. The concern for lawyers, if the victim's evidence was not compelling, is the perception that she would then be in serious risk of a reversal in the care arrangements of their children. If the court thought that the mother is someone who cannot work co-operatively with the father and that she is not supportive of the children having a relationship with the father, then the lawyer's concern is that the client will be seen as a "no contact" parent.

111. Barristers representing such women are also concerned about the Court's perception about them being no-contact mums or being somehow un-cooperative. Due to these concerns, there is often a concerted effort to encourage or compel the mother to accede to interim parenting orders. The woman, who is still unable to grapple with how violence has impacted on her, is potentially vulnerable to agree to orders, despite knowing on one level that she should not. Such orders bring this woman back into the perpetrator's sphere of power and abuse. In such circumstances, the perpetrator behaviour may cause further diminishment of the woman's capacity to cope and hence her parenting can be compromised.

112. Lawyers are not consistently trained to identify or screen for violence, hence the need to ensure that risk assessment tools are universally taught and adopted by all who work with families.

113. Despite legislative provisions in the Family Law Act, in reality without thorough family assessments (interim Family Reports) and all proceeding with caution before interim orders are made, the provisions do not realise their full protective potential.

114. When a client cannot conceive that what she has experienced is violence, it becomes a difficult process to entrust her to be able to tell her story to a Magistrate. The implementation of magisterial training in this area and the fact that the Magistrates' Court has developed expertise and aiming for best practice across its courts, should alleviate this woman falling through any gaps.

115. The 2006 reforms were concerning for the judiciary as well. There is an artifice in having to apply the relevant sections of the Family Law Act, the paramountcy provision of best interests, the primary considerations, the additional considerations. It is akin to performing a contortionist act. As each case is decided on its own facts and as each decision must be made in the best interests of a given child, the

legislative reforms do not inherently assist judges. The issue again is one of best practice and consistent Court culture. Legislative reform of itself will not assist promulgate culture.

116. In relation to those families whose entry point is an intervention order, then the current power of State magistrates should be exercised at first instance, in a triage construct, to make urgent interim orders regarding children, even regarding property, in addition to granting interim intervention orders. The Magistrate can make the necessary assessments of risk. They can make orders consistent with the intervention order. They can then refer the matter to other jurisdictions for further work to be undertaken.

117. This would necessarily require that the Magistrates' Courts be better resourced to more effectively make use of the powers that they already have. In addition, their powers should be extended in some cases. A Magistrate should be able to retain a matter even in the absence of consent by the parties, where there are unopposed matters where the family law jurisdiction is being applied and where the court already has jurisdiction to act.

118. For example, the length of time that a Magistrate can suspend Family Court orders should be extended. Given expanding delays in the Family Courts, the Magistrate is the one best placed to make a determination for what period of time that suspension should occur. The suspension or making of family law parenting or property orders should not be confined to a given time period but rather should allow the necessary interim and urgent court interventions to be put in place and ensure robust case management as well as a seamless eventual transfer from the Magistrates' Court to the Family Courts. The time period will need to take into account the readiness of the subsequent jurisdiction to accept the transfer, ensure the continuation of case management and interim orders in such a way to make this safe for the family involved.

119. Pending transfer between the jurisdictions, the Magistrate should be in a position to make orders for say the preparation of an interim Family Report (s 11F report) to be completed (in addition to the suspension of or other parenting orders, interim property orders) as well as orders addressing family violence issues. This may include the perpetrator being ordered to engage in a behaviour change program and linking these perpetrators into other available and relevant programs. After these interventions, the Magistrate could send the parties to, or back to the Family Courts, because the violence and relevant family issues have been managed up to that point. It is not

contemplated that this would need to occur in every case. This could be the domain of those families requiring rigour, perpetrator accountability and support for victims and children as well as the proper preparation of the matter for further court interventions. Case management would then form part of the information sharing between courts, as I have discussed above. It is essential that there be robust case management by judicial officers who are alive to the family violence dynamics and who are best placed to make appropriate inroads in relation to case management and can do so with family safety in mind.

Increasing pressure on the court system

120. The Federal Circuit Court does the great majority of family cases now, and does so under great pressure and great demand, all with a diminishing bench that is not being replenished. There is a bottleneck and delays are increasing exponentially. Better resourcing is clearly needed to help to ensure that the increase in demand can be effectively managed. Safety of families is compromised when there are court delays.

121. In a best practice court mode, perpetrator accountability has to be handled consistently across the jurisdictions. Therefore court delays in one court would jeopardise ensuring that accountability. Poorly resourced courts would invariably lead to differences in how the interests of victims are preserved. A consistent court culture would also require consistent levels of funding and resourcing.

122. I give full credit to Victoria Police and the Magistrates' Court for the change that they have been able to affect in their culture, processes, management and education of their members.

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