Royal Commission
into Family Violence

WITNESS STATEMENT OF HELEN FATOUROS

I, Helen Fatouros, Director Criminal Law Services of Victoria Legal Aid, 350 Queen Street, Melbourne in the State of Victoria, say as follows:

1. I am authorised by Victoria Legal Aid (**VLA**) to make this statement on its behalf.

2. I refer to and rely on VLA's submission to the Victorian Royal Commission into Family Violence (**Royal Commission**) dated June 2015, which sets out 35 recommendations to improve the legal response to family violence. A copy of that submission is attached to this statement and marked **'HF 1'**.

3. 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

4. I am the Director, Criminal Law Services for VLA. I have held this position since January 2013. In this position I am responsible for overseeing VLA's criminal law program across the state both in terms of service delivery and policy. I also appear on behalf of clients and VLA in court.

5. I am also Director for the Goulburn region and North Western suburbs. I have held this position since January 2013. Like all other VLA Directors, in addition to my accountability for the criminal law program State-wide, I also have direct responsibility for regional and outer metropolitan offices and their legal service delivery across particular regions, in my role those of the Goulburn and North Western suburbs serviced by VLA's Shepparton and Broadmeadows offices.

Background and qualifications

6. I was admitted to practise as a Barrister and Solicitor in 2002 and hold a current practising certificate as a principal of a law practice.

7. I have been a legal practitioner for over 13 years practising almost exclusively in criminal law.

8. From 2001 to 2012, I was a prosecution lawyer employed by the Office of Public Prosecutions (**OPP**). From 2008 to 2010, I was Directorate Manager of the Specialist Sex Offences Unit at the OPP; from 2010 to 2012, I was the leader of the OPP Advocacy Team.

9. I have appeared as a Legal Prosecution Specialist in many complex indictable matters including matters involving family violence.

10. Between 2009 and 2012, I also led the profession-wide implementation of the Sexual Offences Interactive Legal Education Program for which I was awarded the Law Institute of Victoria's 2012 President's Award for Government Lawyer of the Year.

11. I am currently a:

    11.1 Board member of the inTouch Multicultural Centre Against Family Violence. I was appointed to this role in 2010.

    11.2 Director of the Sentencing Advisory Council (**SAC**). I was appointed to this role in mid-2013.

    11.3 Commissioner of the Victorian Law Reform Commission (**VLRC**). I was appointed to this role in 2014.

Victoria Legal Aid criminal law practice

12. VLA has the largest criminal law practice in the State. Our Criminal Law Program provides high quality legal advice and representation for people charged with criminal offences who cannot otherwise afford it and who meet our eligibility criteria, focusing on people who are disadvantaged or at risk of social exclusion.

13. As well as helping individual clients, as an organisation, we are obliged under the *Legal Aid Act 1978* (Vic) to seek innovative means of providing legal assistance to reduce the need for individual legal services. We are also required to provide the community with improved access to justice and legal remedies. One way of achieving this is by pursuing improvements in law and policy that result in better outcomes for our clients and the community more broadly.

14. VLA's Criminal Law Program has four sub-programs:

14.1 Appellate crime

We strive to maintain client and public confidence in the criminal justice system by ensuring that cases demonstrating legal errors and miscarriages of justice can be tested by higher courts through expert representation and by contributing to the development of the law through senior appellate courts.

14.2 Indictable crime

We aim to achieve timely and appropriate outcomes for people facing serious criminal charges by providing high quality expert legal advice and representation and by influencing the criminal justice system to be efficient, fair and respectful to accused people. The most serious family violence matters involving, for example, rape or death fall within this practice area.

We also provide specialist legal advice and representation to people facing sexual offence charges in all courts, specialist duty lawyer services at the Melbourne Magistrates' Court and expert assistance to people who are responding to applications pursuant to the *Serious Sex Offender (Detention and Supervision) Act 2009* (Vic). We apply this knowledge and experience to law reform and policy development, to promote fair and just outcomes in serious criminal and sexual offence cases.

In 2013-14 the Criminal Law Program assisted 46,016 unique clients. We fund approximately 80% of all criminal trials and spend approximately $33.2 million per year on indictable crime. Overall, 70% of all grants of legal assistance in indictable crime cases are conducted by private practitioners. The remaining 30% are conducted by VLA's in-house staff practice.

14.3 Summary crime

We help people charged with summary offences to achieve timely and appropriate outcomes by targeting finite resources to a range of interventions based on need, and by influencing the criminal justice system to be efficient, fair and respectful to accused people. The majority of family violence matters are dealt with in the summary stream.

Our criminal law duty lawyers provide assistance to respondents who have been charged with criminal offences, including those committed in the family violence context, and with breaches of a family violence intervention order. In

2013-14 we provided duty lawyer services in 2,990 matters relating to a breach of a family violence intervention order.

14.4 Youth crime

We ensure that children charged with crimes are treated fairly and that outcomes have a therapeutic focus by providing expert legal advice and representation in a way that reflects the unique status and vulnerability of children. Our Youth Crime team also provides legal representation for children accused of committing family violence offences.

Family violence cases

15. VLA contributes to the safety of adults and children impacted by family violence and assists in reducing the incidence of family violence by providing legal information, advice and representation to affected adults and children. This includes acting for clients at the Family Law Courts, the Children's Court and the Magistrates' Court of Victoria. We also represent and fund the representation of serious family violence cases in the higher courts at trial and appeal.

16. We also contribute to law reform and the development of policy, practice and procedure for Victorian courts and state agencies in relation to family violence.

17. In my experience, a high percentage of VLA cases involve family violence issues. For example, a recent examination of assistance provided in matters over a three-year period where an accused was charged with murder or attempted murder suggests that just under 50% of these matters occurred in the context of family violence. This sample, while including only two matter types, indicates the level of impact family violence has on the delivery of our legal services.

18. We know from research and data that the victims of family violence are overwhelmingly women and children. During my time as a prosecutor for the OPP the majority of murder cases that I prepared involved the murder of an intimate partner, parent or child by a male offender. Those cases fell across a wide spectrum from relationships that had no history of family violence (but that did involve other issues such as mental illness, drug and alcohol addiction, homelessness and/or poverty), to relationships with a history of documented family violence. Regardless of where a case sits on the spectrum, family violence cases are all serious and complex.

19. Those family violence perpetrators who pose the highest risk of harm to their victim fit into two broad categories - the recidivist offender who continues to offend and breach orders and has a significant history of police interaction; and the first time offender who has had minor or no interaction with police, but who goes on to kill or seriously injure their intimate partner or other family member. It is important to remember that high-risk offenders are the minority in the context of family violence offenders.

20. The best way to reduce the risk of re-offending is to engage a perpetrator in behaviour change programs and other interventions that assist them in resolving the underlying contributors and causes of their offending behaviour. Ideally this should happen in an early and timely way, well before there is even a charge or court event. Resources need to be invested in re-entry and re-integration programs and supports, in meaningful prison programs and parole also needs to be properly resourced. It is essential that perpetrators be afforded every opportunity to participate in these programs and that the intensity of interventions is proportionate to the risk posed by a family violence offender.

21. Our in-house practice experience demonstrates a clear link between future offending and the childhood experience of family violence and contact with the child protection system. These are both risk factors for our young VLA clients going on to either commit family violence or other criminal offences as children, in turn increasing their likelihood of offending as adults. We have a cohort of child and adult clients who become entrenched in a cycle of offending and presentation as victims, resulting in them becoming high users of legal aid services across the criminal, family and civil programs within VLA.

Higher Court Family violence matters and the criminal justice system

22. It is important to note that in the last decade the criminal justice system has undergone radical reform. When I began my career as a prosecution lawyer there was a lack of understanding of the dynamics around family violence and sexual offending and the legislative framework itself was contributing to women and children experiencing unfairness and injustice. It was a far more difficult criminal justice system for victims to negotiate generally. There has been such a vast improvement in the way we understand how we have to support victims and to a lesser extent offenders through the criminal trial process. This does not mean that there is not significant room for improvement, particularly around addressing re-offending and the need to focus on rehabilitation as a long term strategy. However, we should not lose

sight of the gains that have been made and in considering how we address family violence, we should work from the position that the system is not broken rather it requires additional resourcing, improved integration as between jurisdictions, services, agencies and processes; and improved resourcing of education and training both within the legal profession but also outside of it within the community and in the broader non-legal sector that supports the criminal justice system.

23. I have been asked to comment on particular types of evidence common to family violence cases and how that evidence can be taken into account. Historically, thresholds for the admissibility of propensity/tendency evidence were very high and there was limited scope to admit important contextual and relationship evidence.

24. There have been significant evidentiary reforms in recent years including rules governing the scope of cross-examination, the admissibility of tendency or propensity evidence, procedures designed to lessen the traumatic impact of giving evidence and jury directions designed to address common misconceptions about certain classes of offending, evidence and victim (for example sexual assault, complaint evidence and children). An appreciation of the social context in which family violence takes place, as in the case of sex offences, will need to go beyond legislative reforms already in place, to cultural change and awareness within the judiciary and the profession, alongside changes in broader community attitudes.

25. In 2004, the VLRC released a wide ranging report on Sexual Offence Law and Procedure. It made 202 recommendations to improve the way in which sexual offences are dealt with by the criminal justice system, including recommendations designed to minimise victim distress and trauma. That report acknowledged the traumatic effect of unnecessarily intimidating cross-examination. Importantly, the VLRC emphasised that changes to law and procedure will not be effective on their own as there also needs to be changes to the culture of the criminal justice system. There are lessons that we can learn from these reforms in order to ensure that the family violence legislative framework meets its promise.

26. I have been asked about the use of expert evidence within the sexual offence context. There are now specific evidentiary provisions that support the easier use of such evidence in criminal trials subject of course to relevance and reliability and the qualifications of the expert. As the community has also become more aware and knowledgeable so too have juries become more sophisticated and aware of the context in which this type of offending takes place. Expert evidence can cover things

like behavioural consequences of frequent abuse and emotional manipulation, common factors preventing someone from leaving an abusive relationship, including financial control, reduced self-esteem and traumatic bonding.

27. The *Crimes Act 1958* (Vic) includes provisions about family violence evidence which includes psychological abuse in the definition of family violence and which also allows for evidence about the cumulative psychological effect of family violence and the dynamics affecting separation from an abuser. Recent provisions introduced by the *Jury Directions Act 2015* (Vic) include directions about the consequences of family violence, specifically that it is not uncommon to stay with or return to an abusive partner, and to not immediately report family violence or seek assistance.

The role of defence lawyers in family violence cases

28. It may seem obvious to state that the role of defence lawyers is critically important in the administration of justice. The role of defence lawyers is often misunderstood and at times demonised. Defence lawyers represent their clients within legislative and regulatory frameworks as officers of the Court and they are subject to an array of professional and ethical standards.

29. VLA has played an increasing leadership role in leading and implementing systemic improvements designed to ensure the quality of legal services delivered both by its in-house practice and the private profession.

30. Just as assisting victims of family violence can be confronting and traumatic, so too is assisting clients accused of committing family violence who are often in crisis. Defence practitioners often need to strike a difficult balance between protecting an accused person's rights and also being assertive in professionally challenging and encouraging clients with a range of vulnerabilities to make decisions that support rehabilitation and early resolution where appropriate; or which lead to well focused contests where the issues and cross-examination of victims and witnesses is confined, well-prepared and in the best interests of their client. Resourcing for appropriate advocacy and other training is required to support prosecution and defence lawyers to deliver high quality services which balance the duty to their clients, the needs of victims and the overall administration of justice.

31. Just as in the sexual assault space, training that also addresses cultural change and an understanding of the broader context of family violence offending will ensure all lawyers are sensitive to the complex and varied presentation of family violence

victims and accused. This training also needs to be complimented by appropriate vicarious trauma supports and training given the pressures on lawyers working in the family violence space.

32. There will of course be cases where the credibility of a key witness or victim is an important issue and therefore must be tested. Judges and prosecutors also have a key accountability role to play in intervening and taking objection to cross-examination that is improper or oppressive. There are as mentioned above specific laws of evidence governing the questioning of witnesses and victims.

The criminal process and victims

33. The Victorian criminal justice system is now heavily geared towards front ending criminal cases to either resolve cases early or to reduce the burden of the most complex and expensive cases. Criminal cases are therefore funnelled through the system to achieve these goals and the reforms introduced by the *Criminal Procedure Act 2009* (Vic) (**CPA**) impose significant pre-trial obligations on the defence and the prosecution.

34. In contested committal proceedings, leave to cross-examine any witness is required. If leave is granted, cross-examination must be specific and confined to those issues for which leave was granted. In sexual offences cases, so that certain victims are only cross-examined once, special hearings take place outside of the trial process just prior to empanelment, to obtain evidence from complainants who were either under 18 at the time of the proceedings or have a cognitive impairment. These provisions also enable evidence from these vulnerable classes of victim to give evidence remotely. I am aware there are suggestions this approach should also be extended for family violence victims. This is an appropriate procedural reform to be considered, however, we also have the benefit of learning from the sexual assault reforms, both in terms of what has worked and what has not. One challenge with more streamlined committals is that practitioners lose the ability to properly test the strength of the evidence, especially in cases when evidence is contested or where full and proper disclosure of the evidence has not occurred. Some of the more difficult cases can benefit from an early assessment or identification of the strength of the evidence, which can also impact on the ability to resolve early. I note also that committals are not the only way in which early disclosure, preparation and resolution can be achieved.

35. Legislative provisions currently exist to specifically protect family violence victims. The CPA provides that the accused may not personally cross-examine a protected witness in a criminal proceeding that relates to a charge for a sexual offence or an offence where the conduct constituting the offence consists of family violence. Although related to intervention order applications, the *Family Violence Protection Act 2008* (Vic) prohibits the respondent from personally cross-examining the affected family member or any other 'protected witnesses' unless, generally, the protected witness consents to being cross-examined and the court decides that cross-examination will not harm the protected witness. As with the CPA provisions, VLA can be directed to provide legal representation by the Court.

36. The benefit of early cross-examination of the victim does not however, just flow to the accused. Prosecutors can also be aided to make earlier decisions around the prospects of conviction and whether to proceed with a prosecution. The ability to assess issues early enables the prosecution to identify problems and to run the case accordingly. There is a need for flexibility and discretion around how special hearings are used, recognising that some victims want to give their evidence in court. Recent amendments have enabled this flexibility within the sexual offences context and any extension of these provisions to the family violence context should include such flexibility through judicial discretion.

37. From my experience, there are still too many cases that are discontinued late in the process, often on the eve of trial which is not a good outcome for anyone. It can be devastating for victims, expensive for the community and unfair to accused people. This highlights the need for flexibility of approach in criminal cases and the importance of tailoring case management and procedures to suit the needs of the case. We also cannot lose sight of procedural fairness which operates to protect everyone.

38. We also need to improve disclosure within the criminal trial process as there are still too many instances where late disclosure creates delay and unnecessarily prolongs cases when they could have been resolved or determined earlier. It is difficult for the defence to respond and comply with case management requirements where for example they have not received notices of tendency and coincidence evidence, additional statements or material that should have been disclosed at the committal mention stage etc.

39. The way in which victims and key witnesses are proofed by the prosecution is also critical. Management of victims' expectations is extremely important and prosecutors and support services they rely upon a critical to properly preparing victims for the process and possible outcomes.

The role of the bench and juries in criminal trials

40. In my experience and that of VLA's in-house practice, where judges and magistrates are attuned to the needs of victims and offenders by including them through accessible language that is empathetic throughout the court process, the process and outcome is more readily understood.

41. In 2014, VLA consulted with victims of crime as part of its Criminal Appeals Review. The experience of victims we spoke to provided useful examples of the various ways in which victims are treated in the criminal justice system at the appeals stage. Victims and families of victims consulted reported that whilst there had been significant improvements in the way victims were treated at the trial and sentencing stages, some of those improvements had not filtered into the appeals space. Victims reported a more positive experience when the bench took a more inclusive approach, even if an appeal or re-trial was allowed. Alternatively, victims, and families of victims, reported a negative experience when they were not included in the process, for example, in murder cases where the bench did not refer to the victim by name but used the impersonal term 'the deceased', where there was no real acknowledgment of the family being present, or where there was banter between the bench and counsel perceived to trivialise offending.

42. Juries are an integral part of our criminal justice system. Recent reforms simplify the directions the trial judge gives to the jury in a criminal trial to assist the jury in determining whether an accused is guilty or not guilty. The most recent reforms are embodied in the *Jury Directions Act 2015* (Vic), which commenced in June 2015. The changes also simplify and clarify important directions on issues such as misconduct evidence (such as tendency and coincidence evidence), unreliable evidence and delay and credibility. Counsel also has more control over which directions go to the jury, which is designed to reduce judicial error, increase juror comprehension and enable jurors to reach a decision more quickly and easily when deliberating. In November 2014 an amendment to the *Uniform Evidence Act 2009* (Vic) was made to provide a general discretion to exclude evidence that

'unnecessarily demeans the deceased in a criminal proceeding for a homicide offence'.

43. Juror comprehension is essential in all cases, but is particularly important in family violence cases, which involve a range of complex human issues, including attitudes and beliefs that can be based on misconception or gender stereotypes. Jurors who are not well informed about family violence matters may not understand, for example, why a victim would not immediately leave a relationship despite being subjected to violence.

44. Jury directions reforms are a great example of collaboration across the criminal justice system and the phasing in of long-term cultural and legal change. The sexual assault reforms essentially started in 2006 and have steadily improved the criminal justice response to those offences. With the benefit of these reforms and the overlap between family violence and sexual offences, family violence reforms will take less time to take effect subject of course to proper funding that supports the existing reforms to be embedded consistently across the system.

Creation of new family violence specific offences

45. As a result of my practical experience in both prosecution and defence, I am of the view that we are at risk of over-legislating and creating many different forms of criminal liability which can act to fragment and weaken the criminal law's ability to actually hold perpetrators accountable whilst upholding fundamental rights to a fair trial and the presumption of innocence. The creation of new and specific family violence offences could have the counter-productive effect of reducing the protection afforded to women and children. Defensive homicide is an example of a law that was supposed to accommodate cases involving the killing of a family member or intimate partner in circumstances where there may be lower degrees of moral culpability due to a history of experiencing family violence. In operation defensive homicide laws were utilised primarily for one-off violent confrontations between men. Another example is the offence of rape and the laws around consent which have often created perverse outcomes that resulted in injustice. The newly introduced reasonable belief provisions seek to rectify this issue.

46. I am of the view that the current suite of criminal offences in Victoria can cover the spectrum of family violence offending warranting criminal punishment. I have been asked to comment on those cases where there is no physical assault involving

humiliating and degrading conduct that involves a range of psychological and emotional abuse but not physical abuse. These cases will always present problems in terms of establishing criminal liability. The threshold question is really 'at what point does that sort of behaviour become such that we say the criminal law is the only way to address it?' A large number of offences currently exist to capture verbal threats through to the most serious offence of murder. In the vast majority of cases involving this degree of cruelty there will be associated threats or physical assaults. Where cruelty is present in the circumstances of a physical assault or threat, the law currently treats such behaviour as an aggravating feature which informs the sentencing exercise. As evident in the defensive homicide example, caution should be taken in attempting to legislate offences for a very specific category of offender or behaviour where existing offences can be used. Although it may be challenging to prosecute cases involving psychological harm, police and prosecutors should be courageous and robust in bringing assault or injury charges (which do not have to include a physical battery or injury) alleging harm of this sort in the exercise of their statutory duties and powers.

47. It is important to remember that an assault in the family violence context is still an assault and should be treated as seriously as an assault against a stranger or in any other context. There should be no difference in the burden and standard of proof that attaches to family violence offending.

48. On 1 January 2011, several important reforms were also introduced in Victoria which were designed to improve the process of making a victim impact statement (**VIS**). The reforms were based on recommendations set out in a report by the Victims Support Agency which presented the findings of an evaluation into the effectiveness of VISs in Victoria at that time. The recommendations included amendments to the *Sentencing Act 1991* (Vic) to give victims (or their nominated representative if approved by the court) the right to read their own VIS aloud in court and to attach additional material such as photos, drawings and poems to a written VIS. The legislative amendment also provided for victims to request special arrangements such as remote witness facilities or screens when reading their VIS. These reforms follow the introduction of the *Victims Charter 2006* (Vic) and a range of legislative and other reforms designed to integrate victim support services.

49. As a Commissioner of the VLRC, I note that there is currently a wide ranging reference underway around the role of victims within the criminal trial process. The VLRC is tasked to report by 1 September 2016 and the consultation paper is now

available on the VLRC's website. Although it can be challenging to manage victim participation in the sentencing process in a way that is balanced and respectful both of the victim and the rights of the accused, it is the responsibility of all players in the criminal justice system to support a fair and balanced justice system that manages the needs of victims and offenders no matter how challenging that balance might be to strike.

50. We should also not lose sight of the fact the when talking about indictable offences in the County Court, roughly 70% of cases will resolve by way of a guilty plea whether to the principal offence or a lesser offence depending on the evidence and admissions of an accused person. In the Supreme Court, roughly 50% of cases will resolve to a plea of guilty.

51. There has already been a significant shift in sentencing practices within the Victorian judiciary in terms of the approach taken in family violence cases. Previously, the usual penalty for breaching a family violence intervention order was a fine, not jail. As demonstrated by the 2013 SAC report on *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, research on contraventions of family violence intervention orders and safety notices concluded that a transformation in approach to family violence offenders is already being reflected in sentencing outcomes for these matters. The SAC also found that the shift away from fines as a sentencing outcome was unique to sentencing outcomes for contraventions of family violence intervention orders and was not consistent with sentencing trends in the Magistrates' Court as a whole. This indicates that offending in the context of family violence is being taken seriously by the Magistrates' Court.

52. Recent Court of Appeal judgements have strongly denounced family violence offending and have set standards around increasing sentences of imprisonment to reflect the serious nature of family violence offending and capture the breach of trust that characterises such offending. This shift and development should not be interrupted and the principles of proportionality and parsimony remain as key principles that ensure the purposes of sentencing are met in a fair and balanced way.

The importance of including or retaining appropriate context evidence

53. I have been asked about my views regarding context evidence and recent high profile cases where the family violence context was arguably not properly included in the evidence or in the negotiations which led to resolution of serious criminal charges. I

am of the view that that the process by which a case resolves is fundamentally about early preparation and high quality legal services being delivered both by prosecutors and defenders. The process of resolution should always include a careful settlement about the factual basis of the plea.

54. This is not a problem unique to family violence and there are lots of examples where the resolution of the case has not been attended to as carefully as it could have on both sides of the bar table. When resolving a case, VLA's legal practitioners send detailed correspondence to the Crown outlining the factual basis upon which a client is offering to plead guilty and outlining why certain offences are not supported by the evidence. In the majority of cases the factual summary or opening provided by the prosecution will be accepted in full by accused people who have indicated an early plea of guilty. In the more complex cases involving protracted negotiations the summary should reflect those negotiations and the evidence. Where the facts have not been attended to it makes the sentencing task more difficult for the judge and can be experienced adversely by victims and accused. There are now detailed Practice Notes supported by the CPA and other legislative provisions that govern the case management of pleas and trials requiring the filing of openings, submissions and other expert reports of evidence relied upon according to strict timeframes designed to reduce delays, contests and adjournments.

55. Prosecutors also need to take great care when making decisions about charges and negotiating in relation to pleas, both in terms of consistency of decision making and transparency. Whilst the decision to resolve a case rests with the prosecution the involvement of victims in that process is critical.

56. There has been significant reform of the law around context, relationship and propensity/tendency evidence. As I have mentioned above, the threshold for the admission of such evidence has been lowered. In the majority of cases, such evidence will play some part in the process whether by way of verdict or resolution by plea of guilty, and in turn any sentence. Any further reduction of thresholds around the admission of such evidence risks imbalance that could lead to injustice and wrongful convictions.

57. Provisions that were added as part of the family violence reforms over the last couple of years, especially around defensive homicide, enable easier admission of context or relationship evidence. Sometimes, the ability to admit this evidence is just as

important for the defence because it can assist to explain, for example, why a woman acted as she did in a family violence context.

Addressing non-legal issues

58. Criminal justice responses cannot of themselves tackle the issues of family violence. Well funded and delivered legal services which guide both applicants and respondents through the system require equally well supported and funded non-legal services. VLA services also connect people with the information, advice and assistance they need to address the causes and consequences of family violence. People who use or experience family violence typically have a cluster of legal and non-legal problems. Our lawyers can play a critical role in forging connections with other support services. Not only do these interventions support victim safety but they also provide an opportunity to connect perpetrators with services that may assist to address the factors contributing to violence, such as drug and alcohol dependencies or violence-supporting attitudes. By facilitating connections with support services, the legal response furthers both immediate safety and longer term preventative outcomes.

59. We are committed to working with law enforcement, the courts and support services to connect people with the services they need to deal with their legal and non-legal needs. The current demand in the system has limited the capacity to open up effective pathways for referrals as services that are making and receiving referrals are overburdened and often do not have sufficient time to forge these connections. This means that there are numerous missed opportunities for early and effective intervention.

60. The paucity of support for non-legal service delivery for perpetrators places significant limitations on what duty lawyers can achieve beyond the immediate legal issue faced by the client. Consequently, we find that sometimes the most important (and challenging) role a defence lawyer can play is to assist their client to build insight so that they reach a point where they can more clearly consider taking responsibility for their actions and their willingness to take up options that may available for their rehabilitation. That process can be very complicated with vulnerable clients experiencing multiple issues such mental illness, cognitive impairment or drug and alcohol addiction.

61. There is such pressure on the system that it has, for example, resulted in a lack of places in Men's Behaviour Change Programs (**MBCPs**) to the extent that there is effectively no access to programs (particularly in regional Victoria), and this has led to inconsistencies in the availability of the Court Integrated Services Program (**CISP**).

62. There is great unfairness for victims and offenders when access to justice depends on geographical location. The reality is that vulnerable offenders can and should be assisted no matter where they live through consistent access to programs such as MBCPs and the CISP in the Magistrates' Court.

Therapeutic approach to dealing with offenders

63. Even before offenders are found guilty and sentenced, they can benefit from a more therapeutic approach. The CISP should be available in County and Supreme Courts, as well as Magistrates' Courts, and also across the State. There will of course be a small number of high risk repeat offenders who have to be managed differently but the whole system should not be built around those offenders. For example, the serious sex offender supervision and detention scheme is really instructive of what not to do because it has created a very complicated and expensive system which is not working as it was intended.

64. The reality is that we want to be able to sentence family violence offenders in a tailored way that addresses their particular issues and works towards their rehabilitation – keeping in mind the broad purposes of sentencing which are to punish, deter, protect and rehabilitate. I think that children who engage in violent or problematic behaviour in the home need to be treated differently and the VLA submission (attached to this statement at **'HF 1'**) discusses that in detail.

65. We should consider a greater use of therapeutic orders/approaches akin to those utilised in the sexual offences space, the Drug Court and the Assessment and Referral Court List in the Magistrates' Court. There is no reason why such approaches should not be built into the indictable space where appropriate. This provides the potential for a certain cohort of offenders at risk of repeat offending to be managed more actively and intensively by the court or Corrections Victoria (**Corrections)** in an ongoing role. I do want to take care however in making the distinction between pre-conviction/pre-sentence monitoring schemes and post-conviction/post-sentencing related monitoring schemes. The earlier the system can

intervene the better but we must be careful with that distinction given the presumption of innocence and other procedural rights.

Sentencing practices

66. As stated above, sentencing practices in Victoria for family violence are already starting to shift in line with community expectations and an ever growing awareness of the scale and impact of family violence. Any reforms and improvements we implement should work to support consistency in approach and process with the appropriate flexibility and judicial discretion guiding sentencing outcome. That balance of consistency, transparency and fairness is critical in increasing the community's confidence in the criminal justice system.

67. The only caution that I would sound is around mandatory sentencing and rigid sentencing frameworks which reduce the ability of the justice system to actually deliver on all the purposes of sentencing in a way that protects the community. As evidenced in the example in our submission to the Royal Commission, due to the complexity and dynamics of family violence it is unfortunately not rare for victims of family violence to commit family violence offences themselves. It would be perverse for the law not to have the discretion required to deal with those offenders (often women with traumatic experiences of family and sexual violence in their childhood and adult relationships), in a way that is balanced and which reflects their reduced moral culpability. This is an area where a politically expedient response, which does not capture the complexity of family violence cases, could lead to real injustice which entrenches rather than challenges gendered applications of the criminal law.

68. Deterrence research shows that it is not the severity of the sentencing outcome that is most important but that certainty of apprehension and swift consequences are a more likely to provide deterrent benefits. I am aware that certain regions where police have taken a no tolerance approach have seen a real impact in terms of reducing re-offending or multiple breaches. However, the current system is so overburdened it is unable to provide the immediacy of detection and consequence.

69. Consistent with research suggesting that swift and certain consequences can increase the effectiveness of a sanction, I consider there is benefit in engaging with and providing legal assistance to family violence perpetrators as quickly as procedural fairness and resources allow. A prompt response to both detection and

consequence of breaches requires an investment of resources to allow for a tailored and meaningful legal response.

70. Where a person does contravene an intervention order, VLA supports enforcement action that ensures victim safety, holds the perpetrator accountable, and takes into account the particular circumstances and any underlying causes of the contravention. While we acknowledge that responding to the crisis is challenging and the dynamics can be unpredictable, we consider (as discussed above) that more effective use can be made of referrals to relevant support services at the point where perpetrators come into contact with the legal system. The importance of responding to the particular needs and circumstances of people who contravene intervention orders is highlighted by our client data.

71. Our client data reveals that 15 percent of our clients who breach family violence intervention orders have disclosed a disability. Of that group, over half had a mental health issue. Seven percent had an intellectual disability and four percent had an acquired brain injury. VLA's experience assisting these clients informs our view that police members should be supported to make firm yet flexible decisions following contraventions. A decision making tool would support consistent decision making and respond, for example, to complaints by affected family members that contraventions of their intervention order are not taken seriously. It would also assist police members to deal with respondents who inadvertently contravene as a result of a genuine inability to understand the nature of their obligations.

Improvements to the criminal law's response to family violence offending

72. Further to therapeutic approaches discussed above, we should also look at the existing sentencing hierarchy and the use of community correction orders (**CCOs**) which are flexible, punitive and can include judicial monitoring. Victoria's first guideline judgement sets out how this sanction can transform the sentencing landscape in a way that both punishes and rehabilitates. With appropriate resourcing of Corrections, CCOs are able to provide tailored and appropriate responses to offending. Even if a new condition were to be added to the CCO regime to specifically address family violence offenders, such as mandating MBCPs, those supports need to be funded and available.

73. We should look to the existing frameworks we currently have and amplify and strengthen them as necessary. I think that we have largely got the legislative settings

right for the family violence system, but there are a few general observations that are important:

62.1 The system is not able to realise its potential because it is overburdened in terms of volume and insufficient resourcing;

62.2 A victim and accused's experience can vary depending on listing practices, , jurisdiction and geographical locations;

62.3 There is inconsistency of approach between police, court staff, legal service providers and the judiciary; and

62.4 The intersecting points between non-legal supports, the criminal justice system (even as between summary and indictable pathways), and the family law system are not working as well as they could.

74. Whilst more funding is needed across the board there also needs to be a focus on the intersecting points between services and systems, but also on the training and up-skilling that is required to mainstream the benefits of specialised family violence Courts or services. The experience of VLA duty lawyers is that where they represent applicants or respondents in specialised courts, the experience for their clients is superior to that of mainstream courts. The challenge is therefore how we can make the specialists mainstream. There are lessons we can learn from the experience of specialisation in the sexual offences context, particularly around the sustainability of maintaining specialist approaches that can create a two tiered system and actually compound service gaps.

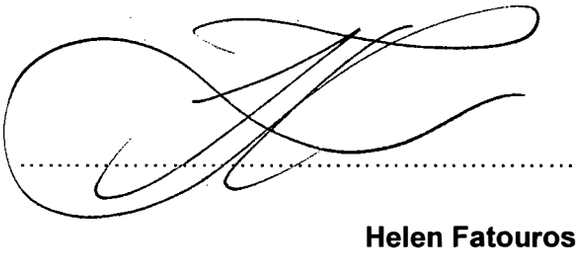
75. Legal practitioners and judicial officers who perform their role in a way that takes a holistic approach are far more effective. However, neither lawyers nor the magistrates can achieve best practice when they have between 20 and 50 matters in their list on a daily basis.

76. Further, there is great benefit in both victims and offenders having access to legal advice early in the process. Some Magistrates, most often in specialist courts, are able to meaningfully engage with an offender and work in partnership with duty lawyers, and are able do this effectively and efficiently. Unfortunately, I am aware that the experience of duty lawyers in terms of judicial management of lists and family violence matters is inconsistent. For that reason, I cannot stress enough the importance of complimentary judicial training.

77. Another difficult and sensitive issue in responding to family violence concerns the reality that victims can also often inadvertently breach family violence intervention orders, either through a sense of powerlessness or a lack of understanding. Inadvertent breaches of intervention orders by a victim can result in the remand and charge of the respondent. This is another reason why it is extremely important that both respondents and victims are accessing information, legal advice and non-legal supports to the same degree and the same level of accessibility. The Victorian system is geared towards more incidences of breach because of some of the design elements that have been added.

78. In my work with inTouch Multicultural Centre Against Family Violence (**inTouch**) we have also seen the benefit of co-located or multi-disciplinary approaches to service delivery. For example, within the family violence crisis service we have established a legal centre, and we are now also piloting a medical legal partnership. The aim is to provide a holistic approach to the support of victims which minimises them getting lost in a fragmented system of legal and non-legal sectors.

79. VLA has some early data regarding a sample of our clients from non-English speaking backgrounds which shows that some cultural groups have a higher incidence of re-offending. I have also seen this through my work with inTouch. This data supports the need for culturally sensitive, tailored MBCPs or prevention programs. The prevention and community education work of InTouch is specialised and unique in that it works directly with the men within particular ethnic communities and with their faith leaders. More funding for programs of this sort are also essential to ultimately reducing the actual occurrence of family violence in a culturally sensitive way.



Helen Fatouros

Dated: 6 August 2015