Royal Commission into Family Violence

WITNESS STATEMENT OF NICOLE RICH

I, Nicole Amanda Rich, Director of Family, Youth and Children's Law Services, Victoria Legal Aid (**VLA**), 350 Queen Street, Melbourne, in the State of Victoria, say as follows:

1. I am authorised by VLA to make this statement on its behalf.

2. 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

3. I am the Director of Family, Youth and Children's Law Services at VLA, a role that I have been in since August 2013.

4. VLA's Family, Youth and Children's Law Services assist people to resolve their family disputes to achieve safe, workable and child-focused parenting and care arrangements. They encompass the following six programs:

   4.1. a Family Violence Program, which assists applicants and respondents in the *Family Violence Protection Act 2008* (Vic) jurisdiction as well as supporting the organisation's broader response to addressing family violence across all of our practice areas and contributing to public debate about policies and practices of courts and governments in relation to family violence;

   4.2. a Child Protection Program, which assists children, young people and parents responding to child protection applications by the state and provides legal information, advice and community legal education designed to help protect and promote the rights of children and families before, during and after child protection proceedings;

   4.3. a Parenting Disputes Program, which is Commonwealth facing and assists separating and separated parents in disputes about the living and care arrangements for their children through legal information, advice and

representation at family dispute resolution or in some cases in the Commonwealth family law courts;

4.4. an Independent Children's Lawyers Program, which is again a Commonwealth facing program and provides assistance in family law court proceedings to children at risk of harm due to the conduct of one or both parents;

4.5. a Family Law Financial Support Program, which is also largely Commonwealth facing and works to ensure that children of separated parents are financially supported in accordance with the law, particularly through legal advice and representation for both payee and payer parents via our Child Support Legal Service; and

4.6. the VLA Family Dispute Resolution Service, which is our case managed and legally-assisted family dispute resolution service.

5. I am responsible for oversight of all six of those programs and services. I am also directly responsible as line manager for the delivery of legal services in those programs out of the Melbourne office, and for the delivery of legal services across all of VLA's programs by staff in the Westernport, Peninsula and Gippsland regional VLA offices.

Background and qualifications

6. I hold Bachelor of Arts and Bachelor of Laws (Honours) degrees from the University of Melbourne. I was admitted to legal practice as a Barrister and Solicitor of the Supreme Court of Victoria in 2001.

7. I have a background in consumer law, and have practiced in that area in the past. I hold a current principal practicing certificate and am responsible for supervision of relevant parts of VLA's legal practice, however I do not deliver individual legal services to clients on a day to day basis.

8. Prior to commencing at VLA, I was the Director of Policy and Campaigns at the Consumer Action Law Centre (**CALC**), where I worked for approximately five years.

9. When I began at VLA in May 2011 I was the Director of Research and Communications, which reflected my background in legal research and policy and strategic communications at CALC.

Victoria Legal Aid

10. VLA is an independent statutory body set up by Victorian legislation, the *Legal Aid Act 1978* (Vic), but with regard to cooperative Commonwealth and State arrangements, and we are funded by both the Commonwealth and the State governments. We are directed under the *Legal Aid Act* to, amongst other objectives, provide legal aid in the most effective, economic and efficient manner. Legal aid is defined as including education, advice and information about the law, alternative dispute resolution programs, duty lawyer services, legal advice and ongoing legal representation under a grant of legal assistance.

11. VLA is the biggest legal service in Victoria, providing legal information and education for all Victorians. We also provide lawyers on duty in most courts and tribunals in Victoria.

12. Through advocating for justice and law reform, we aim to improve the way laws operate and impact on the community. We regularly make submissions to parliamentary inquiries, advocate directly to government and the courts, run test cases to clarify points of law, and collaborate with other organisations to affect positive change. VLA's submission to the Royal Commission into Family Violence (**Royal Commission Submission**), dated 17 June 2015, is attached to this statement and marked **"NR-1"**.

13. We prioritise more intensive legal services such as legal advice and legal representation for people who meet eligibility criteria; based on their financial situation, the nature and seriousness of their problem and their individual circumstances. I discuss this eligibility criteria in my statement further below.

14. Our clients are often people who are socially and economically disadvantaged; people with a disability or mental illness; children; the elderly; people from culturally and linguistically diverse backgrounds; and those who live in remote areas.

15. VLA provides:

    15.1. free legal information through our website[1], our Legal Help line[2], community legal education, publications and other resources;

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1 www.legalaid.vic.gov.au
2 1300 792 387

15.2. legal advice through our Legal Help line and face to face appointments with a lawyer on specific legal issues;

15.3. minor assistance to help clients negotiate, write letters, draft documents or prepare to represent themselves in court;

15.4. grants of legal assistance to pay for legal representation by a lawyer in private practice or a VLA staff lawyer;

15.5. a family mediation service for disadvantaged separated families; and

15.6. funding to 40 community legal centres and support for the operation of the community legal sector.

16. VLA can help people with legal problems about criminal matters, family separation, child protection, family violence, immigration, social security, mental health, discrimination, guardianship and administration, fines, tenancy and debt.

17. Family law is the most common source of people seeking legal information from VLA. That information can be provided online, via the phone or face to face, for example via the reception area at one of our regional offices or by a duty lawyer at court, and it is available to everyone.

18. Depending on the particular legal matter involved and the individual's circumstances, we may also be able to give legal advice over the phone or alternatively via an appointment. Legal information and legal advice are distinguished on the basis that legal advice takes account of people's personal circumstances.

Eligibility for legal advice

19. VLA's prioritises providing legal advice to:

19.1. people living on a low income;

19.2. people in custody, detention or involuntary psychiatric settings;

19.3. children;

19.4. children, young people and women experiencing, or at risk of, family violence;

19.5. indigenous Australians;

19.6. people who experience language or cultural barriers;

19.7. people who are experiencing homelessness; and

19.8. people with a disability (physical, intellectual, or cognitive) or who experience mental illness.

20. In family law parenting dispute matters, we do not make appointments to give advice to individuals who are pre-separation, because they are really at the information stage of their dispute, but these clients can be referred to our Legal Help telephone service to receive information and advice. However post-separation, if there are children issues involved and a basic income test is satisfied, that person is likely to be eligible for an appointment with a lawyer to get legal advice (subject also to legal conflict check requirements).

21. VLA also provides a Duty Lawyer Service to help people who are at court but do not have their own lawyer. VLA has lawyers on 'duty' at many courts and tribunals across Victoria, including in the family violence intervention order list at almost all Magistrates' Courts across Victoria and at the Commonwealth family law courts. The Duty Lawyer Service is free, however duty lawyers do not represent everyone, rather they focus on individuals who meet the criteria outlined at paragraph [19] above. A basic income test applies to eligibility for most VLA duty lawyer services but not for children, for urgent family law matters both in child protection and in parenting disputes nor at the first return date for family violence intervention order matters.

22. Most clients in family violence intervention order matters first receive legal advice from a duty lawyer at court. However, we will also make an appointment for a person to receive legal advice in relation to a family violence intervention order matter where one or more of the following applies:

22.1. the person seeking assistance is a child;

22.2. the person seeking assistance has left the home due to family violence;

22.3. the person seeking assistance has been excluded from their home because of an intervention order;

22.4. the person has a contest hearing (if court date is two days away or less, subject to capacity to provide an urgent appointment).

Eligibility for legal assistance

23. If an individual is unable to resolve their legal problem on their own, and cannot afford a lawyer, VLA may be able to pay for a lawyer to assist. This funding is provided via a grant of legal assistance.

24. Grants of legal assistance are usually for criminal or family matters, but they can also be given in some other matters such as guardianship, infringements, immigration, social security, mental health or discrimination cases.

25. A grant may pay for some or all of the following types of work:

    25.1. legal advice;

    25.2. helping resolve matters in a dispute;

    25.3. preparing legal documents; and

    25.4. representation in court.

26. When determining whether a person is eligible for a grant we consider, firstly, a means test to assess a person's financial situation and whether a person can afford the full costs of legal services from a private lawyer. This takes into account:

    26.1. any income received from work, welfare benefits or other sources, not including any allowable deductions, for example weekly housing costs and amounts allowing for any financial dependants of the person such as children;

    26.2. any relevant assets, including a house or car but not including assets such as household furniture, tools of trade or equity in a car up to a certain maximum (currently $11,280); and

    26.3. the estimated cost of the legal services.

27. The means test also considers whether the applicant is financially supported by anyone else. These people are called 'financially associated persons' and their income and assets are included when determining whether someone is eligible for a grant.

28. Under our grant guidelines we must also consider the merits of the applicant's matter or dispute. The specific merits test that applies depends on whether the grant is for a Commonwealth or state matter but in essence we look at the legal merit or prospects of success of the person's matter; and the reasonableness or appropriateness of spending public legal aid funds on the matter, taking into account factors such as the likely benefit or detriment to the person of receiving or not receiving a grant, and any public benefit that may be achieved as a consequence of the grant being provided.

29. In Commonwealth family law matters our grant guidelines also consider a range of other factors. For example, there needs to a substantial issue in dispute for that person to be eligible for legal aid funding. This is true of matters at the mediation stage as well as when funding is requested for representation in the court system. It may be that following mediation, the parties are closer to reaching an agreement and there is no longer a substantial issue in dispute. As a legal matter progresses, there is an ongoing assessment about whether a client's matter continues to have merit and satisfy the other guidelines. It may be, for instance, that after receipt of the family report, which is an important piece of evidence, the client's matter no longer has merit and therefore they become ineligible for further funding.

30. The model that VLA has adopted involves largely a self-assessment process, called the simplified grants assessment process, where the lawyers doing the work, whether they be VLA in-house, private or community legal centre lawyers, are empowered with the knowledge of VLA's guidelines and in applying for a grant of legal assistance, recommend to VLA that the matter be funded in accordance with the relevant guidelines. Lawyers doing legal aid work under this model must be members of the relevant section 29A specialist practitioner panel (see paragraphs [36]–[41] below). If a matter reaches a point where the lawyer is aware that the guidelines are no longer met, the terms of the lawyer's work require that they implement those guidelines and say to the client, "look I can't recommend that you be funded any further because you no longer meet what I know to be the legal aid test".

31. People who are affected by a decision relating to a grant of legal assistance, for example a decision by VLA to refuse a grant or to put a condition on a grant (for an example of which see paragraph [33] below), can ask to have that determination reconsidered internally. If unhappy with this decision, they may then also ask for an independent review of the decision, which is undertaken by a member of the panel of independent reviewers appointed by the Victorian Attorney-General under the *Legal*

Aid Act. There is also a cost ceiling, or funding cap, for any single grant for Commonwealth family law matters. If that ceiling is reached before a matter is finalised, VLA will not pay further fees or costs without prior approval.

32. Legal assistance provided by VLA is not always free. Applicants may be asked to pay some money towards the cost of running a case, known as a contribution. VLA may also ask the applicant to agree to a charge over any suitable house or land to secure payment for the full costs of the file.

33. If we determine that an individual is eligible for a grant, VLA will send a letter to that person and their lawyer indicating the assistance that has been granted; any special conditions and the lawyer's name and contact details.

34. All of the state and territory legal aid commissions in Australia also apply guidelines for eligibility for family law grants of assistance, including a means test, the Commonwealth merits test, cost ceilings and other guidelines.

Lawyers doing legal aid work

35. Most people who apply for a grant of legal assistance do so with the help of a lawyer. For Commonwealth family law matters, state child protection matters and state family violence intervention order matters, only firms and lawyers who are members of the relevant VLA section 29A practitioner panel may apply for a grant and they must use the simplified grants assessment process (with one exception for Commonwealth family law matters noted below). If a person applies under the simplified process, VLA assumes that the person prefers the lawyer through whom they are applying to act for them if VLA makes the grant of legal assistance. If VLA makes the grant VLA will assign the matter to this lawyer unless there is another reason why VLA should not assign the matter to them.

36. A person can also apply for a grant without the help of a lawyer, generally using the standard application form which VLA manually assesses for eligibility. If an applicant for a grant wishes to have a particular lawyer act on their behalf, they can indicate that preference on their application form. If VLA makes the grant, VLA will assign the matter to a lawyer in accordance with our allocation of work guideline, which applies to all criminal law, family law, child protection, family violence and personal safety intervention order matters, and matters where an independent children's lawyer is appointed. A grant made for any of the above types of matters will only be allocated to a firm or independent children's lawyer on the relevant section 29A specialist panel.

For Commonwealth family law matters, there is one exception in that VLA can allocate the conduct of the matter to a non-section 29A panel firm if the particular needs of the client cannot reasonably be met by a panel member or VLA lawyer.

37. VLA has established six specialist panels pursuant to section 29A of the *Legal Aid Act 1978*, for child protection, family violence, Commonwealth family law, independent children's lawyers, indictable crime and summary crime. Membership for specialist panels is for firms and individual practitioner certifiers, with the exception of the Independent Children's Lawyer panel, to which lawyers are appointed in their individual capacity.

38. There are terms and conditions for approved panel members and individual panel certifiers to ensure practitioners meet the standards expected by VLA in undertaking legally aided matters. This includes using the simplified grants process referred to at paragraph [30] above.

39. Firms and practitioners wishing to join a panel must apply and meet certain entry requirements, both general requirements that apply across all panels and requirements specific to a particular panel. For example, to be included on the Independent Children's Lawyers panel the practitioner must meet the following general individual entry requirements:

39.1. maintain a current practicing certificate without any condition or restriction that would limit the practitioner's ability to provide legal aid services, and have held an appropriate practicing certificate for the full period of the recent practicing experience disclosed on the application form;

39.2. disclose any findings of professional misconduct or unsatisfactory professional conduct, any current or ongoing complaints or investigations into professional misconduct or unsatisfactory professional conduct and any findings of guilt for any criminal offences other than infringements; and

39.3. conduct their practice professionally and appropriately,

and meet specific individual entry requirements which include the following:

39.4. have completed the Independent Children's Lawyer National Training Program run by the Law Council of Australia;

39.5. have at least five years recent experience doing family law work in cases involving children's issues;

39.6. submit written outlines of three complex matters the practitioner has had carriage of within the last 24 months, where an Independent Children's Lawyer has acted and where the matters had been prepared for final hearing in the Family Law Courts; and

39.7. have had carriage of at least two matters that have been settled, or substantially settled, by negotiation, including personally appearing in a pre-litigation or litigation intervention family dispute resolution service attendance, pre-litigation or litigation intervention settlement conference or mediation, and submit written outlines of how the practitioner prepared and conducted each matter.[3]

40. Members of the section 29A panels can be found in our directory of firms doing legal aid work.[4]

Early negotiations and family dispute resolution

41. Section 60I certificates, issued under the *Family Law Act 1975* (Cth), require parties to have attempted family dispute resolution before commencing family law court proceedings for a parenting order.

42. In the past, there has been funding available from VLA for what is sometimes known as early advice and negotiations. At the moment, there is no VLA grant funding for that. It was removed to try to prioritise limited funding for the most difficult cases and where the problems are the most acute. Early advice and negotiation matters were viewed as not as serious, however if we wish to emphasise timely intervention, it is important to ensure we have the ability to resolve matters at that stage where possible. We recently completed a comprehensive review of family law legal aid services and the final report of our review, released in late June 2015, commits VLA to implementing 35 actions for change. Action 20 is that an advice and negotiation grant will be reintroduced for limited matters, with the fee to be deducted from the preparation fee for dispute resolution or litigation (as relevant) if the matter proceeds

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3 http://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/independent-childrens-lawyer-panel; See also VLA's Information package: Independent Children's Lawyers Panel, dated 5 March 2014.

4 http://apps.vla.vic.gov.au/apps/Public/FirmsDirectory.aspx

to that stage. VLA's supplementary submission to the Royal Commission into Family Violence (**Royal Commission Supplementary Submission**), dated 29 June 2015, which includes the final report of the review, is attached to this statement and marked **"NR-2"**.

43. As stated in paragraph [4] above, VLA has a Family Dispute Resolution Service for conducting family dispute resolution and also assists parents in disputes about the living and care arrangements for their children including by funding and providing legal representation for them at family dispute resolution. These are the two different hats we wear: we fund and provide legal representation to parties going through family dispute resolution, and we also provide a family dispute resolution service itself with case managers and family dispute resolution practitioners (called chairpersons).

44. Where family violence is an issue in a dispute, it may not be appropriate to mediate because of safety concerns and/or because of concerns about the capacity of a party to negotiate. In many circumstances, we would issue a section 60I certificate indicating that family dispute resolution is not appropriate. However, we also see many cases where family violence is a relevant issue, however we are able to mediate safely and effectively, and often it has provided a better experience for victims of family violence than the court system. We have detailed case assessment processes that screen for family violence and other issues, appropriate referrals are made, and we are able to conduct family dispute resolution conferences in a range of formats, including by shuttle conference where the parties remain in separate locations and the chairperson moves between the parties. So really what it comes down to is assessing the case appropriately, determining whether family dispute resolution is appropriate and how to respond to family violence issues in a way that ensures clients are supported and their decision-making is done safely and with capacity. That is why I think our family violence experience is so important. All of our case managers are well trained, we have a lot of Family Dispute Resolution Practitioners on site, and the practices and policies developed to support the service were done so in collaboration with the Domestic Violence Resource Centre Victoria.

45. Our experienced Family Dispute Resolution Service chairpersons have tertiary qualifications in law or another discipline (including social work and psychology). Our mediation services are conducted in the shadow of the law, and that is one of the reasons it is effective. For example, chairpersons and lawyers assisting the parties may discuss likely outcomes under the law in helping parties to consider settlement options.

Representation in court

46. VLA guidelines provide for grants of legal assistance for family law court proceedings. To be eligible, the current VLA guidelines provide that there must be a substantial issue in dispute and the matter must be a 'priority matter', which is a matter where a child's wellbeing or safety is at risk, evidenced by one or more of three factors, the first of which is where the child that is the subject of the proceedings has been or is at risk of harm from being subjected to, or exposed to, abuse, neglect or family violence.

47. There is also currently a guideline that restricts funding for representation at a final hearing (family law trial) to matters:

47.1. in the Magellan list;

47.2. where a person has an intellectual disability, acquired brain injury or mental illness and is receiving services under relevant state laws;

47.3. cases that meet certain criteria involving family violence; or

47.4. where the other party is represented either pursuant to the above, privately or through pro bono assistance.

48. If a client does not fit within one of these categories, funding will still be extended for preparation of the materials for trial, but will not be provided for representation at the hearing.

49. In the final report of our family law legal aid services review referred to earlier, we committed to removing the grant guideline restricting funding for representation at family law trials and final hearings for clients otherwise eligible for litigation funding. While a change to this guideline last year enabled funding for representation at final hearings for cases of serious family violence, this action will further support parties, including victims of family violence, who are currently legally assisted to prepare their family law dispute for trial but are required to represent themselves at the final hearing. This guideline change will come into effect on 30 October 2015.

VLA funding

50. Due to the overall size of the finite Legal Aid Fund, we have had to make some difficult choices about who receives funding. One decision that was made previously, as

noted above, was to retain existing funding eligibility criteria for people to have legal representation for family law court proceedings, but restrict funding for the most expensive aspect, trial representation, at the end, if the matter proceeded to that stage. An alternative could have been to narrow who was eligible for family law litigation funding generally but to then keep funding open throughout the matter. We made a good faith policy decision to do the former, reasoning that family law proceedings are heavily reliant on written materials and parties would at least continue to benefit from being legally assisted to prepare their family law matters for hearing.

51. We have since received significant stakeholder feedback, including via our family law legal aid services review, that stakeholders felt it was unfair and led to injustice when a party was represented throughout a matter only to have their assistance restricted for the final hearing. In relation to this issue, there was also considerable concern expressed in particular about victims of family violence being forced to represent themselves at final hearing and being put in the position of either negotiating with, or having to cross-examine and be cross examined by, the alleged perpetrator of the family violence. Whilst it was acknowledged that there was a guideline change to enable representation at final hearing for cases of serious family violence (see paragraph [49] above), stakeholders remained concerned about matters that fall outside this guideline. General feedback suggested that stakeholders felt it was fairer to include funding for representation at final hearing for all clients eligible for litigation funding assistance, rather than fund some clients for trial preparation but not representation, even if this meant further restricting who is eligible for litigation funding. As noted above, VLA listened to this feedback and will change this guideline accordingly, effective 30 October 2015.

52. VLA will also change the general family law litigation guidelines to prioritise funding for cases where:

52.1. a party has a particular vulnerability, such as mental health issue, cognitive impairment, language barrier, literacy issues, drug and alcohol issues, or an acquired brain injury, and the particular vulnerability impacts on either:

52.1.1. the ability of the party to conduct their own litigation and/or

52.1.2. the ability of a child subject to the proceedings to maintain a meaningful relationship with one or more parties to the proceedings; or

52.2. a child's wellbeing or safety is at risk of harm from being subjected to, or exposed to, abuse, neglect or family violence to the extent that Orders made in the proceedings are likely to significantly limit the relationship between the child and one or more parties to the proceedings and/or to make a change in residential arrangements for the child.

Funding in such circumstances will extend to both parties in the matter (subject to other guideline requirements such as the means and Commonwealth merits tests). VLA acknowledges that the proposed priorities above are potentially more restrictive than the current guideline.

53. VLA is conscious that while the stakeholder feedback we received about the trials and final hearings guideline is valid, many of these stakeholders do not see the people who never get legal aid funding for their family law proceedings in the first place. For example, a person may narrowly miss out on eligibility for family law assistance due to the means test, but in practical terms be unable to afford the cost of a private lawyer to assist them. There is then a large gap between the legal assistance they will receive compared to that a person eligible for a grant will receive, when there may be very little difference in the nature of their family law disputes and only a small difference in their financial means.

54. The family law courts have always dealt with significant numbers of matters involving self-represented parties. However our funding guidelines are shaped, there are still going to be many victims of family violence who are self-representing through the Family Law Court system, and who are facing the prospect of direct cross-examination without legal aid or any legal assistance, and that remains a really significant problem. This has been a longstanding issue in the family law system and in my opinion, addressing it may require a range of measures, including but not limited to legal aid funding.

55. Clearly legal aid funding is not able to meet demand. This is exacerbated when child protection workers or family violence services are increased, without corresponding investment in the accompanying, downstream demand that will inevitably follow on the courts, lawyers and legal aid.

56. In September 2014, the Federal Government-commissioned Productivity Commission's "Access to Justice Arrangements" Report estimated that an additional $200 million, per annum, was required from the Australian and state and territory governments to:[5]

56.1. better align the means tests used by the legal aid commissions with other measurements of disadvantage;

56.2. maintain existing frontline services that have a demonstrated benefit to the community; and

56.3. allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted funding.

57. Following the Productivity Commission's report, VLA has initiated a review of our means test to explore changes that could be made within the existing funding envelope to improve eligibility. However, absent additional Commonwealth and state government funding for legal aid, our ability to broaden the means test and better address the issue of unmet demand for legal services is limited.

58. The Productivity Commission in its report also discussed the issue of self-representing parties in the family law courts noted above. VLA believes that changes in legislation and court practices in the Commonwealth family law jurisdiction may assist in reducing situations where victims of family violence face cross-examination by, or having to cross-examine, the perpetrator of violence. Options to consider include: reducing the adversarial nature of court proceedings by broadening the role of judges to directly question parents; routing questions to witnesses through a third party; judge pre-approval of questions; having ICLs (where appointed) undertake cross-examination first to ensure most questions that the alleged perpetrator of violence might wish to canvass during cross-examination are already dealt with; and greater use of remote witness facilities. This is an issue that needs to be addressed at the federal level but many of the families in the family law system impacted by this issue are also those who also seek assistance from the state family violence jurisdiction and we would support a Commonwealth review into the issue of direct cross-examination in the Commonwealth family law courts with a view to identifying

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5 http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf

appropriate legislative and/or practice reforms and any investment required to support such reforms.

VLA's clients & complex needs

59. For the purposes of a submission to the Family Law Council in April 2015, VLA conducted an analysis of the recipients of legal aid under the Family, Youth and Children's Law Program for the period 2009/10 – 2013/14 (**Family Law Council Submission**)[6]. Attached to this statement and marked **"NR-3"** is a copy of VLA's Family Law Council Submission, dated April 2015, which sets out in some detail the results of that analysis.

60. The key findings of VLA's analysis were as follows:

60.1. Between 2009 – 2014, the majority of clients who received legal assistance for their family, youth or children's (**FYC**) law problem only received help for one type of FYC problem; that is, for one of a parenting dispute, family violence or a child protection issue.

60.2. A smaller proportion of clients (12%) received help for at least two types of FYC problems, and an even smaller number (1%) saw us for all three of these FYC problems.

60.3. Although only a small percentage of our total clients present with the need for more than one type of FYC legal help, this still represents thousands of families.

60.4. Of the clients assisted with a parenting dispute grant of aid in 2013/14, 19% of clients first sought assistance for a family violence issue.

61. VLA examined whether family violence or child protection issues, which are addressed by Victorian state courts, occurred at the same time as parenting dispute matters, which are addressed in the Federal Family Law Courts.

61.1. We noted that approximately 30% of clients who received assistance with a parenting dispute under a grant of aid in 2012/13 also received assistance with a child protection or family violence issue, either one year before or one

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6 Legal aid services included legal advice, duty lawyering, minor work assistance (help with one-off tasks such as perusal of documents or writing a letter and representation under a grant of aid, either delivered by VLA staff or legal aid funded practitioners.

year after receiving assistance for the parenting dispute. The most common 'cluster' for this type of client was the combination of a parenting dispute and a family violence matter. These clients received help for both a parenting dispute and a family violence matter within a two year period.

61.2. Family violence and child protection matters were also sometimes linked. Approximately 20% of adult clients who received assistance with a child protection matter under a grant of aid in 2012/13 also experienced a parenting dispute or family violence issue in the year before and/or after the child protection issue.

62. VLA's data analysis suggests that there is a small but significant number of clients with legal issues that span family law, child protection and family violence jurisdictions. These clients may be involved in concurrent court proceedings or sequential court proceedings in each jurisdiction.

63. I note that this data is not definitive as to the number of our clients with complex needs: it may be that they are crossing over more than one jurisdiction without VLA assisting them for the second or third issue.

Addressing complex needs: one court principle

64. The Family Law Council has previously advocated for the adoption of a 'one court principle':

> 'At the earliest possible point in managing a case, the decision should be taken whether a matter proceeds under a state or territory welfare law or under the *Family Law Act*. Once that decision has been taken, in all but the most exceptional circumstances, the matter should proceed in the chosen court system.'[7]

65. VLA supports the 'one court principle'. However our experience recognises that systems need to be in place not only to identify the appropriate forum as early as possible, but also procedures for when protective concerns arise or proceedings are initiated in another jurisdiction when they are already on foot in another.

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7 Family Law Council, 'Family Law and Child Protection' (Research Report, Family Law Council, September 2002) p. 13.

66. To maximise the effectiveness of the justice system, generally, for children and families who present with complex issues and requirements across more than one jurisdiction, VLA recommended to the Family Law Council that:

66.1. the threshold test for adjourning Family Law Court proceedings due to the involvement of the Department of Health and Human Services (**DHHS**) with the family, should be clarified;

66.2. the DHHS appear at the Family Law Court return date to present to the Court the findings of its investigations, so that the Court can make orders that address protective concerns and there is a reduced need to initiate a second round of proceedings in the Children's Court to address protective concerns;

66.3. the Children's Court adopt a practice of making Family Law Court orders by consent where the DHHS plans to withdraw on the condition that family law orders are made;

66.4. in circumstances where the DHHS seeks to withdraw from a family, because the current care arrangements brought about by the Children's Court are safe and stable, however the parents do not consent to family law orders, the DHHS should be required to appear at the first Family Law Court date to assist the family in the transition to the Family Law Court jurisdiction;

66.5. Magistrates should be better assisted to make decisions about varying or suspending time provided by a family law order, due to allegations of family violence, by making available information on existing family law orders, which can then inform analysis of the adequacy of the current care arrangement;

66.6. a process should be established for the Magistrates' Court to notify the relevant Family Law Court when a decision is made to suspend time under an existing Family Law Court order, with the notification prompting the Family Law Court to list the matter if interim orders are in place, or prioritise an application from the parent who has had time suspended under a final order, within 21 days.

67. VLA's Family Law Council Submission also made recommendations in relation to information sharing between the DHHS, the Family Law Courts, Magistrates' Court

and the Children's Court, and for training of staff working within one jurisdiction on the legislative framework of the other two jurisdictions.

68. Better information sharing practices would reduce the duplication of expert reports, which has resource implications for the courts and also leads to ongoing intervention into the family and risks unnecessary trauma arising from parents or children re-telling their story. It would also assist courts to make orders informed by all the relevant and available information including information about relevant courts orders made in other jurisdictions.

69. I wish to reiterate the recommendations in VLA's Family Law Council Submission to the Royal Commission.

Family Violence and Child Protection

70. The Royal Commission Submission at "NR-1" outlines VLA's leading role in the coordination of family violence services in Victoria, including through our Family Violence Program, as well as our recommendations for how family violence services in Victoria might be improved. I similarly wish to reiterate those recommendations to the Royal Commission.

71. As is touched upon in the Royal Commission Submission, we see cases in the Child Protection jurisdiction where a parent is struggling to act protectively, to adopt the jurisdiction's language, because they are a victim of family violence.

72. A typical scenario we would see is a mother making every effort to act protectively but struggling to do so effectively. That mother may allow the perpetrator to return home or spend time with the child because they feel disempowered by the history or violence and they are unable to counter the demands of the perpetrator.

73. In these situations, the DHHS may intervene and remove the child from the home. We are concerned that this response may not adequately recognise the dynamics of family violence and the impact of violence on a protective parent's capacity to parent. I understand the role of the Child Protection authorities and their obligation to protect children. However, I believe more can be done to undertake assessments and provide the necessary supports in such situations in order to support the protective parent and reduce the risk of the situation escalating to one where the DHHS decides to remove the child from the home. Such an approach may also reduce the fear that

some parents may have to ask for assistance because of the risk that DHHS involvement will lead to removal of their child from the home.

74. We make the point in our Royal Commission Submission that non-legal supports, like housing services and drug and alcohol counselling, can be critical in reducing the need for statutory intervention in those families.

75. Whether a child's best interests can be met through stability in a supported family or through removal will depend on the situation. However, reforms to the *Children, Youth and Families Act 2005* (Vic) that come into effect in March 2016 will require a quicker move to permanency for children placed in out of home care.

76. However, current evidence indicates that placing children in out of home care does not necessarily lead to good outcomes for those children, particularly if children are not able to be placed in stable long term out of home care arrangements. This is relevant in Victoria where there is a shortage of foster carers for children as the system currently stands. We also do not have enough quality state residential care facility options, and the legislative reforms do not address the difficulties of finding suitable long term placements for children with complex needs. This highlights the importance of independent court oversight to ensure that families are first supported to stay together if this is possible and appropriate.

77. In addition, under the new legislative provisions, once a child has been in out of home care beyond two years, there is no discretion for the Children's Court to order the return of a child to the birth parent or parents where protective concerns have now been addressed or to place a child on a Family Reunification Order where reunification remains a chance but more time is needed to address the issues of concern. This may adversely impact a parent who is a victim of family violence and who has needed more than two years to respond to the impact of that violence on their ability to provide a protective environment for the child.

Child Support Legal Service

78. VLA's Child Support Legal Service, the major component of our Family Law Financial Support Program, is an important pillar in our Family, Youth and Children's Law Services. Through this service, VLA provides casework and advice services, a daily telephone advice line, community legal education and information kits for self-represented litigants. VLA's child support lawyers assist clients with administrative processes available through the Commonwealth Department of Human Services

(**DHS**) (Child Support) to change assessments, object to decisions, draft limited agreements and enforce or discharge arrears.

79. In some matters, if all administrative avenues are exhausted, the child support lawyer may assist the parent at an appeal hearing by the (now former) Social Security Appeals Tribunal (**SSAT**) or the Administrative Appeals Tribunal (**AAT**).

80. Grants of legal assistance are provided, subject to the means and merits guidelines outlined above, to represent clients at the State Magistrates' or Federal Circuit Court:

80.1. to appeal or respond to a decision from the SSAT on a point of law;

80.2. seeking a departure from an administrative assessment;

80.3. to privately enforce a child support debt;

80.4. to seek or respond to a lump sum application of child support;

80.5. to represent the rights of children over the age of 18 years seeking maintenance to pursue their studies or because they are unable to support themselves due to a disability;

80.6. in cases that have been deemed too complex to be heard by the SSAT;

80.7. where an old "stage 1" court order, that is, a child maintenance order made prior to the Child Support scheme, needs to be varied or discharged;

80.8. to vary or discharge binding child support agreements;

80.9. to obtain declarations that a person is entitled or not entitled to an administrative assessment of child support from another party.

81. The cases we assist with tend to be complex and the parties may be entrenched in conflict, with many cases also dealing with family violence or the risk of family violence. In these cases, safety is the first consideration. VLA seeks to secure just and equitable financial support outcomes for children without exacerbating family violence or the risk of family violence.

82. VLA provides support to both payee and payer parents. For both groups, the legislative framework and formula in the child support system can be difficult to understand.

83. With respect to payee parents, VLA believes that modifications to the change of assessment process and to enforcement procedures would provide greater certainty and consistency, address issues around complexity as well as reducing reliance on legal assistance and improving access to justice.

84. For payer parents, the complexity of the process for discharging arrears can create financial hardship. For payer parents experiencing particular challenges, such as mental illness or incarceration, the system could better support them.

85. In June 2014, VLA made a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Child Support Program (**Inquiry Submission**) that included a number of recommendations for reform of the child support system. Attached to this statement and marked **"NR-4"** is a copy of VLA's Inquiry Submission, dated 20 June 2014.

86. On 21 August 2014, I gave evidence to the Standing Committee on Social Policy and Legal Affairs in relation to the Child Support Program Inquiry, alongside Jayne Ford, the Program Manager for Family Law Financial Support Services at VLA. Attached to this statement and marked **"NR-5"** is a copy of the relevant passage of the Hansard from 21 August 2014.

Child support system & misuse

87. I understand that the Royal Commission is interested in the extent to which the child support system can be used as a tool of financial control or abuse.

88. The starting point for this discussion, in my view, is the fact that the child support system, importantly, provides an administrative formula that aims to provide greater certainty and equity for children through access to fair, secure and regular child support at a level that represents an appropriate share of their parent's income. Prior to the introduction of the national child support scheme in the late 1980s, there was a system of court-ordered maintenance which was criticised for its discretionary approach and problems with non-compliance, which led to inconsistent outcomes for parents and children in similar circumstances. Only 30 percent of non-resident parents were making regular payments and only 26 percent of sole parent pensioners were receiving maintenance. The introduction of the Child Support Scheme was very important.

89. The scheme can be a tool used by perpetrators of family violence to continue abuse and control of victims.

90. This is demonstrated by four scenarios we see in our practice experience.

90.1. First, the period for a child support assessment is 15 months or less. As such, payee parents may be in a constant cycle of submitting or responding to change of assessment applications in order to maintain a level of child support. This creates regular opportunities for the payer parent to challenge assessments as a means of financially and emotionally abusing the payee parent.

90.2. Second, a payer parent may use the change of assessment and objection process even when their circumstances have not changed. When repeated applications are made, the payer parent is demonstrating a pattern of control and abuse, rather than a good faith request for a change of assessment.

90.3. Third, many VLA clients who are payee parents require assistance in preparing change of assessment applications in situations where the payer parent is self-employed and is able to make use of tax planning to minimise their income for tax purposes. This creates a financial burden for payee parents which is emotionally taxing and not in the best interests of the child. In these circumstances, other evidence may be used to demonstrate capacity to pay child support at a higher level. Without legal advice or support, however, payee parents may not be aware of or able to gather the permitted evidence to substantiate their application.

90.4. Fourth, payer parents may only make child support payments sporadically or fail to make payments as a means of maintaining power and control and financially and emotionally abusing the children and payee parent.

91. It would be difficult to prevent misuse entirely but VLA is of the view that there are improvements that could be introduced to the child support system to reduce the interaction between ex-partners and the exposure of the payee parent to behaviour linked to attitudes around economic control. In particular, we believe that there should be reform to the change of the assessment process and a greater involvement in the system from the DHS (Child Support):

91.1. When payment arrears are escalated to the DHS (Child Support) debt recovery team, the criteria used for assessing whether or not litigation is appropriate is unclear. The unreliability of DHS enforcement creates financial uncertainty and reduces the capacity of the payee parent to provide for the child. In VLA's experience, enforceability is a particular issue for payee parents on private collect arrangements. We believe there is merit in extending the period of time in which the administrative process can be used to seek enforcement of arrears. We would also like to see a reorientation towards DHS supervised payment collection and a refocus by the DHHS on investigating and securing child support arrears.

91.2. In VLA's Inquiry Submission at "NR-3", we recommend that private collection methods not be permitted in cases where family violence or a risk of family violence is identified.

91.3. Further, in situations of family violence where repeated change of assessment applications are required at the conclusion of each child support period and where there is no variation to existing special circumstances, we recommend applying a "flag approach" to these cases. This would see an independent party, the DHS, rather than the payee parent, initiate change of assessment applications in consultation with the payee parent.

92. Such measures may assist in challenging the perception that the payee parent is 'nominating', 'seeking' or 'registering' the payer parent, the perpetrator, for child support. Rather it is an obligation imposed by legislation on the payer and administered by the State.

93. This is consistent with the general principle that the perpetrator of family violence should not be exempted from their responsibility to financially support their child. However, this must be balanced against the priority to protect parents and children who have experienced or are at risk of family violence.

94. It is important that the option remains available for a payee parent to request an exemption from Centrelink from their obligation to seek child support payments. To be eligible for family tax benefit-part A at more than the base rate, a parent must take reasonable action to obtain child support from the other parent, within 13 weeks of being entitled to receive child support. However, a parent may be exempt from seeking child support for fear of violence or adverse consequences by the payer

parent towards them or their family. This is a difficult decision for a payee parent as it requires them to balance safety considerations against the financial challenges created by the lack of child support from the perpetrator of the violence. Again, as such we believe additional processes (as outlined above) could be built into the child support system to reduce the risk that a parent can use the child support system as a tool of financial control and emotional abuse.

Children perpetrated family violence

95. In our view, there is merit in the Royal Commission considering the issue of children and young people who use violence in the home. The definition of family violence is broadly defined and captures violence perpetrated by children and young people in the home. This concerning behaviour and violence is a serious issue and it needs to be responded to. However, in VLA's view an intimate partner violence framework is not appropriate. The dynamics of control are different and thus a different response is required to ensure safety and address the reasons why the child or young person is using violence

96. VLA has significant practice experience in representing children and young people in child protection, family violence intervention order, and youth crime matters. From VLA's observations, children and young people who use violence in the home present with a range of complex behavioural, mental, physical and emotional issues. The response should maximise the use of therapeutic and diversionary interventions by connecting the child or young person and their family with holistic support services, provide case management and ongoing support, and divert children and young people away from the criminal justice system where possible.

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Nicole Amanda Rich

Dated: 6 August 2015