IN THE MATTER OF THE ROYAL COMMISSION INTO FAMILY VIOLENCE

STATEMENT OF MARISA DE CICCO

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[redacted]

I, MARISA DE CICCO, Deputy Secretary, Criminal Justice Division, Department of Justice and Regulation, SAY AS FOLLOWS:

1. I am a Deputy Secretary of the Department of Justice and Regulation (**Department**). As Deputy Secretary, I have responsibility for the Criminal Justice Division of the Department. I have held this position since the Division was established in March 2014, following a restructure within the Department.

2. Prior to my current position, I held the position of Executive Director, Strategic Policy and Legislation Division within the Department since 2011. Strategic Policy and Legislation Division was responsible for criminal and civil policy, including courts policy, and was replaced by separate Civil Justice and Criminal Justice Divisions.

3. The Criminal Justice Division provides policy support and advice to, and prepares legislation for, both the Attorney-General and the Minister for Police on criminal justice system and police-related matters. The Division is also responsible for the delivery of services in relation to victims of crime, support for Victoria's honorary justices, the Working with Children Check and community crime prevention programs, along with policy development on family violence and sexual assault matters and diversity issues. It also oversees the delivery of Victoria's infringements and road-safety camera systems, asset confiscation and the Sheriff's Office.

4. I make this statement in my capacity as Deputy Secretary.

SCOPE OF STATEMENT

5. I have received a notice from the Royal Commission into Family Violence pursuant to s 17(1)(d) of the *Inquiries Act 2014* (Vic.) requiring me to attend to give evidence at the Royal Commission and to provide a written witness statement.

6. I make this statement in response to a request by the Royal Commission to give evidence regarding matters the subject of the public hearing for Module 14 (Criminal Justice Response). I understand that the Royal Commission would like me to give evidence about the use of criminal offences to respond to family violence and the recognition of family violence in the sentencing of offenders as well as some of the options for possible changes in both these areas of law.

7. At the outset, I make the observation that the criminal justice system can fulfil an important role in responding to family violence. The criminal law can make a strong statement about the types of behaviour that the community condemns and finds unacceptable. Perpetrators can be publicly held to account for their behaviour and the harm done to victims can be recognised. Criminal law responses are, however, only one part of what needs to be an integrated and holistic response to address the problem of family violence. Any changes to the criminal law must be considered in the broader context; they cannot provide a total solution to the problem.

FAMILY VIOLENCE PROTECTION ACT 2008

8. Before discussing criminal offences and sentencing laws, I would like to take the opportunity to provide some relevant contextual information about family violence legislation generally and then more specifically about the *Family Violence Protection Act 2008* (Vic.) (**Family Violence Protection Act**).

9. As observed by the Australian and NSW Law Reform Commissions (**Law Reform Commissions**) in *Family Violence – A National Legal Response* (2010), family violence legislation was enacted in most Australian states and territories in the 1980s and 1990s in response to growing acknowledgement that existing legal mechanisms failed to protect victims – predominantly women – from family violence. Critics highlighted, for example, the inability

of the criminal justice system to protect women from future violence, as well as systemic institutional failure to tackle family violence.

10. Generally, the criminal law prescribes certain conduct to be an offence and the response to that conduct occurs after the event. Given the consequences that flow from being convicted of a criminal offence, the prohibited conduct must be prescribed clearly and precisely. The standard of proof that applies in a criminal proceeding is high – beyond reasonable doubt. Criminal trials are generally public and the sentencing of offenders achieves a range of purposes, and in particular punishment, deterrence, denunciation, rehabilitation, and community protection.

11. In contrast, family violence legislation is generally focussed on the prevention of harm and protection of victims. The standard of proof for obtaining an intervention order (that is, the balance of probabilities) is lower than that which applies in a criminal proceeding. The behaviours prescribed to be family violence are often broader than those that are prescribed as offences in the criminal law, aiming to reflect the nature and dynamics of family violence. Proceedings for an intervention order are generally not publicly reported in an attempt not to discourage victims from coming forward to seek legal protection. If an intervention order is contravened, then the criminal law has a role to play.

12. The Family Violence Protection Act, which replaced the *Crimes (Family Violence) Act 1987*, commenced on 8 December 2008. Unlike its predecessor, the Family Violence Protection Act deals exclusively with family violence. Section 1 of the Family Violence Protection Act provides that the purpose of the Act is to:

    12.1 maximise safety for children and adults who have experienced family violence; and

    12.2 prevent and reduce family violence to the greatest extent possible; and

    12.3 promote the accountability of perpetrators of family violence for their actions.

13. As set out in section 2, the Act aims to achieve this purpose by providing an effective and accessible civil system of court made family violence intervention orders and police issued family violence safety notices, and creating criminal offences for contraventions of those orders and notices.

14. Family violence is given a broad meaning in the Act, covering physical and non-physical behaviours as well as children being exposed to these behaviours. Specifically, section 5 of the Act provides that family violence is behaviour by a person towards a family member that:

    14.1 is physically or sexually abusive; or

    14.2 is emotionally or psychologically abusive; or

    14.3 is economically abusive; or

    14.4 is threatening; or

    14.5 is coercive; or

    14.6 in any other way controls or dominates the family member and causes them to feel fear for their safety or wellbeing or that of another person.

15. As I have noted above, the definition of family violence also includes behaviour by a person that causes a child to hear or witness, or otherwise be exposed to, family violence. The Family Violence Protection Act lists several examples of behaviour that may constitute a child hearing, witnessing or being exposed to the effects of the behaviours in subparagraphs 14.1 to 14.6 above such as, for instance, cleaning up a site after a family member has intentionally damaged another family member's property, or comforting or providing assistance to a family member who has been physically abused by another family member.

16. Economic abuse is defined, in section 6 of the Act, to mean behaviour by a person (the first person) that is coercive, deceptive or unreasonably controls another person (the second person), without the second person's consent:

16.1 in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or

16.2 by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

17. Some of the examples of economic abuse included in the Act are preventing a person from seeking or keeping employment, coercing a person to claim social security payments, or coercing a person to relinquish control over assets and income.

18. Section 7 of the Act defines emotional or psychological abuse to mean behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person. Preventing a person from making or keeping connections with their family, friends or culture, including cultural or spiritual ceremonies or practices, or preventing them from expressing their cultural identity, or repeated derogatory taunts, including racial taunts, are two examples of emotional or psychological abuse included in the Act.

19. The Family Violence Protection Act also contains a broad definition of family member so that it encompasses a diverse range of relationships. Section 8 of the Act provides that a family member in relation to a person (the relevant person) means:

19.1 person who is, or has been, the relevant person's spouse or domestic partner; or

19.2 a person who has, or has had, an intimate personal relationship with the relevant person; or

19.3 a person who is, or has been, a relative of the relevant person; or

19.4 a child who normally or regularly resides with the relevant person or has previously resided with the relevant person on a normal or regular basis; or

19.5 a child of a person who has, or has had, an intimate personal relationship with the relevant person.

20. The Act also defines domestic partner and relative in ss 9 and 10 respectively. Importantly, for an Aboriginal or Torres Strait Islander person, the Act provides that a relative of a person includes a person who, under Aboriginal or Torres Strait Islander tradition or contemporary social practice, is the person's relative.

21. A family member of a relevant person is also defined to include any other person whom the relevant person regards or regarded as being like a family member if it is or was reasonable to regard the other person as being like a family member.

THE USE OF CRIMINAL OFFENCES TO RESPOND TO FAMILY VIOLENCE

22. In Victoria, as well as in other Australian states and territories, family violence is not a specific standalone criminal offence. Offences committed against family members are dealt with under the general criminal law.

23. Much of the behaviour defined in the Family Violence Protection Act as family violence is covered by the general criminal law. This includes, for example, behaviour that is physically or sexually abusive. This type of behaviour would be covered, for example, by offences against the person, including stalking, and sexual offences in the *Crimes Act 1958* (Vic) (**Crimes Act**).

24. Other behaviours that are defined as family violence by the Act are not necessarily crimes in their own right. For example, behaviours that are economically or emotionally or psychologically abusive may not always be covered by the general criminal law. These behaviours can, however, constitute contravention of a family violence safety notice or family violence intervention order where a notice or an order has been made that includes a condition prohibiting the respondent from committing family violence against the protected person. I discuss these offences in more detail below.

25. I understand that the Royal Commission is interested in me giving evidence on possible ideas for changes to the way criminal offences might be used to respond to family violence, including a standalone family violence offence and new offences to cover behaviours not presently covered by the general criminal law.

26. Other Australian and overseas jurisdictions provide examples of possible approaches to the use of criminal offences to respond to family violence, as do recent reviews of family violence laws, such as those conducted by the Special Taskforce on Domestic and Family Violence in Queensland (**Special Taskforce**) and the Law Reform Commissions. These reviews also highlight some of the possible benefits as well as the challenges associated with various approaches to criminal offences.

27. Before I go on to discuss some ideas for possible new family violence offences, I would like to give a brief overview of relevant offences in the Family Violence Protection Act.

Family Violence Protection Act offences: contravention of notices or orders

Conditions included in notices and orders

28. In accordance with s 29(1) of the Family Violence Protection Act, a family violence safety notice may include any of the six conditions specified in s 81(2)(a) to (f) of the Act. These conditions, which are imposed by police issuing the notice, are:

    28.1 prohibiting the respondent from committing family violence against the protected person;

    28.2 excluding the respondent from the protected person's residence;

    28.3 conditions relating to the use of personal property;

    28.4 prohibiting the respondent from approaching, telephoning or otherwise contacting the protected person, unless in the company of a police officer or a specified person;

28.5 prohibiting the respondent from being anywhere within a specified distance of the protected person or a specified place, including the place where the protected person lives;

28.6 prohibiting the respondent from causing another person to engage in conduct prohibited by the notice.

29. Police are not permitted to include the conditions set out in s 81(2)(g) and (h) of the Act of revoking or suspending a respondent's weapons approval or a weapons exemption applying to the respondent, or of cancelling or suspending a respondent's firearm authority. These conditions are only available to the court.

30. In contrast, pursuant to s 81(1) of the Act a family violence intervention order issued by a court may include any conditions that appear to the court necessary or desirable in the circumstances. The court is not limited, therefore, to including only the conditions listed in s 81(2)(a) to (h) of the Act; rather, it has a broad discretion (subject to s 75(2)) to tailor the conditions included in a family violence intervention order to the particular circumstances of the case.

31. The Family Violence Protection Act contains five criminal offences for contravention of a condition included in a family violence safety notice or a family violence intervention order - two summary offences (ss 37 and 123) and three indictable offences (ss 37A, 123A and 125A).

Summary contravention offences

32. Contraventions of a family violence safety notice or of a family violence intervention order are summary offences punishable by a maximum penalty of two years imprisonment and/or a fine of 240 penalty units.

Indictable contravention offences

33. It is an indictable offence to contravene a family violence safety notice or a family violence intervention order intending to cause, or knowing that the conduct will probably cause:

33.1 physical or mental harm to the protected person, including self-harm; or

33.2 apprehension or fear in the protected person for their own safety or that of any other person.

34. These offences are punishable by a maximum penalty of five years imprisonment and/or a fine of 600 penalty units.

35. It is also an indictable offence to persistently contravene a family violence safety notice or a family violence intervention order (s 125A). This offence is also punishable by a maximum penalty of five years imprisonment and/or a fine of 600 penalty units. To prove this offence it is necessary to prove that:

35.1 the accused engaged in conduct that would constitute a summary contravention offence; and

35.2 on at least two other occasions within a period of 28 days immediately preceding this the accused engaged in conduct that would constitute a summary contravention offence; and

35.3 on each of the occasions referred to in paragraphs (a) and (b) the accused knew or ought to have known that the conduct constituted a contravention of the family violence safety notice or family violence intervention order (as the case requires).

36. The indictable offences are relatively new, commencing operation on 17 April 2013. Data from the Crime Statistics Agency indicates that for the 2013-14 financial year there were: 1,165 recorded offences of persistent contravention of a family violence safety notice or family violence intervention order; and 3,616 recorded offences of contravention of a family violence safety notice or family violence intervention order intending to cause fear or harm.

37. In his second reading speech, the then Attorney-General, the Honourable Robert Clark MP, stated that:

> The [persistent contravention] offence will target cases where the respondent has persistently flouted the law and showed complete disregard for the conditions of the FVIO or FVSN. It will allow police to target recidivist family violence offenders and ensure that when the courts sentence those offenders, the court will be aware of the context and persistent nature of their offending.

38. In regard to the other indictable offence, the former Attorney-General stated, in his second reading speech, that this offence was 'aimed at contraventions that were particularly harmful to the victim', noting that the definition of mental harm covers psychological harm and suicidal thoughts and situations of self-harm. This offence may include, for example, the respondent putting a bullet in the protected person's mail box.

Possible ideas for new a family violence offence

Standalone offence of committing family violence

39. In their report, *Family Violence – A National Legal Response*, the Law Reform Commissions canvassed views on creation of a standalone family violence offence, as did the Special Taskforce in its report *Not Now, Not Ever* (2015). In particular, the Law Reform Commissions sought views on an offence capturing courses of conduct committed by an offender who is in a family relationship with the victim, where such behaviour is part of a pattern of power and control over the victim. No particular model was considered by the Special Taskforce.

40. Ultimately, neither the Law Reform Commissions nor the Special Taskforce recommended creating a standalone family violence offence. Both highlighted some of the challenges posed by any attempt to do so, including:

    40.1 The significant difficulties in conceptualising the exact parameters of such an offence, and in particular whether it should be framed to include conduct that is not generally recognised under existing criminal laws – for example, economic and emotional abuse – and particularising the conduct covered by such an offence.

    40.2 The evidentiary challenges where only the victim and the accused were involved in the incident and the victim, for a range of reasons, is reluctant or wholly averse to providing evidence. In the absence of the victim's testimony, prosecutors may be placed in the position of seeking that a witness be declared hostile, which would cause the victim further trauma.

40.3 The risk of victims who have used violence to resist or protect themselves being charged with the offence.

41. The Law Reform Commissions acknowledged that a standalone offence may potentially recognise and facilitate an understanding of the dynamics of family violence in the criminal justice system. However, they considered that there was insufficient evidence to conclude that improvements could not be realised within existing frameworks or that a standalone offence would necessarily achieve the desired outcomes.

42. Leaving aside some of the potential challenges and difficulties with enforcing a standalone family violence offence, I would like to make some comments on how such an offence might be constructed to fit the Victorian context.

Possible model for Victorian standalone family violence offence

43. To equate with the level of the indictable contravention offences in ss 37A, 123A and 125A of the Family Violence Protection Act, a new offence could be based on the intentionally causing injury or recklessly causing injury offences in s 18 of Crimes Act. These offences have a maximum penalty of 10 years imprisonment and 5 years imprisonment respectively.

44. The offence could be that of 'causing injury through family violence'. The definition of injury in s 15 of the Crimes Act is broad, meaning physical injury or harm to mental health, whether temporary or permanent, and would capture injury caused by the behaviours defined to be family violence in the Family Violence Protection Act.

45. While the offence would not criminalise anything new and would overlap with the existing offences in s 18 of the Crimes Act, it might focus police, prosecutors and judicial officers on the injury that can be caused by family violence, and in particular harm to mental health. It might also encourage police, prosecutors and judicial officers to treat conduct causing mental harm in the same way as conduct causing a physical injury is treated. Police would also be able to choose whether to charge the 'causing injury through family violence' offence instead of or with a contravention offence.

46. Two of the questions arising for consideration with this possible approach are whether the offence of 'causing injury through family violence' would

apply to all the family relationships covered by the Family Violence Protection Act, and whether the family violence behaviours covered by it should be the same as those defined to be family violence in the Family Violence Protection Act.

47. Applying the Family Violence Protection Act definition of family violence, a person would commit the offence if:

47.1 they engage in conduct:

(a) towards a family member that is physically, sexually, emotionally, psychologically or economically abusive, threatening, coercive, or in any other way controls or dominates the family member and causes them to feel fear for their safety or wellbeing or that of another person; or

(b) that causes a child to hear or witness, or otherwise be exposed to the effects of the conduct in paragraph (a); and

47.2 they engage in the conduct intending to cause injury to the family member or being reckless as to such injury being caused.

48. If the injury caused to the victim was a serious injury, it would continue to be covered by the serious injury offences in ss 16 and 17 of the Crimes Act, which have maximum penalties of 20 years (serious injury caused intentionally) or 15 years imprisonment (serious injury caused recklessly). A serious injury is defined in s 15 of the Crimes Act to mean an injury (including the cumulative effect of more than one injury) that endangers life or is substantial and protracted, or the destruction of a foetus.

49. While it would be possible to mirror the serious injury offences for family violence related offending, it would not be necessary to create a complete replica of all the causing injury offences. Serious injury offences, including the gross violence offences in ss 15A and 15B of the Crimes Act, cover such serious conduct – regardless of the context – that there is less need to ensure that the family violence context is specifically recognised.

Creating an offence for family violence behaviours not covered by general criminal law

50. Another approach that has been taken in some jurisdictions is, rather than creating a standalone family violence offence, to enact new offences to criminalise family violence behaviours that might not already be covered by the general criminal law. I explore below some of the possible approaches.

Tasmanian model: offences of economic abuse and of emotional abuse

51. Tasmania has enacted specific offences of economic abuse and emotional abuse or intimidation in the context of family violence in ss 8 and 9 of its *Family Violence Act 2004* (Tas.). Both of these offences have a maximum penalty of two years imprisonment or 40 penalty units.

52. Central to both of these offences is a course of conduct by the offender that is intended to unreasonably control or intimidate the victim, or cause the victim mental harm, apprehension or fear.

53. During her second reading speech, the then Minister for Justice and Industrial Relations, the Honourable Judy Jackson MLA, stated that 'creation of offences of economic abuse and emotional abuse are critical if we are to take a more holistic view of the nature of family violence and offer our community the best possible protection against its many forms'.

54. The Special Taskforce considered this option and was of the view that, while it would provide an additional mechanism for holding perpetrators to account, it would face similar difficulties to a standalone family violence offence. Foremost in the consideration of the Special Taskforce was the likelihood of successful prosecution of such offences, based on Tasmania's experience of very few offences being successfully prosecuted, re-traumatisation of victims whose evidence would be essential, and the potential for victims to unintentionally become subject to criminal prosecution.

55. The Law Reform Commissions did not make any recommendations in respect of economic or emotional abuse offences. They were concerned about the feasibility of criminalising economic and emotional abuse, and the absence of evidence to justify the creation of new offences. In particular,

the Law Reform Commissions noted the difficulties in defining the conduct captured by these offences with sufficient particularity. They also noted the potential difficulties in enforcing and proving these offences beyond reasonable doubt, noting that at the time of their report there had been no prosecutions for the Tasmanian offences.

56. Criminalising conduct in Victoria that is economically abusive or emotionally abusive would capture some behaviour that might not already be covered by our existing criminal laws. As I have noted above, however, there may be some overlap with the existing criminal laws. This could be considered and addressed by the way in which any offences were constructed.

57. Consistent with the definition of family violence in Tasmania, those offences of economic and emotional abuse only apply where the offender is or has been married to or is or has been in a significant relationship with the victim. If such offences were considered in Victoria, regard would also need to be had to the broad family relationships covered by the Family Violence Protection Act, to assess the application of such offences to all of these relationships.

United Kingdom model: offence of controlling or coercive behaviour

58. The United Kingdom recently enacted an offence of controlling or coercive behaviour in an intimate or family relationship where the behaviour is repeated or continuous and has a serious effect on the victim and the offender knows or ought to have known that this would be the effect. The new offence is yet to commence.

59. The offence applies if the offender and the victim are in an intimate personal relationship, or if they live together and they are either members of the same family or have previously been in an intimate personal relationship.

60. The offender's behaviour has a 'serious effect' on the victim if it causes the victim to fear, on at least two occasions, that violence will be used against the victim, or it causes the victim serious alarm or distress which has a substantial adverse effect on his or her usual day-to-day activities.

61. The offence does not apply where the behaviour is perpetrated by a parent, or a person who has parental responsibility, against a child under 16. The

reason for this is that the criminal law, in particular the offence of child cruelty, already covers such behaviour.

62. The maximum penalty for the offence is five years imprisonment (tried on indictment) or one year imprisonment (tried summarily).

63. In the Public Bill Committee debate of the Serious Crime Bill 2015, the Solicitor-General, Robert Buckland QC MP, stated that the offence would:

> ...close a gap in the law that should not exist. It would ensure that those abused by the people closest to them are protected by the law. The new offence seeks to address repeated or continuous behaviour in relationships where incidents viewed in isolation might appear unexceptional but have a significant cumulative impact on the victim's everyday life, causing them fear, alarm or distress.

64. As the offence is new and yet to commence, no commentary is available on its effectiveness.

65. An offence based on this model would potentially overlap with the offence of stalking in s 21A of the Crimes Act and possibly the offence of fail to protect a child from harm in s 493 of the *Child, Youth and Families Act 2005* (Vic.).

66. As I have noted, the offence only applies if the victim and the offender are in an intimate personal relationship or if they live together and are either family members or have previously been in an intimate relationship. If such an offence was considered in Victoria, consideration would need to be given to the broad family relationships covered by the Family Violence Protection Act, to assess the application of such an offence to all of these relationships.

Aggravated offences

67. An alternative option that the Royal Commission might wish to consider is the creation of aggravated offences. That is, setting higher maximum penalties for relevant existing crimes committed in a family violence context. This approach was canvassed by the Special Taskforce and the Law Reform Commissions.

68. In Victoria, the Crimes Act contains some aggravated offences. For example, there are some aggravated sexual offences where the victim was

under 18 years of age. For example, s 45 of the Crimes Act, concerning sexual penetration of a child under 16, sets three maximum penalty levels depending on the age of the child. The Crimes Act does not, however, provide for a general circumstance of aggravation that applies to all offences committed in a family violence context.

69. The criminal legislation of South Australia and Western Australia, for example, makes provision for aggravated offences committed in a family violence context.

70. Under the *Criminal Code Act Compilation Act 1913* (WA) a number of offences against the person are treated as aggravated. Section 221 of the Act sets out the relevant circumstances of aggravation, which are if:

70.1 the offender is in a family and domestic relationship with the victim; or

70.2 a child was present when the offence was committed; or

70.3 the offender's conduct in committing the offence constituted a breach of a restraining order; or

70.4 the victim is of or over 60 years of age.

71. The definition of family or domestic relationship is the same as that which is in the *Restraining Orders Act 1997* (WA).

72. In *Enhancing family and domestic violence laws: Final report* (2014), the Law Reform Commission of Western Australia recommended extending the application of the abovementioned circumstance of aggravation to additional offences such as criminal damage, deprivation of liberty, threats to kill and assault causing death.

73. Under s 5AA of the *Criminal Law Consolidation Act 1935* (SA), an aggravated offence is an offence committed in particular circumstances, including where the offender knew that the victim was either:

73.1 a spouse, former spouse, domestic partner or former domestic partner of the offender; or

73.2 a child in the custody of, or who normally or regularly resides with, the offender, a spouse, former spouse, domestic partner or former domestic partner of the offender.

74. The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) covers a broader range of family relationships than s 5AA.

75. The Law Reform Commissions reported that several states in the United States have aggravated forms of assault and battery for offences where the victims and the offender are in a defined family or domestic relationship.

76. The Special Taskforce recommended the introduction of a circumstance of aggravation for all criminal offences related to domestic and family violence, 'so that penalties are commensurate to the crimes'. It did not, however, determine how the circumstance of aggravation should be constructed. The Special Taskforce noted that whether legislation provides that it is 'the existence of a relevant relationship and/or that the offence was part of a pattern of domestic and family violence conduct and/or acknowledges coercive and controlling behaviour or creates fear' are all factors that will require further consideration.

77. The Law Reform Commissions noted that aggravated offences may potentially serve educational or denunciatory functions, and may be a more feasible option than a standalone offence in that they are based on existing criminal offences. However, they considered that there was insufficient evidence on which to make a recommendation for creating such offences.

78. While the Law Reform Commissions did not recommend the development of aggravated offences committed in the family violence context, they were of the view that a family relationship between the victim and the offender should not be the sole basis for aggravating an offence. They acknowledged that additional or alternative factors to the existence of a family relationship may be more difficult to prove, but considered that the concept of family violence itself necessitates some proof of the underlying dynamics of power and control in the relationship. The Law Reform Commissions noted that requiring proof of such matters would be proportionate to the increased gravity of the consequences for persons convicted of aggravated offences.

79. If this approach was to be considered in Victoria, consideration would also need to be given to a range of matters including how to construct the circumstance of aggravation and to which existing offences the circumstance of aggravation would apply. For example, in regard to the latter, would it apply to offences against the person in the Crimes Act?

80. Whether or not such an approach is an appropriate response to family violence depends on the purpose for effectively increasing the maximum penalties for certain offences committed in a family violence context. As noted by the Sentencing Advisory Council in its paper *Does Imprisonment Deter? A Review of the Evidence* (2011), the sentencing purposes of punishment and denunciation are essentially ends in themselves referable to the offender and their criminal behaviour. The other purposes of sentencing – deterrence, rehabilitation and community protection – do not merely respond to the criminal behaviour, but also aim to achieve a reduction in crime.

81. In relation to general deterrence, the Supreme Court of Victoria Court of Appeal recently, in *Boulton v The Queen* [2014] VSCA 342 at [123] and [127], made the following statements:

> As a general rule, the effectiveness of an individual sentence as a deterrent depends on two things:
>
> (a) the degree to which the sentence is, and will be perceived by the relevant section of the community to be, punitive in nature; and
>
> (b) the extent to which the fact of the sentence, and its punitive character, is communicated to those whom it is intended to deter.
>
> Both conditions must be satisfied. Self-evidently, a sentence of which the public are unaware can have no deterrent effect on anyone other than the offender.
>
> ....
>
> ... As this Court said recently in *DPP v Russell*, courts have neither the expertise nor the resources to undertake the kind of systematic public communication on which the theory of general

> deterrence depends. That is properly a function of government, which is responsible for public safety and law enforcement.
>
> [Footnote omitted.]

82. I also note the Sentencing Advisory Council's concluding remarks in *Does Imprisonment Deter? A Review of the Evidence*, and in particular the following:

    82.1 The evidence from empirical studies suggests that the threat of imprisonment generates a small general deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of imprisonment, do not produce a corresponding increase in the general deterrent effect.

    82.2 A consistent finding in deterrence research is that increases in the certainty of apprehension and punishment demonstrate a significant increase in the deterrent effect.

    82.3 The research shows that imprisonment has, at best, no effect on the rate of reoffending and is often criminogenic, resulting in a greater rate of recidivism by imprisoned offenders compared with offenders who received a different sentencing outcome.

Recognition of family violence in sentencing laws

83. I understand that the Royal Commission is interested in me giving evidence on possible ideas for recognising family violence in sentencing laws, including prescribing family violence as an aggravating sentencing factor in the *Sentencing Act 1991* (Vic.) (**Sentencing Act**) and extending the categories of serious offenders in that Act to family violence offenders. Before discussing these possible ideas, I make some relevant contextual remarks about Victoria's sentencing laws and practice.

84. In Victoria, a maximum penalty is generally set for criminal offences and the court determines an appropriate sentence within that range. Recent reforms to sentencing laws have set baseline sentences for certain offences and set minimum mandatory non-parole periods for some offences. None of these reforms apply specifically to family violence offences, but may be relevant to

serious offences committed in a family violence context. In this statement, I focus on general sentencing laws.

85. The sentencing of offenders is governed by the Sentencing Act and the common law principle of proportionality, parsimony, totality and parity, and the prohibitions on double punishment and crushing sentences. The sentencing options available to the court are set out in the Sentencing Act and include imprisonment, community correction orders and fines as well as adjourned undertakings.

86. Section 5(1) of the Sentencing Act sets out the purposes for which sentences may be imposed on offenders: punishment; deterrence; denunciation; rehabilitation; and community protection. The Supreme Court of Victoria Court of Appeal has held that denunciation and general deterrence are important sentencing considerations in circumstances of family violence. See, for example, *Pasinis v The Queen* [2014] VSCA 97 and *Felicite v The Queen* [2011] VSCA 274.

87. In sentencing an offender, the court must have regard to the factors set out in s 5(2) of the Act, being:

87.1 the maximum penalty prescribed for the offence;

87.2 the baseline sentence for the offence;

87.3 current sentencing practices;

87.4 the nature and gravity of the offence;

87.5 the offender's culpability and degree of responsibility for the offence;

87.6 whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated;

87.7 the impact of the offence on any victim of the offence;

87.8 the personal circumstances of any victim of the offence;

87.9 any injury, loss or damage resulting directly from the offence;

87.10 whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

87.11 the offender's previous character; and

87.12 the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

88. In accordance with s 5(3) of the Act, a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

89. Part 2A of the Sentencing Act provides for the sentencing of serious offenders. Pursuant to s 6A of the Act, Part 2A applies to the court in sentencing:

89.1 a serious sexual offender for a sexual offence or a violent offence;

89.2 a serious violent offender for a serious violent offence;

89.3 a serious drug offender for a drug offence;

89.4 a serious arson offender for an arson offence.

90. When determining the length of a term of imprisonment to impose on a serious offender for a relevant offence, s 6D of the Act provides that the Supreme Court or the County Court:

90.1 must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and

90.2 may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.

91. The effect of these provisions is that the court is not constrained by the common law principle of proportionality which effectively prevents a court from imposing a sentence beyond what is proportionate to the crime. The

court is, however, still bound by the maximum penalty that has been set for the offence.

92. In accordance with s 6E of the Act, every term of imprisonment imposed on a serious offender for a relevant offence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender.

93. It is not clear how the sentences imposed on offenders for criminal offences committed in a family violence context compare with those imposed on offenders who commit equivalent offences in a non-family violence context. I note that the Supreme Court of Victoria Court of Appeal has made strong pronouncements on the seriousness of offending that occurs in a family violence context. Further, in its *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention* (2013), the Sentencing Advisory Council reported that the sentencing outcomes for contravention of intervention orders have changed significantly. Specifically, between 2004–05 to 2006–07 and 2009–10 to 2011–12:

93.1 Fines, adjourned undertakings and community orders remained the most common sentences for intervention order contravention, but the distribution of these sentences changed markedly.

93.2 Fines were imposed in 25.8% of cases (a decline of 30.5%), adjourned undertakings were imposed in 23.4% of cases (an increase of 27.1%) and community orders were imposed in 19.2% of cases (an increase of 9.1%).

93.3 The use of fines declined by 34% in cases where the contravention offence was the only offence sentenced, and by 32% in cases where co-occurring offences were sentenced alongside the contravention offence. Accordingly, there was a shift away from fines even when controlling for wider criminality.

93.4 For repeat intervention order contravention, the use of fines almost halved and custodial sentences increased. As a result, imprisonment became, by a small margin, the most common sentence in repeat contravention cases (21.7% of cases).

93.5 The shift away from fines was unique to contravention offences and did not reflect broader sentencing trends in the Magistrates' Court.

94. Based on consultations with stakeholders, the Sentencing Advisory Council concluded that a change in sentencing practices – rather than a change in the nature of the contravention behaviour – was responsible for the most recent sentencing outcomes.

Possible ideas for recognising family violence in sentencing laws

Aggravating sentencing factor

95. An aggravating sentencing factor justifies a higher penalty within the existing sentencing range for the offence. Unlike in some other jurisdictions, for example New South Wales, the Sentencing Act does not contain a list of aggravating and mitigating sentencing factors. These factors are instead derived from the common law.

96. The categories of what is a mitigating factor and what is an aggravating factor are not closed. Aggravating factors can include repeat offending, the degree of planning and organisation behind the offence, offending that involves a breach of trust, the age or vulnerability of the victim and the use of particular weapons. A family relationship between the offender and the victim may, in certain circumstances, be treated as an aggravating factor.

97. Both the Law Reform Commissions and the Special Taskforce canvassed the option of prescribing a family relationship between the offender and the victim as an aggravating sentencing factor. For a range of reasons, neither recommended this approach.

98. The Law Reform Commissions recommended that a family relationship between the offender and the victim should not be prescribed as an aggravating sentencing factor. Instead, they recommended that sentencing laws be amended to provide that an offence committed in the context of a family relationship should not be considered a mitigating sentencing factor.

99. While the Law Reform Commissions acknowledged the potential educative and denunciatory function of an aggravating sentencing factor, they had reservations about introducing a legislative requirement that would remove judicial sentencing discretion. They also thought that it was too blunt an

instrument to recognise the nature and dynamics of family violence. Further, they considered that such an aggravating factor would capture criminal conduct outside the family violence context and elevate the gravity of an offence committed against a family member solely on the basis of the family relationship. Finally, the Law Reform Commissions thought that prescription of a family relationship as an aggravating factor might involve duplication of existing sentencing factors.

100. The Special Taskforce preferred creating aggravated family violence offences to making family violence an aggravating sentencing factor. The rationale given for this preference was that it was in keeping with the Special Taskforce's vision to ensure the seriousness of family violence is acknowledged and that perpetrators of such violence are held to account.

101. A possible alternative the Royal Commission may wish to consider would be to include whether an offence was committed in a family violence context in the list of factors specified in s 5(2) of the Sentencing Act that the court must have regard to when sentencing an offender.

102. This approach was taken in 2009 when s 5(2)(daaa) was inserted in the Sentencing Act. That provision specifies that the court must take into account whether the offence was motivated by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated.

103. The insertion of s 5(2)(daaa) followed a recommendation the Sentencing Advisory Council made in *Sentencing for offences motivated by hatred or prejudice* (2009). The then Attorney-General, the Honourable Rob Hulls MP, had sought the Sentencing Advisory Council's advice on how the Sentencing Act could be amended so that, where an offence is motivated by hate or prejudice against a particular group, this motivation is taken into account as an aggravating circumstance at the time of sentencing.

104. Explicit recognition by way of a legislative requirement that courts take into account whether an offence was committed in a family violence context, would promote the practice of taking this matter into account. It would also

make it clear that such offences are particularly serious and cause great harm to individuals, their families and the broader community.

105. This approach would not fetter judicial sentencing discretion, and would arguably be a better fit with the approach that underpins Victoria's sentencing laws.

Serious family violence offender category

106. The serious offender scheme was included in the Sentencing Act in 1993. It initially covered only serious sexual offenders and serious violent offenders. The then Government stated that introduction of the scheme represented 'a first step towards fulfilling its election commitment to bring sentencing practices and sentencing law into line with community expectations'.

107. In 1997, the categories of serious offenders were extended to include serious drug offenders and serious arson offenders. The operation of the serious offender regime has not been evaluated.

108. The offences included in the serious offender scheme are the most serious indictable offences. Many of the offences against the person that are included in the scheme may be committed in a family violence context, and the serious offender provisions would apply if the offender has the requisite criminal history.

109. If a new category of serious family violence offender was to be considered, it would be necessary to determine what type of family violence offending would be captured and the requisite criminal history of the offender.

110. Arguably, contravention of a family violence safety notice or family violence intervention order is not necessarily of the same degree of seriousness as the other offences included in the scheme, so it would not seem appropriate to use these offences as the basis for a new category of serious family violence offender.

111. A category of serious family violence offender might be more useful if a new serious family violence offence were to be enacted. I note that the possible offences I discussed earlier might not be considered to be of the same degree of seriousness as the offences that are currently included in the serious offender regime.

112. If a new category of serious family violence offender was created, there would likely be some overlap with the serious violent offender and serious sexual offender categories that are recognised in the existing provisions. This might add unnecessary complexity.

Signed by Marisa De Cicco)

at Melbourne)

this 24th day of July 2015)

Before me

[redacted]

[redacted]

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