Royal Commission into Family Violence

WITNESS STATEMENT OF LEE FORMICA

I, Lee Formica, Consultant, Taussig Cherrie Fildes Lawyers, of 530 Lonsdale Street, Melbourne, in the State of Victoria, say as follows:

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

Current role

2. I am an Accredited Family Law Specialist, practicing as a Consultant at Taussig Cherrie Fildes Lawyers.

3. My practice principally involves advising parties about family law matters including parenting and property disputes. I also prepare cases for hearing in the Family Court and the Federal Circuit Court. I also conduct cases in the Magistrates Court. In some cases, there are elements of family violence. I have represented clients who that are alleged perpetrators of family violence as well as alleged victims of family violence.

Background and qualifications

4. My qualifications include a Bachelor of Arts and a Bachelor of Laws from The University of Melbourne. I am Accredited Family Law Specialist of the Law Institute of Victoria and have been since 1991.

5. I began practicing in family law in 1986. Early in my career I did quite a lot of work for different women's refuges, and I have also practiced as an Independent Children's Lawyer. I was a Partner of the law firm Wisewoulds Lawyers and of Maurice Blackburn Lawyers, before joining Taussig Cherrie Fildes in 2005.

6. The breadth of my experience is in family law, both in relation to children in family law disputes and in property matters.

7. I have written and delivered papers on many areas of family law, and have been a lecturer and presenter at the Leo Cussen Institute of Victoria. I was for many years a member of the Executive Committee of the Family Law Section of the Law Institute of Victoria (**LIV**) and holder of the Family Violence Portfolio of the LIV. I am a member of the Family Law Advisory Committee to the Accreditation Board of the LIV for Family Law. I am also a member of the Collaborative Practice Group of the LIV.

Family law system

8. As a family lawyer I see a number of clients in the context of a recent separation from their partner and others who have been separated for some time. Those who present immediately post-separation are usually unfamiliar with the family law process and so I spend some time explaining to them each of the steps involved.

9. The family law process can be summarised as follows:

   9.1. The first step is negotiation, mediation and discussion for resolution of disputes. This can involve the parties directly (after being advised of their legal entitlements), attending family dispute resolution practitioners, counsellors and mediators or negotiating through their lawyers directly or in conjunction with other dispute resolution methods.

   9.2. The last resort is court intervention. If parties end up in the court system there are a number of court imposed events to assist parties to try to resolve their disputes. Only a small proportion of cases proceed to final hearing. Many settle along the way. The court process usually formally commences with an interim hearing. The court makes interim orders which are in essence holding orders or procedural orders to deal with the dispute pending the final hearing, when the parties give evidence and are cross examined in the adversarial process. There is generally a long lapse of time between the two hearings and many cases settle before final hearing.

10. A family lawyer's role is to get as much information from their client as possible, including in relation to family violence, if that is a consideration. The lawyer needs full instructions in order to assist with resolving the dispute or preparing the case for court. The lawyer needs to understand the relevant factors of family violence to determine what Orders should be sought and to prepare the case and to assess what will best protect the family in question in that particular case.

11. The ability of the lawyer to obtain that information depends on the rapport and trust which is built with the client. If successful in building that rapport, and trust is established, then a client will usually divulge the information required. However a lot of people who see family lawyers may present as contained and reticent, because there are costs involved and people can be intimidated by the process of seeing a lawyer, as most do not deal with lawyers regularly, and perhaps only when they buy or sell a home or for the drafting of a Will. This can be so for many women who may not be as familiar with the corporate world than men. Sometimes clients are also unable to articulate what has happened to them: they may say "Oh, well yes he did that to me", but will not expand or can't remember the details or dates Further, for some people, family violence is not the most important consideration. They may be more focused on the financial aspects of their separation, and the family violence issues may be left behind especially if they are now physically separated and feel safe.

12. If violence is a consideration, the lawyer will do a risk assessment and will discuss safety issues with the client, such as whether they have an alternative place to stay and support from family and friends, whether there is the likelihood of future violence and what protective measures may be required such as an intervention order, orders for suspension of contact, supervised contact, orders for psychiatric assessments, whether court security is required for any court attendances etc.

Mediation

13. Subject to whether there has been an allegation of violence or matters of urgency, clients are usually directed to a family dispute resolution practitioner in an attempt to resolve their dispute. Lawyers are less likely to be involved in this initial type of mediation where children are concerned. A mediation involving children may utilise a therapeutic counsellor, for instance.

14. If the parties are unable to resolve their dispute, they will be issued with a certificate pursuant to section 60I of the *Family Law Act 1975* (Cth) (**Section 60I Certificate**). Generally speaking, a Section 60I Certificate is required to initiate family law proceedings if orders are being sought about children.

Issuing proceedings & interim hearings

15. After proceedings are issued, I will begin to prepare a client's affidavit material in advance of the interim hearing. The information that goes into an affidavit at first

instance is very important, because interim hearings are determined on the basis of that written material. In an adversarial system, if relevant information known to the client is not provided in the first instances, but deposed to in a subsequent affidavit, that delay may be used against the client and the information can be treated as a recent invention.

16. Solicitors usually prepare the affidavits which contain the evidence about family violence. If the affidavit contains very specific allegations which are corroborated by medical evidence then that is much easier for the lawyers and the Court to deal with and make appropriate orders.

17. However it is not uncommon at an interim hearing for judicial officers to be presented with two completely different versions of the same event, that is, to have an affidavit from one side that says 'black' and one from the other side that says 'white'. To an accusation of violence, the response may be "Well you can't prove that, my client will say this"; "she hits him as much as he hits her"; "The kids weren't there, it was private. They were asleep, they didn't hear anything" or "Nothing happened". The court is not able to make findings of fact because at an interim hearing there is no cross examination. Therefore the competing evidence cannot be tested. No findings can be made about the veracity of each party's version. After listening to the submissions from the lawyers for each party and assessing the affidavits the Court will make a decision on an interim basis which it regards as best promoting the welfare of the children.

18. Many cases also resolve at the interim level by way of consent orders. This means there will be a compromise of some kind in the interim, and is usually recommended by the lawyers involved because it is difficult to get court time in a busy list.

19. Interim hearings are crucial because they effectively sets the parties up for the final hearing. If you are able to obtain a favourable result at an interim hearing, it is less likely, although of course subject to a testing of the evidence by way of cross examination and further evidence, for an order for example, for time with a child or the children to be reduced at the final hearing. Similarly, if the interim result is unfavourable, that status quo can be harder to shift in either further negotiations or at final hearing subject to the testing of the evidence.

Resolution of family law disputes & the family report

20. Only a small percentage of cases where proceedings have been issued progress to a determination at a final hearing. The majority settle along the way.

21. In parenting cases, the court will require the parties and the children to undertake an interview process with a family report writer, who is usually a psychologist or social worker either employed by the court or in private practice. The family report writer assesses the family dynamics and makes recommendations to assist the family and present a report to the Court. Family reports are very influential in bringing about settlement. Although they are not binding on a judge, they are persuasive and many cases will settle once that report has been released. The contents of the report, in addition to the commercial reality of proceeding to trial, which can cost approximately $20,000 - $50,000 per party, can lead to people agreeing to concessions that they may subsequently regret.

22. Family report writers spend several hours, usually in one day, to meet with a family during the course of preparing their report. The report writers will read the court documentation, including the affidavit material, subpoenaed material, liaise with the Independent Children's Lawyer (if appointed) and then conduct a meeting in their rooms where they interview the various family members. As a result of those interviews and their observations, they then prepare a report, including recommendations to the court.

23. Sometimes the family report process can leave people feeling as if they have been hung out to dry. Someone has assessed them, their parental capacity and their future with their children often based on a meeting of no longer than a few hours. They can feel very aggrieved. They will be advised by their lawyers that the report is persuasive, because unlike the judge, the writer has had the opportunity to meet with each of the parties and the children.

24. If a family law report is not favourable to a party, the only remedy available to that party is cross-examination: they can endeavour to fight on and attempt to challenge the evidence of the family report writer. Some people will choose to fight on, however many are so exhausted that they just want to get out of the system. If there is a compromise position with which they can live, then they will often opt for it at this point.

25. One such compromise that has been popular in recent times is "parallel parenting", whereby changeovers of children take place at school, or at a predetermined public place during school holidays, so that the parents rarely encounter each other. This allows the court to avoid making a determination about the family violence issues because the parents are not going to see each other in any event. It however leaves unanswered the question of what violence the children have witnessed and the impact on them and perhaps any ongoing abuse or control by one partner to the other through the children.

Role of Independent Children's Lawyers

26. Most lawyers consider that many Independent Children's Lawyers do not play the role in negotiations over parenting arrangements that they once did, as a consequence of significant cuts to their services in recent times. Due to those financial restrictions, their role is less involved and their input is more heavily reliant on the recommendations of the Family Consultant. Ultimately if they adopt the recommendations of the Family Consultant as being in the best interests of the children and if the parties also agree, then a judge will ratify the terms of the consent orders provided he/she is satisfied the arrangements are in the best interests of the children. One outcome of final orders is usually that the Independent Children's Lawyer's appointment is discharged. This I understand is a requirement of the terms of funding for an Independent Children's Lawyer. However it means there is limited scope to supervise the implementation and monitoring of those orders. There is a real need for funding of Independent Children's Lawyers in this area in children's cases with issues of family violence so that the role of an Independent Children's Lawyer can continue past the making of final orders.

Culturally diverse people

27. I do not have a great deal of personal experience of working with people from a non-English speaking background, or who are culturally diverse, but I can imagine the family law system would be very difficult for those individuals. The system is overwhelming for people who are English speaking and who are familiar with the culture, so it must be even more stressful for those who are not.

28. This is particularly so given legal aid is now so limited. There is also limited community based legal assistance programmes due to funding limitations.

A less adversarial approach?

29. Ideally, parties should find a way to live alongside one another in the future, and that some sort of safe arrangement can be reached, without a court having to make a final determination of right and wrong. This might result in a more expedient and less traumatic result for those concerned. However the obstacles to this are twofold:

    29.1. First, if serious allegations are made and the other party denies it, then that allegation needs to be tested so that a judge can make a finding. Without that rigour, the system becomes unworkable and individuals who may be good parents (or even good enough) are denied their rights. Removing the safeguards of an adversarial system risks trampling the rights of the participants. However an adversarial system is counterintuitive if the aim is to promote a therapeutic approach that is supportive of the welfare of families and children.

    29.2. Secondly, a cooperative approach requires people to have insight into their own behaviour. Many parties who become embroiled in these disputes do not possess that insight. If they had that insight, they may not have been abusive to begin with, or, if they were, they would be open to use counselling to work through it. They would realise, 'I don't want to be this person, I need to change.' It isn't simply a question of the system that is in place: people need to be made aware of their own behaviour and have the will to change.

30. An alternative system to that provided by the courts, where people discuss and resolve their differences requires a great deal of cooperation, trust and an equal bargaining position, that is, each party is able to participate without fear of abuse or control. It requires participants with a capacity to reflect on their behaviour, adopt change and communicate on a level playing field. This can be difficult in the context of family violence.

Collaborative law

31. Collaborative law has not really taken off in Victoria, and although some practitioners are very committed to it, the majority of lawyers avoid it. It can regrettably be open to abuse and in some of the matters I have conducted, the other party has been tactical and strategic to delay progress and resolution. This was to my clients' detriment. However, again if the tenements of trust, co-operation

and insight into behaviour and conduct exist then this can be a good forum for some families.

General observations about family violence in the context of family law

32. In my experience, there are many shades of family violence.

33. As a family law practitioner, I see "situational family violence" that arises as a result of the breakdown of a marriage or relationship, where there are feelings of hurt, disappointment, betrayal and distrust, to name a few. Confronted by that situation, the human condition will take place and people can behave in a hostile manner towards each other, and become verbally abusive, in particular. That is not to excuse the behaviour, however it can often be a reaction to the extreme stress and grief which accompanies the breakdown of a relationship. People can behave badly to each other in such circumstances, however once they are no longer in those circumstances, that behaviour will cease, because it is atypical or out of character.

34. As lawyers we are required to try to navigate through that behaviour, and determine whether it is truly a symptom of the marriage breakdown or more pervasive violence. We consider whether, once the parties separate and participate in counselling, if they will then be able to refocus, enter into parenting orders and return to their normal selves. If the violence is not situational, and the violence is pervasive, continuing and recurrent, such parenting orders may not be possible.

35. Where there is physical family violence, it is more straightforward as a lawyer to present this evidence to the court, because there will often be bruises or physical signs of violence, and there may be medical reports or corroborating witnesses.

36. In the more extreme cases of family violence, the Family Court and the Federal Circuit Courts deal with it very well. They are quick to get on top of the issues, and they have the resources to respond appropriately and protectively. The judges can get it right, because it is easy to get it right.

37. However, it is the more nuanced cases of pervasive, recurring and more subtle forms of abuse which the courts are less adept at responding to, and there may be a larger proportion of these cases presenting in court. Family lawyers and judges have become accustomed to seeing people behaving poorly to each other. The question is then, for the purposes of family law, when is family violence a serious issue? How seriously does the Family Court need to view this behaviour?

38. It is hard to discern a serious case of emotional abuse or underlying threatening behaviour from all of the other white noise of people being hostile. Often the client is not sure how to best articulate it, or they may be quite affected by it, to the point of jeopardising their own case: they will say "He wins, he always wins, he always gets what he wants". If someone has experienced years of abuse, it is hard for that person to accept they will be believed, or that anything will work in their favour. It is understandable people feel dispirited and defeated.

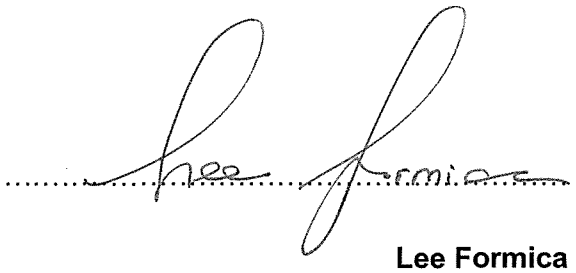
39. It may be that that the situational family violence perspective that family lawyers have sometimes infiltrates their view about the seriousness of violence or of ongoing violence and can overlook the impact of family violence on children. I know that many practitioners share a cynicism about intervention orders (**IVOs**), for instance. This stems from the ease and speed with which they appear to be made. There is a view in some circles that IVOs are being made too quickly by Magistrates without proper testing of the allegations in lists which are too big, unmanageable and with no time to listen and assess the facts. This does not apply solely to men who complain about the system but orders can also be made against women by the husband/partner who "gets in first".

Improving the family law system for family violence victims

40. Something that would be particularly helpful for family violence victims in the family law system is greater training and education for family lawyers regarding what family violence is, how it affects people, how such people may present and how it impacts on children, how we can assess the likelihood of ongoing violence and what the triggers are for such violence. This would enable victims to talk about family violence with a practitioner who has a real understanding of the issues involved rather than simply seeing it as various sections in the *Family Law Act 1975* (Cth) which are relevant in parenting cases. Certainly the Family Court produced "Family Violence Best Practice Principles" manual is a useful resource for practitioners working in the area of family violence. If better educated, family lawyers could be more responsive to the issues of family violence.

41. There is a kind of prevailing optimism amongst family lawyers that once family court orders are in place, the violence will have dissipated and the parties will focus on the children and their role as parents. Perhaps this does occur in many cases but it is not always the case. It is in the latter cases that there needs to be continued support from the community and state authorities. However in many instances

family court orders are made without that support or network. Again, the absence is due primarily to limited funding resources. This cannot be in the interests of children.



Lee Formica

Dated: 6 August 2015