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VICTORIAN ROYAL COMMISSION INTO FAMILY VIOLENCE

MELBOURNE

FRIDAY, 7 AUGUST 2015

(15th day of hearing)

BEFORE:

THE HONOURABLE M. NEAVE AO - Commissioner

MS P. FAULKNER AO - Deputy Commissioner

MR T. NICHOLSON - Deputy Commissioner

1 COMMISSIONER NEAVE: As I have said on a number of previous  
2 occasions, the Inquiries Act permits the functions of the  
3 Commission to be performed by one or more Commissioners  
4 separately. Today two Commissioners will be present at  
5 this public hearing, as Deputy Commissioner Nicholson  
6 cannot be present. Thank you, Mr Moshinsky.

7 MR MOSHINSKY: Commissioners, the topic for today's hearing is  
8 the intersection with family law and child protection law.  
9 Each day this week we have been examining aspects of the  
10 justice system's response to family violence. On Monday  
11 we dealt with the initial police response. On Tuesday,  
12 Wednesday and Thursday we dealt with aspects of the civil  
13 and criminal response. Today we turn to another aspect of  
14 the legal system response.

15 The interaction between family violence and the  
16 family law system is of immense practical significance.  
17 In many cases where there is family violence there are  
18 also family law disputes over custody and access to  
19 children. The response of the family law system in this  
20 situation was frequently raised in the course of the  
21 community consultations. To what extent does the family  
22 law system take into account the family violence that has  
23 occurred? Is there a consistency of approach to the issue  
24 of family violence across the different parts of the legal  
25 system, taking into account that as a result of our  
26 federal structure different issues will be dealt with by  
27 different courts?

28 A particular issue concerns the interaction  
29 between the state child protection system and the federal  
30 family law system. One of the issues raised in a number  
31 of submissions is that each of those systems places

1 different expectations on the woman as to what it means to  
2 be a good or protective parent. On the one hand, the  
3 child protection system places emphasis on whether the  
4 mother is behaving as a protective parent which may expect  
5 her to prevent all contact with an abusive father. On the  
6 other hand, the family law system was said to expect  
7 mothers to facilitate the father having access to  
8 children, with the mother criticised for opposing this.

9 It is important to note the limitations on the  
10 scope of the Royal Commission's powers both under the  
11 Inquiries Act and the Terms of Reference. As I noted on  
12 Tuesday, section 123 of the Inquiries Act provides that  
13 the Royal Commission cannot inquire into or exercise  
14 powers in relation to, among other things, a Victorian  
15 court. Subsection (3) provides, however, that nothing in  
16 the section prevents a person or body from giving evidence  
17 or information or producing a document voluntarily to the  
18 Royal Commission.

19 In light of these provisions, the Royal  
20 Commission will not be inquiring into any Victorian court,  
21 and this includes both the Magistrates' Court and the  
22 Children's Court. Likewise, although not specifically  
23 mentioned in section 123, the Royal Commission will not be  
24 inquiring into any Federal Court, and this includes both  
25 the Family Court and the Federal Circuit Court. Thus, for  
26 example, the Royal Commission will not be examining the  
27 outcomes of any particular cases or the performance of any  
28 judicial officers or of any of those courts in general.

29 Can I now outline some of the questions that will  
30 be addressed in the evidence today. How do family  
31 violence issues present in the Children's Court and Family

1 Courts? What jurisdiction and powers do those courts have  
2 to respond to family violence issues and what are the  
3 barriers to them doing so? Given that both jurisdictions  
4 operate within the prism of the paramountcy of the best  
5 interests of the child, how are the risks posed by family  
6 violence assessed and managed in the different systems?  
7 To what extent can there be therapeutic responses through  
8 the family law and child protection systems to family  
9 violence or its causes? What opportunity is there to hear  
10 directly from children or have their experiences and views  
11 taken into account? How do the jurisdictions share  
12 information?

13 Can I now outline the witnesses who will be  
14 giving evidence today. We start with a lay witness, to  
15 whom we have given the pseudonym "Anna Jones". She will  
16 give evidence of her experience of the family law and  
17 child protection systems as a victim of family violence.  
18 That evidence will be subject to a Restricted Publication  
19 Order and will not be live streamed on the internet.

20 Following that we will hear evidence from  
21 President Chambers, the President of the Children's Court,  
22 and Magistrate Dotchin, who sits in the Children's Court.  
23 They will provide evidence of the Children's Court  
24 perspective on the way family violence issues emerge in  
25 and are responded to in that court.

26 Then we will hear evidence from Andrew McGregor.  
27 He will give a children's lawyer's perspective on acting  
28 for parents and children in cases in the Children's Court  
29 where family violence is an issue.

30 Then Dr Patricia Brown will give evidence about  
31 the role of the Children's Court Clinic in assessing the

1 risk to children posed by family violence and the way  
2 those risks are balanced against other risks to the  
3 welfare of children.

4 Then Leeanne Miller will give evidence about how  
5 child protection authorities become involved in family law  
6 matters, the threshold for child protection intervention  
7 in the Children's Court and how DHHS works in the family  
8 law and child protection interface.

9 Next, Nicole Rich will give evidence. Her  
10 evidence will deal with VLA funding, guidelines and  
11 services for family law and family violence, including  
12 child support matters.

13 Next, Dr Kelsey Hegarty will give evidence about  
14 the impacts of family law proceedings on victims of family  
15 violence.

16 Then we will have a panel comprising Caroline  
17 Counsel, Lee Formica and Helen Matthews. They will  
18 address how family violence issues emerge and are dealt  
19 with in the family law system, including reflections on  
20 the impact of successive legislative changes, the role of  
21 culture, issues of accessibility for litigants, the role  
22 of lawyers and the potential for further legislative  
23 change.

24 Can I now mention some of the potential  
25 recommendations that have arisen through the submissions  
26 the Commission has received. These recommendations  
27 address the following matters: to clarify the power of the  
28 Children's Court to make family law orders; to expand the  
29 Magistrates' Court powers to make and suspend family law  
30 orders; a single database for family violence, child  
31 protection and family law orders; training for lawyers on

1 family violence; increased access to Legal Aid for victims  
2 of family violence; recommendations to the federal  
3 Attorney-General regarding training for family law  
4 consultants and the expansion of the present Family Law  
5 Council terms of reference on the intersection of family  
6 law and child protection to include family violence; to  
7 redirect the focus of Child FIRST and DHHS involvement  
8 towards perpetrators rather than imposing responsibility  
9 on victim parents; and embedding of family violence  
10 workers in courts and child protection agencies.

11 Commissioners, that concludes my opening remarks.  
12 As the next witness's evidence won't be on the internet,  
13 could we now have a short break for a couple of minutes.

14 (Short adjournment.)

15 (CONFIDENTIAL SECTION FOLLOWS)

1 <PRESIDENT CHAMBERS:

2 <MAGISTRATE DOTCHIN:

3 MS ELLYARD: Thank you, members of the Commission. We have  
4 present in the witness box President Chambers and  
5 Magistrate Dotchin from the Children's Court, and we thank  
6 them for their presence. President Chambers, may I ask  
7 you first to identify the role that you hold and your  
8 background both in the law and as a judicial officer?

9 PRESIDENT CHAMBERS: Thank you. It is a pleasure to be here  
10 today and to have an opportunity to speak to the  
11 Commission. So I thank you for that opportunity. I was  
12 appointed President of the Children's Court in June of  
13 this year, so I am new to the role. Prior to my  
14 appointment I was a magistrate for the past approximately  
15 nine years and had worked in a range of jurisdictions,  
16 civil, criminal, in all areas of the court. My last two  
17 years were as supervising magistrate of the sex offence  
18 list. Prior to that I had been supervising magistrate of  
19 the Victims of Crime Assistance Tribunal. My background  
20 prior to that is working in the area of industrial law in  
21 a range of areas, in private practice and also within  
22 government. So that's my background.

23 MS ELLYARD: Magistrate Dotchin, could I invite you to  
24 summarise your history both as a judicial officer and in  
25 the law more generally?

26 MAGISTRATE DOTCHIN: Thank you. I have been a magistrate for  
27 five years, appointed in June 2010. I have worked for the  
28 last five years exclusively in the Children's Court at  
29 Melbourne, and for this year I have been the regional  
30 coordinating magistrate at the Moorabbin Children's Court.  
31 Prior to that I was in my own practice for about 13 years.

1 Prior to that, about 11 years working at the Legal Aid  
2 Commission, as it was then called, and my practice  
3 involved me appearing in courts, mainly Magistrates',  
4 County and a lot of work in the Children's Court.

5 MS ELLYARD: May I ask you, President Chambers, to summarise  
6 the work and the jurisdiction of the Children's Court?

7 PRESIDENT CHAMBERS: So the Children's Court is created and  
8 under the legislation is referred to as a specialist  
9 court. It is divided under the Children, Youth and  
10 Families Act into four divisions. Overwhelmingly, the  
11 majority of the work of the court occurs in what's called  
12 the family division, which deals with protection  
13 applications in relation to children and young people from  
14 birth until the age of 17 years of age who are at risk.  
15 The family division sits at the Melbourne Children's Court  
16 at Moorabbin and, upon its opening, at Broadmeadows  
17 Children's Court, which is due to open as a purpose-built  
18 facility for the Children's Court towards the end of this  
19 year.

20 There are 13 magistrates currently that work in  
21 the Children's Court exclusively in that jurisdiction in  
22 addition to myself. The family division also operates in  
23 regional Victoria, but that occurs through magistrates of  
24 the Magistrates' Court of Victoria in the regional courts  
25 around Victoria.

26 The second division of the court is the criminal  
27 division of the court, which deals with children and young  
28 people charged with committing an offence. I will return  
29 to that important jurisdiction in a moment. For the past  
30 10 years - we are coming up to the 10-year anniversary of  
31 the Children's Koori Court, which operates in the criminal



1 division, and that was an initiative to deal with the  
2 overrepresentation of young Koori youths in the juvenile  
3 justice system. The Koori Court operates in eight  
4 locations across the state, and in some areas it's  
5 referred to as a Koori youth court. Then there's the  
6 Neighbourhood Justice Division that also deals in the  
7 criminal jurisdiction.

8 I'll move on now to the intervention order  
9 jurisdiction.

10 MS ELLYARD: Yes, please. The court has, as I understand it,  
11 both an exclusive and an overlapping jurisdiction in  
12 relation to intervention order matters?

13 PRESIDENT CHAMBERS: Yes, and this is a matter I will return to  
14 in more detail later in my discussion. So the Children's  
15 Court does have a concurrent jurisdiction under the family  
16 violence legislation to deal with all matters where there  
17 is a child involved. Primarily the Children's Court deals  
18 with applications where the child or a young person is the  
19 respondent to such an application, and that we have - and  
20 I will address this later, but there's been a concerning  
21 increase in those types of applications where  
22 overwhelmingly parents or step-parents are those protected  
23 by the application.

24 MS ELLYARD: Leaving aside the criminal jurisdiction where  
25 I would understand that proceedings are initiated as they  
26 would in any other criminal jurisdiction by the laying of  
27 charges, how is the family division jurisdiction of the  
28 court invoked? How does a case come to you and then how  
29 does it progress through your system?

30 PRESIDENT CHAMBERS: The court - in the child protection area  
31 there are two primary ways in which an application comes

1 before the court, really depending on the circumstances of  
2 the matter. The first is by notice, where the matter will  
3 be listed initially in the mention list of the court.  
4 They are less common. Then there's by way of apprehension  
5 and placement in an emergency care where a child is placed  
6 in emergency care by the protective intervener, either  
7 with or without a warrant. Those applications must be  
8 dealt with by the court within one working day, and on  
9 apprehension, then the court makes a determination as to  
10 whether or not the child is to remain with parents or to  
11 be placed in out-of-home care, whether that means with  
12 other kin or other family or in some form of residential  
13 facility.

14 MS ELLYARD: You mentioned the protective intervener. As  
15 I understand it, the authority with the power to apprehend  
16 a child and commence a proceeding of this kind is the  
17 Department of Health and Human Services?

18 PRESIDENT CHAMBERS: Health and Human Services and the  
19 delegate, yes.

20 MS ELLYARD: That jurisdiction having been invoked and the  
21 child having been brought before the court, what are the  
22 kinds of orders that the Children's Court is empowered to  
23 make and what's the decision-making framework or  
24 principles pursuant to which those decisions are being  
25 made?

26 PRESIDENT CHAMBERS: So the overriding consideration for the  
27 court in all its determination under the Act is what is in  
28 the best interests of the child, and that's the paramount  
29 consideration and that's the framework within which all  
30 decisions are made by the court. I have provided to the  
31 Commission a document that sets out decision-making

1 principles to which the court must have regard. They are  
2 set out in section 10 of the Act.

3 Ultimately when determining whether a decision is  
4 in the best interests of a child the need to protect the  
5 child from harm and to protect his or her rights and to  
6 promote his or her development must be considered. Then  
7 there are beyond that an additional layer of  
8 considerations, which it must be acknowledged are at times  
9 competing considerations. So, for example, a need to give  
10 the widest possible protection and assistance to a parent  
11 and a child as a fundamental group unit within society is  
12 one of the best interest considerations, having regard, as  
13 I said, to that paramount consideration of the best  
14 interests of the child. Again, the need to strengthen,  
15 preserve and promote positive relationships between the  
16 child and their parent, family members and other people  
17 significant to the child.

18 Notably in this context the effects of cumulative  
19 patterns of harm on a child's safety and development, and  
20 I'm aware that the Commission has heard extensively in  
21 relation to cumulative harm in the context of family  
22 violence; again, the desirability and continuity of  
23 stability in a child's care; if desirable, the need to  
24 plan for reunification of a child with their parent;  
25 desirability of a child to be supported to gain, and this  
26 is an important area, appropriate educational services,  
27 health services, accommodation; to participate in  
28 appropriate social opportunities for the child; the  
29 desirability of siblings being placed together.

30 I haven't referred to all but, again, most  
31 significantly in the context of our Koori - Aboriginal and

1       Koori community, having regard to where a child has a  
2       particular cultural identity and where they are placed in  
3       out-of-home care, the desirability of a child retaining a  
4       connection to their culture and to community.

5               So, as you can see, as I read through some but  
6       not all of those considerations that the court must take  
7       into account, there are competing considerations which  
8       must inform our decision making against the paramount  
9       interests of the - the best interests of the child.

10   MS ELLYARD:   Are you able to estimate to what extent, thinking  
11       particularly about the family division child protection  
12       jurisdiction of the court, to what extent family violence  
13       presents as one of, if not the only, considerations that  
14       have brought a child or a family to the court?

15   PRESIDENT CHAMBERS:   Under the Children, Youth and Families Act  
16       there is no specific head, if you like, that deals with  
17       family violence per se.   Under the Act what the court has  
18       regard to - the applications that are brought before the  
19       court involve applications where there is either a concern  
20       about physical abuse of a child or psychological,  
21       emotional abuse or that a child is at risk of those  
22       things.   So they are the grounds generally identified by  
23       the protective intervener, the Department of Health and  
24       Human Services, as the basis to an application being  
25       brought before the court.

26               In answer to your question, my understanding is  
27       that an overwhelming number of those matters involve  
28       either singularly, but more frequently in combination with  
29       other factors such as mental health, drug and alcohol, the  
30       presence of family violence either where children are  
31       witnessing it, and that's more frequently a concern, or

1           having a more direct experience of family violence.

2   MS ELLYARD:   You mention that often family violence presents as  
3           one of a number of overlapping factors that have brought  
4           the child to the attention of the protective intervener  
5           and then to the court.   Is it possible to say anything  
6           general about the cohort of families who find themselves  
7           in your jurisdiction and the particular issues that, as a  
8           way of generalisation, tend to affect those families?

9   PRESIDENT CHAMBERS:   What becomes apparent is that there is  
10           often intergenerational disadvantage that appears in our  
11           court, that you will not infrequently have families that  
12           have an intergenerational experience of the child  
13           protection system.   Put that in the Koori context, that's  
14           also common.   I'm familiar with the evidence you received  
15           from Andrew Jackomos in relation to the prevalence of  
16           family violence in the review, the Taskforce 1000 review,  
17           that he's undertaken.

18                   If you can generalise around demographics in our  
19           court, there is entrenched disadvantage, poverty, a  
20           prevalence of drug and alcohol problems, and intergeneral  
21           disadvantage.   Coupled with that are the lack -  
22           educational - lost opportunities for educational and other  
23           opportunities for the young people that are before our  
24           court.

25   MS ELLYARD:   You mentioned that there's no specific head of  
26           intervention on family violence and that, rather, an  
27           application will come before the court nominating one of  
28           the grounds under the Children, Youth and Families Act  
29           such as risk of physical harm or risk of emotional or  
30           psychological harm.   Given that that's the way the matter  
31           reaches you, taking the example of an apprehension where

1 the matter comes to the court quite fast, what are the  
2 processes by which the court's able to inform itself about  
3 the context of the application and, for example, to make  
4 an assessment of family violence and the risks that family  
5 violence might be posing to that child?

6 PRESIDENT CHAMBERS: Yes. Ours is not strictly an  
7 inquisitorial process. It is an adversarial system to the  
8 extent that we are reliant on the information that is  
9 brought before the court to a large extent. Although the  
10 criteria is very different, it's not dissimilar in a sense  
11 to the information that you have in a bail application in  
12 that you are reliant upon the police to bring forward the  
13 information.

14 I thought this was perhaps best explained to the  
15 Commission if Magistrate Dotchin gave an example of a day  
16 at Moorabbin and how - what comes into his court and the  
17 information he's likely to receive in the court.

18 MS ELLYARD: Please.

19 MAGISTRATE DOTCHIN: A typical day at Moorabbin will involve a  
20 number of style of cases, and the more difficult cases  
21 would probably be the ones that are coming through the  
22 door, the ones that you don't know when you walk into  
23 court at 10 o'clock in the morning. They will be the  
24 protection applications or the breaches by emergency care,  
25 and the magistrate knows little about those cases.

26 If I open my file I will have a form. It's  
27 called a Form B. It's a summary that the Department of  
28 Human Services have typed out for me, and that gives me an  
29 overview, from their point of view, from its point of  
30 view, as to what the case is all about. Apart from that  
31 there is another formal document which, if it is a

1 protection application, will have the boxes ticked which  
2 grounds of the protection application the child has been  
3 lodged on or children have been lodged on. So that's the  
4 only written material that I will generally have at the  
5 start of the day.

6 During the course of the day I will be advised  
7 further by the department's lawyer and the lawyers for the  
8 other parties, they may be the parents or the children, as  
9 to what they say the case is about. So in terms of  
10 written documentation, very little, and it's a difficult  
11 situation because you are deciding cases about where  
12 children should be placed by way of submissions from the  
13 Bar table. Those submissions cannot be tested, of course,  
14 because the very nature of the submissions argument is  
15 that there is no evidence. It's just submissions from the  
16 Bar table.

17 MS ELLYARD: So, Mr Dotchin, if I can follow that up. You are  
18 talking about a situation where there is an immediate  
19 dispute about where a child should live in the short term?

20 MAGISTRATE DOTCHIN: Correct.

21 MS ELLYARD: Whether with their family or elsewhere, and in the  
22 context of family violence and weighing the risks posed to  
23 that child to what extent at that early stage do you have  
24 any ability to test who's more likely to be correct or  
25 what the level of risk to the child is?

26 MAGISTRATE DOTCHIN: As I say, the only documents that I have  
27 are the two that I have mentioned, and then it's just the  
28 material that's given to me through the submissions from  
29 the solicitors or the lawyers at the Bar table, so there's  
30 nothing further, and the urgent decision has to be made as  
31 to where the child or the children have to be placed that

1 evening. I suppose having worked in the jurisdiction for  
2 a considerable period of time I bring that experience to  
3 bear in terms of determining what should occur in their  
4 case. I look at the section 10 principles in the Act of  
5 course, and a child should only be removed from a parent  
6 or parents if there is an unacceptable risk of harm.

7 MS ELLYARD: So when we think about that unacceptable risk of  
8 harm level, I wonder could you reflect for the Commission  
9 on how in practical terms the risks posed by family  
10 violence are weighed in the scales in general terms  
11 against the kinds of other risks that might exist?

12 MAGISTRATE DOTCHIN: They are very significant risks, and they  
13 are often downplayed in the submission arguments in court  
14 obviously by the solicitors who are representing the  
15 parents on the particular day. They are often difficult  
16 to get to the bottom of. There's a dispute about the  
17 extent of the family violence. The department will often  
18 have information from what's called a notifier. That  
19 notifier's details are of course secret. That notifier  
20 may have given some details to the department about what  
21 they say is the family violence, if we are just talking  
22 about family violence, isolating that issue, and then the  
23 parents will be advising through their lawyers what they  
24 say the situation is in relation to the domestic violence,  
25 family violence.

26 MS ELLYARD: Can I take up something you mentioned earlier,  
27 President Chambers, about the work of Andrew Jackomos and  
28 the evidence that the Commission has heard from him. One  
29 of the things that he told the Commission was that there's  
30 a very substantial overrepresentation of Aboriginal  
31 children amongst the cohort of children who are removed.



1 I think he said that it's five out of every thousand  
2 children in the general population, but it is 63 out of a  
3 thousand amongst Aboriginal children who are removed from  
4 their families by a protective services. Could you  
5 reflect from the court's perspective on that statistic and  
6 the way that presents for the court?

7 PRESIDENT CHAMBERS: Yes. It is a matter of concern to the  
8 entire community the overrepresentation of children, both  
9 in our family division but, as must be observed, in the  
10 criminal division as well. That's seen, unfortunately, a  
11 large spike in the number of children remanded, and that  
12 includes our Koori community. I was at Parkville Youth  
13 Centre last week. There were 67 children held on remand,  
14 26 undertaking sentence. So they are very concerning  
15 figures in the criminal jurisdiction. So there are what  
16 you could call cross-over kids or young people who are  
17 both involved in child protection and involved in the  
18 criminal jurisdiction.

19 So in the context of the overrepresentation of  
20 our Koori children and young people that is an enormously  
21 concerning matter. My understanding is that Victorian  
22 Aboriginal children are 12.3 times more likely to be on a  
23 care and protection order in comparison to the rest of the  
24 community, 11.8 times more likely to be in out-of-home  
25 care. Out-of-home care may well mean with kin, in kinship  
26 arrangements, but may well mean in residential care  
27 facilities, with a need for, in my view, a greater number  
28 of those to be Aboriginal controlled organisations  
29 facilitating that if we are unable to find appropriate  
30 kinship arrangements.

31 MS ELLYARD: May I turn then to a different topic, and you have

1 already adverted, President Chambers, to thinking about  
2 the intervention order jurisdiction of the court, some  
3 increases that you have observed. In the joint submission  
4 that was submitted to the Commission by the Magistrates'  
5 Court and Children's Court of Victoria there's some  
6 statistics at section 5.2, which is on page 25, about the  
7 way in which applications in the intervention order  
8 jurisdiction of your court have increased over time and  
9 the way in which proportions have changed. Could you  
10 reflect on those matters, please?

11 PRESIDENT CHAMBERS: Yes. I think the concerning trend that's  
12 been identified here is young people as respondents to  
13 applications for intervention orders here. It's a very  
14 different - the issues that have brought those matters to  
15 court will often involve very different issues than other  
16 family violence, if I can say so. I think this is quite a  
17 discrete area for the Commission's inquiry.

18 In our DOCS submission it indicated that  
19 respondents were mostly male and between the ages of 10 to  
20 17 years, but this concerning age group between 15 and  
21 17 years has almost doubled since 2003/04 to 59 per cent  
22 in 2013/14. What obviously concerns me about that is when  
23 a matter has reached the Children's Court where a parent  
24 has made an application obviously there's a lot that's  
25 gone on that has led to a decision by a parent to get to  
26 the point where they are seeking intervention by the  
27 court. What I'm anxious to see is improved services for  
28 these young people. Our submission made reference to a  
29 program run by the Greater Outer Dandenong Council called  
30 the GRIPP program.

31 MS ELLYARD: Yes, and that's referred to I think in your

1 submission a little bit further along.

2 PRESIDENT CHAMBERS: Yes. That was a referral point for these  
3 young cohort of young men and involved individualised  
4 sessions involving cognitive behaviour, aggression  
5 replacement therapy but also a crisis response, working  
6 with the family, which seemed to be critical.

7 I said I would come back to our criminal division  
8 because the court has now put in place, albeit as a pilot,  
9 a criminal diversion program for young people in  
10 conjunction with Jesuit Social Services that's operating  
11 at a number of sites - Dandenong, Sunshine, Werribee,  
12 Broadmeadows, Ballarat, Stawell and Ararat - working with  
13 Victoria Police to divert young people and to provide  
14 appropriate supports and services to young people at the  
15 very entrance to the criminal justice system, so hopefully  
16 divert them.

17 I would like to see services available for this  
18 group of young people to again divert them because at the  
19 worst end we end up with children in custody, on remand,  
20 because the parents cannot have that child in the home and  
21 we can't bail them back to the home because the parents  
22 aren't prepared to have them returned to the home unless  
23 services have been brought into place that assure the  
24 family that the siblings, that the daughters are going to  
25 be safe in the home.

26 These are complex issues because there are mental  
27 health issues prevailing here, there are behavioural  
28 issues prevailing, and then there's the added complication  
29 and increasing prevalence of ice being involved. So these  
30 young men need to have an appropriate program of services  
31 available either to divert them from this behaviour or to

1 respond before it gets to the point where we are remanding  
2 these young people in custody.

3 COMMISSIONER NEAVE: Ms Ellyard, I did have a question. Is it  
4 your impression that this cohort is different from the  
5 cohort that you deal with in the child protection  
6 applications; that is, children who are subjected to child  
7 protection? Are they coming from a wider range of  
8 families?

9 PRESIDENT CHAMBERS: Absolutely right. Absolutely right, yes.  
10 So you have parents who would otherwise be - have access  
11 to resources or would be resourceful or have community  
12 supports. These children may well be in education. But  
13 it's behaviours within the home that are concerning, but  
14 it's a broader demographic, if I can put it that way, than  
15 you may generally see in child protection. Not  
16 exclusively, but, yes, I think that's right.

17 MAGISTRATE DOTCHIN: I agree with that. I think that's  
18 correct.

19 MS ELLYARD: President Chambers, you talked about the existence  
20 of diversion programs as pilots in the criminal  
21 jurisdiction. But am I correct in understanding that what  
22 the court presently doesn't have the capacity to do when  
23 responding to a young person who at this stage is still  
24 only a respondent to an intervention order, there's an  
25 absence of services or programs to which the court can  
26 make referrals at that earlier stage; is that the  
27 position?

28 PRESIDENT CHAMBERS: Earlier stage. So what I want to be able  
29 to see is greater opportunities for diversion and services  
30 for young people at the very entrance into our criminal  
31 justice system, but also services available for families

1 before they come to the point of coming to the court to  
2 get an intervention order, and at court. If that is the  
3 very first time we are capturing these young people, and  
4 often court events are a mechanism to capturing - we have  
5 got to a pointy end in a family's life. What the  
6 Children's Court never received was funding for applicant  
7 and support workers, and I'm keen to have certainly a  
8 youth focused response available at the court so that we  
9 can make appropriate referrals to services, but there need  
10 to be the services for these young people. I think the  
11 GRIPP program, as I mentioned in the submission, was  
12 defunded. So as far as I know there isn't that specific  
13 service available for these young people.

14 MS ELLYARD: You mentioned the increased prevalence of ice as a  
15 factor. To what extent are there youth-specific drug and  
16 alcohol facilities or courses to which the court is able  
17 to make referrals?

18 PRESIDENT CHAMBERS: Our court is fortunate in that there is  
19 enormous goodwill to do work out in the community for  
20 young people. There is. It is not a direct answer to  
21 your question yet, but I will get there. For example, in  
22 the family drug treatment court, it will be operating out  
23 of Broadmeadows, this is in our family division an  
24 intensive, non-adversarial program that is overseen by a  
25 magistrate, Children's Court magistrate, together with the  
26 department and others to provide families, parents - this  
27 is parents with access to drug and alcohol treatment,  
28 where they in particular have young children under three  
29 years of age and the court has worked very positively with  
30 places such as Odyssey House that have devoted some beds  
31 there and facilities and other drug and alcohol programs

1 to provide facilities for the family drug treatment court.

2 But, in answer to your other question about what  
3 is available, there is a limit, obviously, on mental  
4 health beds for young people, and that's particularly  
5 concerning because at times we have seriously unwell young  
6 people remanded in custody because a bed can't be found  
7 for them. There is a concerning lack of appropriately  
8 built residential facilities. There are services,  
9 certainly there are, but accessing those in a timely way  
10 remains an enormous problem for young people.

11 MAGISTRATE DOTCHIN: Could I add something there, Ms Ellyard?

12 MS ELLYARD: Of course.

13 MAGISTRATE DOTCHIN: If I could just take a typical scenario  
14 with an intervention order list at the Melbourne  
15 Children's Court. It's not uncommon to have a single  
16 parent, usually the mother, with a couple of children that  
17 she's looking after, and it might be that the eldest  
18 child, usually a male, is causing some difficulties in  
19 that home. That young male might be assaulting his  
20 mother, refusing to go to school, damaging property in the  
21 home. He is really becoming unmanageable. There's been a  
22 lot that's occurred before they finally get to court.  
23 This is not a child that's come under the - any  
24 notification of the Department of Human Services, Health  
25 and Human Services. At the last resort someone has  
26 advised her that she should take an intervention order out  
27 against her son. She is very upset about that. She  
28 doesn't want to do that. But she comes to court and she  
29 says, "I can't have him home. I can't have him home  
30 because he's assaulting me, he's damaging the house and  
31 now he's assaulting his younger sister, and I have to

1 protect her as well as me and the house. I can't have him  
2 home." She's in tears. She doesn't know what to do.

3 If I could just add to what Judge Chambers says,  
4 I have no service available at that stage to refer that  
5 boy to. The best I can come up with is to either (a) make  
6 a notification to the department that they need to find  
7 him some accommodation. At that late stage the only  
8 accommodation they are likely to find for him will be in a  
9 residential unit. He may be placed with young men who are  
10 in trouble with the law, who have much worse family  
11 backgrounds than this young fellow, and he's then exposed  
12 to a whole set of risk factors that he's not exposed to at  
13 home.

14 If there is no notification to the department at  
15 that stage, in terms of getting some assistance I can  
16 refer the case to the Melbourne Children's Court Clinic,  
17 and with all of the goodwill in the world the clinic may  
18 not be able to report back to the court within a period of  
19 time that's appropriate given the problems that that  
20 family is facing. So if the clinic is busy and it's not  
21 able to provide a report - it may take anywhere between  
22 six, eight or 10 weeks for that report to come back - what  
23 do we do in the meantime with that young man and where  
24 does he go? That is a reasonably common scenario in the  
25 Children's Court of Melbourne.

26 The service, if I could say, needs to  
27 be - certainly from my perspective as a magistrate - at  
28 that level, right there, and available in court, whether  
29 it's an educational service, whether it's some sort of  
30 support service, a housing service - something to keep  
31 this young man out of the mainstream of protective

1 services but just something that we have got to keep him  
2 safe for a period of time, and maybe something can occur  
3 where he can go back home with the appropriate services  
4 put in place at home.

5 Judge Chambers has mentioned the remand scenario.  
6 That certainly is the worst case scenario, but it's below  
7 that that we are struggling.

8 PRESIDENT CHAMBERS: Magistrate Bowles has recently completed a  
9 Churchill Fellowship in relationship to this very issue of  
10 young people accessing drug and alcohol treatment. She  
11 visited Sweden and New Zealand and other places. In  
12 Sweden they have a mandated program for young children.  
13 It places them in home-like environment but they have to  
14 stay there. It's not a punitive environment by any means  
15 but it's staffed by experienced clinicians, psychologists,  
16 drug and alcohol workers, et cetera. That has yielded  
17 very successful results.

18 This all came in response to Magistrate Bowles,  
19 who is an experienced magistrate in the Children's Court  
20 jurisdiction, hearing parents saying, "What do I have to  
21 do to save my child's life?"

22 MS ELLYARD: May I turn to a different range of issues which  
23 I will invite the court to comment on and that I will  
24 group under the heading of "Jurisdictional issues". You  
25 mentioned in your introduction to the court, Judge, that  
26 the Children's Court is a specialist court, but you also  
27 mentioned that in regional Victoria the jurisdiction is  
28 exercised by magistrates of the Magistrates' Court, who  
29 don't sit full time in the Children's Court.

30 PRESIDENT CHAMBERS: Yes.

31 MS ELLYARD: Are there comments you would like to make about



1 the way that works in practice and, if I could say this,  
2 the pros and cons of the specialised approach to the  
3 Children's Court jurisdiction?

4 PRESIDENT CHAMBERS: Certainly one of the attractions of the  
5 regional model is that they will potentially have a  
6 greater familiarity with the family - may well have. They  
7 will also be sitting in the criminal jurisdiction, the  
8 family violence jurisdiction. They will close the court,  
9 open the Children's Court, be able to deal with that  
10 matter, and so that as a model has certain attractions.

11 Every magistrate assigned to work in the  
12 Children's Court is assigned by the President of the  
13 Children's Court, having been satisfied that that is an  
14 appropriate assignment for that magistrate. So there are  
15 certainly attractions to that without undermining the need  
16 for a specialisation for this area for very good reason,  
17 because the issues for children - for example, in the  
18 criminal jurisdiction the sentencing regime is entirely  
19 different. We have proudly in Victoria a dual-track  
20 system that's been enormously successful in focusing on  
21 the rehabilitation of our young people and exercising a  
22 very different sentencing regime to that that's exercised  
23 in the criminal jurisdiction.

24 If you look at our statistics of youth related  
25 violence they are far lower than any other state in  
26 Australia. So it is a system that works well. So that  
27 degree of specialisation is very important, but certainly  
28 in terms of the capacity for those magistrates to get a  
29 better understanding of the families and the complexity,  
30 if you like, of the legal issues that may be arising, they  
31 could be in a better position.

1                   For example, and I think as Magistrate Dotchin  
2                   was saying, if he is sitting at Moorabbin and is trying to  
3                   determine what are the circumstances in relation to the  
4                   intervention order, for example, if I can just give one  
5                   example of how information sharing is problematic in our  
6                   jurisdiction, the Children's Court identifies cases by  
7                   reference to the child's name. So our electronic system  
8                   does it in that way in the family division. It's not easy  
9                   for us, therefore, in all cases or many cases to be able  
10                  to search whether or not a parent, who may have a  
11                  different name, is a respondent to an intervention order  
12                  in the Magistrates' Court.

13                 We won't necessarily have that information  
14                 brought to us. We can ask for it to be brought to us, but  
15                 it won't necessarily. I think in my discussions with  
16                 Mr Dotchin he says that infrequently is that information  
17                 available, let alone finding out is the father facing  
18                 criminal charges, is he on remand, when is his bail  
19                 application, information - critical information like that.  
20                 There's more work to be done, I suspect, in finding that  
21                 out than in those regional areas.

22                 That said, one thing that I'm very pleased about  
23                 is what Magistrate Dotchin is doing and will happen at  
24                 Broadmeadows is a docketing system for our family violence  
25                 matters so that magistrates will - there will be improved  
26                 case management of these matters and a better knowledge of  
27                 the families and hopefully that builds up information.  
28                 But there obviously does need to be a lot done about  
29                 information sharing, the ability of agencies to ensure  
30                 that - and for the court to share its information and for  
31                 information to be brought before the court so that we are

1 all making the best informed decisions in the best  
2 interests of children.

3 MS ELLYARD: One of the issues that the Commission has heard a  
4 fair bit about is the experience of a number of people who  
5 made submissions about their experience of having to go  
6 both to the Children's Court and to the Family Court  
7 system in respect of access and custody arrangements  
8 involving their children and the difficulties they  
9 encountered because certain things could only be done in  
10 one place or another. Are there comments you would make  
11 about the way in which some of those difficulties might be  
12 able to be resolved and the role that your court might  
13 wish to or be able to play?

14 PRESIDENT CHAMBERS: Yes. The jurisdictions - the intersection  
15 between the Magistrates' Court of Victoria, the Children's  
16 Court of Victoria and the Family Court are perplexing even  
17 to those of us in this room experienced with the system.  
18 So imagine trying to navigate that process when you are  
19 talking about the group of families that generally are  
20 coming before our court. In terms of the family law  
21 proceedings and Children's Court of Victoria proceedings,  
22 there is a memorandum of understanding in relation to such  
23 matters, but generally where a family has been in our  
24 court but protective concerns have resolved, the  
25 proceedings may well be adjourned for a reasonably lengthy  
26 period of time because what's being asked of the family is  
27 to now go over to the Family Court to finalise their  
28 matters in that jurisdiction.

29 Then there's the question of what information is  
30 transferred to that jurisdiction, and the worst case  
31 scenario is a family, and more particularly a child's

1 life, has been caught up in litigation in the Children's  
2 Court of Victoria only potentially to have litigation  
3 rerun but in a different context in the Family Court of  
4 Australia.

5 There is a live question as to whether the  
6 Children's Court of Victoria is a court of summary  
7 jurisdiction for the relevant provisions of the Family Law  
8 Act. The Australian Law Reform Commission had made  
9 recommendations that that be rectified, and I would  
10 strongly support a move to rectify and clarify that the  
11 Children's Court of Victoria can operate as a court of  
12 summary jurisdiction in that regard.

13 Following reviews of the Children's Court system,  
14 a lot of investment and a lot of my personal commitment is  
15 to less adversarial processes in the Children's Court of  
16 Victoria and a conciliation conference process ideally  
17 where parties have resolved matters - and that would  
18 include parenting orders - ideally the Children's Court of  
19 Victoria could make those orders without any need for  
20 people to transition across.

21 That could happen now where the Children's Court  
22 sits in conjunction with the Magistrates' Court of  
23 Victoria. But then, and I think Magistrate Dotchin is  
24 best placed to answer, whether or not we would have a  
25 capacity or, with those that appear in our jurisdiction,  
26 the necessary skills and training, because at the moment  
27 we are very much silos between practitioners and  
28 magistrates that work in child protection in the family  
29 division and those that then go across. I think  
30 Mr McGregor's submission to the Commission talks about  
31 practitioners often simply referring families to another

1 lawyer who has expertise in family law, despite having  
2 built relationships with families in the Children's Court  
3 of Victoria.

4 MAGISTRATE DOTCHIN: I just did a straw poll last night.

5 I could only think of two lawyers who regularly appear in  
6 the Children's Court who have got a family law practice.  
7 So they are mutually exclusive jurisdictions for the  
8 practitioners as a rule.

9 If I can just go back a step too just to add  
10 something that came to my mind a moment ago. I talked  
11 about in the morning when I'm at Moorabbin and I open my  
12 file and I have really just two documents in front of me,  
13 the summary and the formal piece of paper about the  
14 grounds of the application. I do not have a copy of an  
15 intervention order that may be in existence that may be  
16 relevant. I don't have a copy of any reports from the  
17 Family Court or any reports at all from any other  
18 jurisdictions. I have none of that material before me.  
19 So the dissemination of this material does not occur at an  
20 early stage in the proceedings in the Children's Court.  
21 You are really bereft of that sort of information.

22 MS ELLYARD: May I turn to a different aspect of jurisdiction  
23 and perhaps information limitations, and that arises  
24 because of the state based nature of child protection laws  
25 in Australia as opposed to the national system for family  
26 law. Are there comments you would make on the issues that  
27 arise for your court where children or families move  
28 between jurisdictions?

29 PRESIDENT CHAMBERS: Look, this is most commonly a problem for  
30 our Koori community who live on the border of  
31 Albury-Wodonga, for example, and so to add to the

1 complexity of their lives is our federation. But perhaps  
2 Mr Dotchin can talk about his recent experience about this  
3 matter, very issue, arising.

4 MAGISTRATE DOTCHIN: If I could just highlight that with some  
5 examples just so that you get an idea of the problems we  
6 run into. There are occasions when I'm asked to make an  
7 order for a young person because that young person is  
8 going to be transferred to another state; New South Wales,  
9 Queensland. I look at the order that I'm being asked to  
10 make and I think in terms of the hierarchy of the orders  
11 that it's probably too high, but I'm told that if I don't  
12 make that order the other state will not pick up the order  
13 because there's no reciprocity with the order that I think  
14 is the most appropriate order. So you run into that  
15 difficulty.

16 I had a case - - -

17 COMMISSIONER NEAVE: Can I just clarify that. I'm sorry, I'm  
18 not sure I quite understood the example. This is a child  
19 in the criminal jurisdiction?

20 MAGISTRATE DOTCHIN: Family jurisdiction.

21 COMMISSIONER NEAVE: Why are they going to be transferred to  
22 another state?

23 MAGISTRATE DOTCHIN: Because they may live with a family member  
24 in Queensland who's been assessed as a suitable carer.

25 COMMISSIONER NEAVE: I see. So you are making an order that  
26 this child should live with their aunt who lives in  
27 Queensland.

28 MAGISTRATE DOTCHIN: Exactly.

29 COMMISSIONER NEAVE: And would you mind just going on with that  
30 example again so I understand it?

31 MAGISTRATE DOTCHIN: For example - I don't know the reciprocity

1 with all of the states; I can't answer that - I might  
2 think that a custody to secretary order, which keeps alive  
3 most of the parents' guardianship rights, is the most  
4 appropriate order to make, but the department are advising  
5 me that the order will only be picked up, if you like, by  
6 the authorities in, say, Queensland if I make a  
7 guardianship order, which extinguishes all of the rights  
8 of the parents. I might think that that's not the  
9 appropriate order to make, but I'm really hamstrung by the  
10 other state picking up that order.

11 PRESIDENT CHAMBERS: What you mean by "picking up the order" is  
12 the department in Queensland being able to work with that  
13 family.

14 MAGISTRATE DOTCHIN: That's right. Another example would be  
15 where parents have travelled to Victoria, there's a child  
16 born in Victoria and the department in Victoria say there  
17 is a significant protective history in, for instance, New  
18 South Wales. The parents' previous two children have been  
19 removed because of protective concerns, and the department  
20 can't provide me in Victoria with any information from the  
21 DOCS file in New South Wales because they have to go  
22 through a protocol to get that information.

23 So if you could imagine in court where there's a  
24 baby being apprehended, if you like, the parents are  
25 saying, "We didn't come to Victoria to avoid the  
26 authorities in New South Wales. We are doing very well  
27 with our new baby. We want the baby returned tonight,  
28 please. We don't want this baby going into care," but the  
29 department is saying, "We have a plethora of information  
30 in New South Wales; we just can't put our hands on it at  
31 the moment", that's not acceptable in court. And of

1 course the obvious Albury-Wodonga situation with people  
2 crossing the border to give birth and where is the  
3 protection application, where is the appropriate court for  
4 the matter to be heard?

5 PRESIDENT CHAMBERS: So I might just clarify. I know some  
6 Commissioners will have a clear understanding of this,  
7 others may not, but what happens with these early  
8 applications in court is they run a submissions hearing.  
9 So it is not an evidence based thing, and so that then  
10 needs to go to an evidence based hearing as soon as  
11 possible. But it is getting the best information you  
12 could possibly have before you at that time, and the  
13 reason I was keen for Magistrate Dotchin to explain that  
14 is because last week in his court he had five submissions  
15 hearings he had to deal with that day, to determine where  
16 the child was going to be placed on an interim basis.

17 COMMISSIONER NEAVE: Entirely on the basis of entirety  
18 inadequate evidence.

19 PRESIDENT CHAMBERS: Information.

20 COMMISSIONER NEAVE: Just information which hasn't been tested  
21 at all.

22 PRESIDENT CHAMBERS: Not in any way, and this is, can I make it  
23 clear, no criticism, because the department itself will  
24 have become involved with that family potentially the  
25 night before and been working with the family the entire  
26 night before, but it is how our systems can be improved to  
27 ensure that decision makers are able to make the best  
28 decision, the most informed decision, because these are  
29 critical decisions.

30 MS ELLYARD: May I just invite you to comment on one more  
31 matter, President Chambers. You have already mentioned



1 the docketing system that's going to be trialled in  
2 Broadmeadows, but my understanding is that in the criminal  
3 jurisdiction the court has an initiative which involves  
4 the Department of Education. I wonder would you speak to  
5 the Commission a bit about what's being done in that area?

6 PRESIDENT CHAMBERS: Yes. So recognising, really, the  
7 importance of education in the lives of so many of the  
8 children and the reverse of that, the absence of education  
9 in the lives of many children, concerningly, appearing in  
10 our court, the court has received funding which has now  
11 been extended, I was pleased to be advised, for a further  
12 two years for what's called the education justice  
13 initiative.

14 It is based in the criminal division of our  
15 jurisdiction. It involves funding for two full-time  
16 Department of Education and Training officers who are  
17 based at the court. One has a particular Koori focus.  
18 That's in the criminal division. They also operate at  
19 Heidelberg and Dandenong Koori Court. There are other  
20 versions of education initiatives in other regions.

21 At Geelong and Barwon there's access to an  
22 education pathways officer who's based in the department  
23 office at Geelong but attends some Children's Court  
24 sittings to try to facilitate. Again, Ballarat and the  
25 Grampians a similar model. Mildura and Swan Hill, again  
26 an education pathways officer based in Mildura for the  
27 Children's Court Koori Court sittings and Magistrates'  
28 Court youth sitting days, Shepparton and Morwell.

29 The attraction of the education justice  
30 initiative at Melbourne is that when we have young people  
31 first coming into our court, that they are linked then to

1 the education officers based at our court who will ring  
2 the schools, the principals, to find out, "Why isn't this  
3 child at your school? What have you done to follow up?"  
4 It's not a case necessarily that a child has been  
5 expelled; they just haven't been coming. Then we will  
6 follow up, if that school can't take them, where is  
7 another school, where is a flexible education opportunity  
8 for them. Then they will take the child, these officer  
9 officers take the child, meet with the schools, facilitate  
10 the enrolment and then follow up with the schools after  
11 that period to confirm the child is still engaging.

12 The pilot was evaluated by Victoria University  
13 and significantly the finding was 100 per cent of those  
14 children wanted to be in a school setting, but weren't.  
15 So this is a follow-on from the presence of Parkville  
16 College at Parkville and at Malmsbury where education is  
17 being offered in a custodial setting and what I am told is  
18 that the kids and young people in those settings are  
19 having education daily, sport daily, that they are doing  
20 it on a Saturday and the kids are asking for it on  
21 Sundays. So, it's about ensuring the system is meeting  
22 the needs. We are not talking about children who don't  
23 want to be in education. They do. But we need to make it  
24 possible. So that's what that program is all about.

25 MS ELLYARD: Thank you, judge. Are there any further questions  
26 that the Commissioners have for the witnesses?

27 DEPUTY COMMISSIONER FAULKNER: I have one following on from the  
28 evidence that we heard this morning from our lay witness  
29 about the extent to which you see where there are shared  
30 arrangements for custody of children and you have to  
31 determine whether one party who has access is acting

1 protectively and whether a child should be removed even  
2 though there may be a family law order in place. Does  
3 that happen?

4 MAGISTRATE DOTCHIN: It does, yes. There might have been some  
5 circumstances since that family law order was put in place  
6 which has led to someone like myself adjudicating that  
7 there is an unacceptable risk of harm for the child to be  
8 in that shared care arrangement and/or that the parent who  
9 has got the contact, that contact should move to a  
10 supervised situation, or no contact at all. It just  
11 depends on the circumstances. So, I would apply the tests  
12 in our Act, if you like, to determine that, if I have to,  
13 depending on the circumstances before me.

14 DEPUTY COMMISSIONER FAULKNER: Thank you.

15 COMMISSIONER NEAVE: I have a follow-on question from that.  
16 Ultimately the department has to be active in that  
17 context. Is it your observation that these applications  
18 are often made in situations where there's already a  
19 Family Court order in place, but the argument is the  
20 circumstances have changed?

21 MAGISTRATE DOTCHIN: No, I wouldn't say that's a regular  
22 occurrence. It does occur, but it's not the majority of  
23 the cases before the court.

24 COMMISSIONER NEAVE: Thank you.

25 MS ELLYARD: If there are no other questions, I thank the  
26 witnesses very much for their attendance.

27 COMMISSIONER NEAVE: Thank you very much indeed. We really  
28 welcome the assistance that the Children's Court has  
29 provided the Commission. It has been extremely helpful.

30 <(THE WITNESSES WITHDREW)

31 MS ELLYARD: I'm in the Commission's hands whether you want to

1 take another break. We are running a little behind, but  
2 I'm in the Commission's hands whether we take a short  
3 break or press on.

4 COMMISSIONER NEAVE: We will go on.

5 MS ELLYARD: In that case I will ask that the next witness,  
6 Mr McGregor, come to the witness box and be sworn.

7 <ANDREW IAN MCGREGOR, sworn and examined:

8 MS ELLYARD: Mr McGregor, what is your present occupation?

9 MR MCGREGOR: I am a solicitor practising in the Children's  
10 Court, predominantly, family division and criminal  
11 division. I also do some adult crime.

12 MS ELLYARD: Over what period of time have you been practising,  
13 if I may say, as a children's lawyer?

14 MR MCGREGOR: I think it's about 25 years. I was formerly in  
15 charge of Legal Aid's youth legal service.

16 MS ELLYARD: In the work that you do as a children's lawyer,  
17 does that involve acting for both children and parents in,  
18 for example, the family division of the Children's Court?

19 MR MCGREGOR: Yes. So we operate an adjunct duty lawyer  
20 service with Legal Aid's in-house legal service. The  
21 in-house legal service for Legal Aid is directed  
22 principally to appearing on behalf of children and young  
23 people, but if they have a conflict of interest where  
24 Legal Aid has provided a service to an adult in the same  
25 case, then they will look to us to assist. So, I have a  
26 number of clients who are children and young people, in  
27 the criminal division of the court acting for young people  
28 as well.

29 MS ELLYARD: You have made a statement to the Royal Commission  
30 that's dated 6 August 2015. Are the contents of that  
31 statement true and correct?

1 MR MCGREGOR: Yes.

2 MS ELLYARD: One of the things that you identify at paragraph  
3 13 and following is the way in which representation is  
4 funded in the Children's Court. Did you hear the evidence  
5 of the previous witnesses, President Chambers and  
6 Magistrate Dotchin?

7 MR MCGREGOR: The majority.

8 MS ELLYARD: One of the things they noted was the presence of  
9 poverty as a factor in a very high percentage perhaps of  
10 the cases that come before them. Is that consistent with  
11 your observation of the litigants that come before the  
12 Children's Court?

13 MR MCGREGOR: Absolutely. There were discussions about the  
14 jurisdictions of the Family Court and the Children's  
15 Court, and they are quite distinct cohorts. If you were  
16 doing a Venn diagram you would have one large circle,  
17 another large circle and a small intersection, those that  
18 cross between the two. An attribute of our clients are  
19 that they are by and large socially isolated, they are in  
20 situations of intergenerational poverty, mental health  
21 issues, substance abuse issues and the like. To be  
22 eligible for Legal Aid essentially requires that someone  
23 has Health Care Card. The practice that we run is I would  
24 say not less than 95 per cent legally assisted clients.  
25 Children are eligible. It is very rare to have a child  
26 who is in employment.

27 MS ELLYARD: But even amongst the adult cohort of your clients,  
28 it's usually the case that where they are funded to have a  
29 lawyer that funding comes from Legal Aid rather than from  
30 a private source?

31 MR MCGREGOR: Indeed.

1 MS ELLYARD: At paragraph 16 and following of your statement  
2 you talk about the way in which, perhaps differently from  
3 other jurisdictions, children can be represented and have  
4 their voices taken account of in the family division.  
5 Could you explain, please, to the Commission the way in  
6 which lawyers are able to act for children and the  
7 different ways that can play out in the family division?

8 MR MCGREGOR: Sure. So there was a discussion that I heard  
9 earlier with Judge Chambers and Magistrate Dotchin about  
10 an ideal situation in which you had a one-stop shop, a  
11 legal practice which could assist children whether they  
12 are in the Family Court or the Children's Court. One of  
13 our issues in regard to that is that the model of  
14 representation in the Family Court is the independent  
15 children's lawyer. There is an expectation that the  
16 independent children's lawyer will speak with children and  
17 ascertain the outcome that the children seek, but their  
18 role is to act, analogous to Counsel Assisting the Royal  
19 Commission, to furnish the court with evidence and  
20 information to support an outcome, an outcome which on  
21 occasions will be diametrically opposed to that which the  
22 children's instructions represent.

23 In the Children's Court we operate by a different  
24 model legislatively. We have been assisted in the way in  
25 which we undertake that model by advice from Dr Pat Brown  
26 from the clinic and it is that we have an instructions  
27 model base. So, if our clients say to us, "Yes, that's a  
28 situation of abuse. Yes, I made that known. As a result  
29 I've gone into foster care. I've disliked that intensely.  
30 I'm instructing you that you are to tell the court that  
31 I am retracting my accusations about the abuse that

1 occurred." This is a situation in which we will be  
2 involved in the very difficult conversation with the young  
3 person about the nature of our assistance to them, our  
4 advice to them about the unlikelihood of any court taking  
5 the view that an instant retraction would represent true  
6 reflection of the circumstance. But ultimately we are  
7 bound by instructions and we act for children on that  
8 basis and in that role.

9 MS ELLYARD: From your observation, to what extent are the  
10 instructions of children taken account of and weighed in  
11 the scale when magistrates make decisions about family  
12 violence cases involving children?

13 MR MCGREGOR: So we are acting for children from 10 years of  
14 age and up. We have to assess whether they have the  
15 maturity to instruct. That's an assessment which entails  
16 a description of the decision-making process in  
17 age-appropriate language. If we are satisfied that a  
18 child comprehends the nature of the decision making, then  
19 we will act on their instructions, as I say.

20 In terms of issues of family violence, we will be  
21 asking children from 10 and up at times about specific  
22 circumstances that are made known to the court.

23 Magistrate Dotchin talked about the fact that you turn up  
24 to court, you have a summary of events that may have  
25 occurred the night before. In addition to that, you will  
26 be provided with documents that the department has  
27 generated in greater detail when you indicate to the court  
28 that the matter is likely to be contested.

29 If your client instructs that they were not  
30 present when these events occurred, that's what you will  
31 make the court aware of. If the client instructs that

1       they saw what took place, they were not deeply distressed  
2       by it, that's the position that you will put to the court.  
3       You will obviously be reality testing your client's  
4       instructions. You will be saying to them,  
5       "Notwithstanding the fact that you're telling me that what  
6       you want me to tell the court is that you were asleep for  
7       much of what happened, but you woke up when the police  
8       arrived, the court will be gravely concerned about this  
9       circumstance and will want to make decisions that are in  
10      your best interests with regard to placement."

11               If I can just quickly go back to the question  
12      about the issue of the adequacy of a submissions argument.  
13      When I began in the jurisdiction, we didn't work that way.  
14      The protective worker would go in the witness box and be  
15      cross-examined just like a bail application, and the  
16      thinking is: this is a question as crucial as a bail  
17      application. The bail is saying: while untested  
18      allegations are determined, is the defendant at liberty or  
19      in custody? For a child, the question is: while these  
20      matters are assessed and determined, while different  
21      versions are weighed up, is there an option of returning  
22      the child to the same situation? Is there an option of  
23      placing the child with the non-offending parent and  
24      another family member? So these are the kinds of matters  
25      that we will tease out with our clients and make known to  
26      a court.

27               In terms of your question with regard to the  
28      weight that's attached to that information, it will relate  
29      directly to the sophistication of the instructions  
30      received, the detail of the information that's contributed  
31      and at times it will be absolutely crucial. "I saw the



1 whole thing. It's not the way they're saying." Sometimes  
2 a child will be a key element of a scenario being fleshed  
3 out before a court.

4 MS ELLYARD: Does the opposite sometimes occur where the child  
5 says, "I saw the whole thing. It was absolutely terrible.  
6 I don't want to go home if he's still there"?

7 MR MCGREGOR: Absolutely. In terms of the span of horrendous  
8 circumstances that children are exposed to, I have had to  
9 talk with families in situations where the children have  
10 witnessed the perpetrator inflict an injury on a parent  
11 where the child and their siblings are involved in trying  
12 to assist the mother with immediate first-aid which  
13 represents trying to keep the organs of her body within  
14 the wound site. So at times you are speaking with family  
15 members and children in utter extremis. So, yes, we will  
16 be talking with them about the fact that a court will  
17 consider that if they say they don't want to be back in  
18 that circumstance, they won't be put back in that  
19 circumstance.

20 In terms of our role and a young person's  
21 participation in a process, my experience is that young  
22 people find that the process of being listened to, having  
23 their information and position conveyed and being  
24 reassured by a practitioner about the notion that their  
25 input will be a key component of the decision-making  
26 endeavour, my experience of that process with young people  
27 is that they find it tremendously reassuring and they find  
28 it empowering.

29 MS ELLYARD: What about circumstances, and you comment on this  
30 at paragraph 21 of your statement, where the child's  
31 preference is not the decision that the court ultimately

1 makes? So this might not occur in the moment of crisis.  
2 Perhaps long-term the decision is made the order is going  
3 to be made for the next 12 months. It's not the order the  
4 child wanted.

5 MR MCGREGOR: Yes.

6 MS ELLYARD: What do you do then in terms of how you explain to  
7 the child what's going to happen and what the child's  
8 opportunities will be to complain if things don't work out  
9 the way the court hopes they're going to?

10 MR MCGREGOR: There will be occasions where the decision-making  
11 process of the court results in an outcome by which it's  
12 determined that, with appropriate supports and with  
13 scrutiny, it is the preferred outcome for the young person  
14 to be in a family environment and one in which it is  
15 possible that the person about whom the first concerns  
16 were expressed is part of that household.

17 We would be doing something very similar to the  
18 things that a protecting worker will do in their  
19 conversation with a young person, which is to say, "This  
20 is what is being contemplated. If you found the same  
21 problems again, who would you talk to?" And our clients  
22 will say to us, "Well, there's a terrific school  
23 counsellor," or "Last time I told someone about this it  
24 was my friend's mum and I would do the same thing again."  
25 And we will at times be saying that there will be ongoing  
26 involvement from Child Protection and like.

27 I would not be saying that the court process is  
28 infallible in this regard. I have matters in which we  
29 have a situation sustained and as a result of information  
30 provided by a young person it is made known that there has  
31 been a continuation of the inappropriate behaviour and, on

1 revisiting that circumstance in the court, different  
2 outcomes occur.

3 MS ELLYARD: From your observation, if orders are made that  
4 might provide for ongoing child protection monitoring of  
5 children and an opportunity for children to speak with  
6 Child Protection about their concerns, are there  
7 logistical or resource issues that affect the extent to  
8 which that can happen?

9 MR MCGREGOR: The system does have shortcomings. There are  
10 unallocated cases that the department would acknowledge is  
11 a feature of the department's operation. So, to the  
12 extent that that would be regarded as the ongoing  
13 monitoring process, our conversations with clients would  
14 be directed towards the notion that that's not the  
15 essential component; there have to be other ways in which  
16 they may make their concerns known.

17 MS ELLYARD: May I ask you now about the different circumstance  
18 where you are acting for a parent of a child and perhaps  
19 acting for the parent who is the person alleged to be the  
20 perpetrator of family violence. You deal with this at  
21 paragraph 25 and following. You reflect on perhaps a  
22 change that you have observed over time and the different  
23 kind of conversations you now have with those clients.  
24 Could you expand on those matters a little, please?

25 MR MCGREGOR: As I mentioned, when I began this work it was a  
26 dual-track system where the department and the police were  
27 both responsible for intervening in circumstances of  
28 protective concerns. There was a culture at that time,  
29 which I believe would be acknowledged and recognised, in  
30 which a domestic was regarded as something that didn't  
31 warrant intervention. That was a matter that was a family

1       affair. We are now at a point where we respond in an  
2       entirely different manner and so I will have conversations  
3       with parents who say to me, "Why is this occurring? Why  
4       are my children being removed? They slept through the  
5       whole thing." We will have the discussion about  
6       the notion of children being in a home circumstance which  
7       is emotionally charged from the sequelae of those events  
8       - not that that's a word that I'd use with my clients  
9       terribly often - that we know that the impact on children  
10      is such that they do not have to have been eyewitnesses to  
11      events. If they are coming out of their bedrooms in the  
12      morning and they can see that their mother has sustained  
13      an injury, and that's not an uncommon occurrence, they  
14      will have a response to that situation and the court  
15      considers that children have to have assistance and that  
16      that cannot occur on an ongoing basis.

17 MS ELLYARD: At paragraph 28 of your statement you talk about  
18      your experience about the way in which DHHS responds to  
19      parents who actively seek help. I wonder could you expand  
20      from your experience on what your clients sometimes  
21      experience there?

22 MR MCGREGOR: So I would not say that this is a frequent  
23      occurrence, but I would say that there are times where we  
24      have clients who say to us, "We have sought assistance  
25      earlier. We have made our concerns known," and there  
26      wasn't a timely assistance or intervention forthcoming.

27 MS ELLYARD: Does this arise out of this issue about the  
28      availability of a protective parent perhaps sometimes  
29      operating as a barrier to the department having a  
30      statutory ability to intervene?

31 MR MCGREGOR: Yes.

1 MS ELLYARD: So in practical terms, what does that mean for  
2 perhaps the victim parent who is doing their best and  
3 seeking assistance from DHHS?

4 MR MCGREGOR: Calibrating our systems response perfectly is a  
5 significant challenge. There are times where the  
6 department will have a notification, and we know the  
7 proportion of notifications they receive which are  
8 substantiated, those which reach court, it's an  
9 ever-descending tier and hopefully the matters that reach  
10 courts are the ones that are there of necessity.

11 In the earlier interventions there can be  
12 referrals to systems where the protective parent is told,  
13 "Here is the service you can access." The offending  
14 parent is told, "Here is a men's behaviour change program  
15 that you should be going to attend," and things are  
16 treated on the basis that that engagement will take place,  
17 but things deteriorate.

18 If I can expand from that point perhaps to a  
19 broader point, and if I can refer to a paper from an  
20 academic who has previously given evidence, Cathy  
21 Humphreys. In her paper for Australian Domestic and  
22 Family Violence Clearing House, issues paper 13, "Domestic  
23 violence and child protection, challenging directions for  
24 practice", she makes the comment at page 13, second  
25 column, second paragraph, "Without support for the adult  
26 victim of domestic violence, providing a sensitive and  
27 supportive child protection service will always be  
28 problematic."

29 My experience of the ways in which we intervene  
30 is that the line where we draw, where we say to a parent  
31 who is the non-offending parent, "The children are in your

1 care, the father is off doing a course, here is his  
2 contact supervised through the court, that's the regime,  
3 don't break it," and where the access that's meant to  
4 occur for the offending parent doesn't take place and  
5 where the custodial parent is approached by the  
6 perpetrator of domestic violence and that person says,  
7 "I'm not seeing my children. That can't be good for our  
8 children, can I do so." Off the books, off the record,  
9 and that takes place. We are then in the dilemma of do we  
10 say to that parent who is the custodial parent, "Well, you  
11 haven't kept to court orders and that's why your children  
12 are being removed and not returned."

13 That's probably the widest cohort of cases we are  
14 involved in that cause me the greatest degree of  
15 difficulty in terms of the adequacy of our systems  
16 response and the consequences for the shortcomings with  
17 regard to those kinds of services and supports.

18 MS ELLYARD: Can I turn now to what you discuss in your  
19 statement at paragraph 29 and following. We have heard a  
20 little bit from President Chambers and Magistrate Dotchin  
21 about the intervention order jurisdiction that the  
22 Children's Court can exercise. From your observation,  
23 what are some of the issues that arise where Magistrates'  
24 Courts are exercising intervention order powers in  
25 relation to children rather than it being done in the  
26 Children's Court specialist context?

27 MR MCGREGOR: An uncoordinated systems response can be a  
28 catastrophe. Last week I was at court for a mother. Her  
29 children had been taken into care and placed with their  
30 biological father. It was a blended family. She had a  
31 new husband with whom she had an infant child. He was

1       alleged by the teenage children to have been behaving in a  
2       range of ways which were inappropriate towards them. They  
3       also alleged that he had been violent to their mother.  
4       She instructed me that these accusations had been  
5       concocted by their father in order to secure an  
6       advantageous outcome for him in terms of custody, and that  
7       was the consequence.

8               When I asked her where her new husband was she  
9       says, "He's at Broadmeadows court. He was told to go  
10      there." I said, "Why would he be there?" She said, "For  
11      the intervention order." So simultaneous to the  
12      protection application proceedings at the Children's Court  
13      was an intervention order against her new husband. But,  
14      brilliantly, that outcome included her. So she came from  
15      a court system with the children in the care of the  
16      biological father of their older two, the infant placed  
17      elsewhere, no contact other than supervised through the  
18      department with them, utter safety there, and she was  
19      prohibited from having contact with her new husband  
20      because of the accusations made by the children that he  
21      had been violent to all of them.

22             It was an interim order. It went for four days.  
23      But it was a nonsense outcome. For a court to expect that  
24      a parent would take such orders seriously, she's the  
25      intended beneficiary of intervention orders not sought by  
26      her, she is prohibited from having contact with her new  
27      husband, it was just a disgraceful and ridiculous outcome.

28             Where we can head them off and deal with them  
29      urgently we will try to. If there is an after-hours  
30      intervention order being sought - I have been known on  
31      occasions to speak with a district superintendent on an

1 urgent duty basis and say, "Look, we had a protection  
2 application at the Children's Court this afternoon.  
3 Orders have been made. The whole situation is under  
4 control and contemplated. But I'm told by my client that  
5 right now there's an intervention order being sought out  
6 of hours. Can you please head this off?" And that  
7 intervention has succeeded. But we operate in ways which  
8 are not as coordinated as they should be, and I think  
9 those themes were identified by Judge Chambers and  
10 Magistrate Dotchin.

11 MS ELLYARD: Can I ask you then about another aspect of lack of  
12 coordination that you deal with in your statement and  
13 that's about the interplay between the Family Court system  
14 and the Children's Court system and the difficulties that  
15 in your experience have arisen where cases move between  
16 the jurisdictions?

17 MR MCGREGOR: Sure. There was reference to a protocol which  
18 was adopted between the Family Court and the Department of  
19 Human Services, as it was then titled. That emerged  
20 because there was a case in which the department was a  
21 protective intervener, the outcome had not been to its  
22 liking and it immediately issued a protection application  
23 and brought the matter to the Children's Court. Clearly  
24 that was regarded as tantamount to an abuse of process.  
25 You can't conduct an appeal of a Family Court decision in  
26 the Children's Court, but that's what was attempted.

27 So to remedy that problem there was a protocol  
28 determined. I have seen a situation in which a client,  
29 having run their race in the Family Court, received a  
30 letter of advice from a practitioner there to say, "You  
31 have exhausted your remedies in this court. Really the



1       only thing that could give you another opportunity to be  
2       heard would be an accusation that resulted in Children's  
3       Court proceedings." Lo and behold, the mother is accused  
4       of sexually abusing the children and it is taken seriously  
5       and comes to court. We know that the incidence of  
6       perpetration of sexual abuse by biological mothers is  
7       somewhat rare, but on that occasion it had the outcome of  
8       reversing the placement that had arisen through the family  
9       law determination.

10               We will have matters come urgently to the  
11       Children's Court because of some accusation which is taken  
12       seriously, and may have to be at face value, and there  
13       will be a plethora of material from the Family Court which  
14       we are asked to come to terms with for purposes of running  
15       a submissions contest that day. The Children's Court has  
16       a practice which I would believe to be something of an  
17       adaptation and of a reaction to these circumstances where  
18       they will essentially say, "It is most unlikely we will  
19       interfere with the status quo from the Family Court," in  
20       every respect, both for contact and for custody. So there  
21       are ways in which that practice is discouraged, but it  
22       occurs.

23   MS ELLYARD: Do the Commissioners have any questions for  
24       Mr McGregor?

25   DEPUTY COMMISSIONER FAULKNER: No.

26   COMMISSIONER NEAVE: No, I don't.

27   MS ELLYARD: I ask that Mr McGregor be excused.

28   COMMISSIONER NEAVE: Thank you very much, Mr McGregor; very  
29       helpful.

30   <(THE WITNESS WITHDREW)

31   MS ELLYARD: Is the Commission content to continue?

1 COMMISSIONER NEAVE: Yes.

2 MS ELLYARD: I ask that Patricia Brown come into the witness  
3 box and be sworn.

4 <PATRICIA FRANCES BROWN, sworn and examined:

5 MS ELLYARD: Dr Brown, what is your present professional role?

6 DR BROWN: I am the Director of the Children's Court Clinic.

7 MS ELLYARD: How long have you been the director of the clinic?

8 DR BROWN: I have been the director of the clinic since 1992.

9 MS ELLYARD: Could you summarise for the Commission, please,  
10 your professional background?

11 DR BROWN: I have worked in this field for 50 years. I have  
12 worked at the Children's Court Clinic for most of that  
13 time. I have lectured in universities in their doctoral  
14 courses. I have been the chairperson in the inaugural  
15 year of the Australian Psychological Society College of  
16 Forensic Psychologists. I have written numerous papers  
17 and articles, book chapters.

18 MS ELLYARD: You are by profession both a clinical and a  
19 forensic psychologist?

20 DR BROWN: Yes, I am.

21 MS ELLYARD: We have heard a little bit already from President  
22 Chambers and Mr Dotchin this morning about the Children's  
23 Court Clinic, but could you summarise, please, for the  
24 Commission what is the clinic, what does it exist to do  
25 and through what staffing arrangements does it carry out  
26 that work?

27 DR BROWN: Yes. We take referrals only from the court. So we  
28 work exclusively for the court. We mainly do assessments  
29 for the court. Because the assessments have become so  
30 complex lately, we don't have much of a role doing  
31 treatment. We do have a small treatment role, however,

1       where there are cases specifically earmarked by us as  
2       cases where if we do short-term treatment it may make a  
3       difference to what we recommend to the court at the end of  
4       that time. So our role is in protection matters and in  
5       criminal matters for the Children's Court.

6 MS ELLYARD: You have made a statement to the Commission that's  
7       dated 6 August 2015. Are the contents of that statement  
8       true and correct?

9 DR BROWN: They are.

10 MS ELLYARD: In that statement, beginning at paragraph 20  
11       onwards, you talk about the way in which work gets  
12       referred to the clinic and the process that's followed.  
13       You have indicated that you make assessments both in  
14       family division cases and in criminal cases.

15 DR BROWN: Yes.

16 MS ELLYARD: In some cases you might be asked to assess the  
17       family dynamic, if I might put it that way, or the risks  
18       posed to children by one or more family relationship; is  
19       that correct?

20 DR BROWN: Yes.

21 MS ELLYARD: And in other criminal cases you might be asked to  
22       undertake what might be a neuropsychological or other  
23       assessment of a young person facing criminal charges.

24 DR BROWN: Yes.

25 MS ELLYARD: From your observation, in what percentage of cases  
26       either in the family division or in the criminal division  
27       is family violence part of the presenting issues in that  
28       family or in that young person?

29 DR BROWN: I have only done a very quick check of this, but not  
30       in the criminal division. In the family division what we  
31       did was take the first 100 cases of protection matters

1           that were referred to us this year and we counted the  
2           times in those 100 cases that family violence occurred,  
3           was mentioned, and that was in 69 cases out of the 100.  
4           I can't tell you what happens on a yearly basis. We  
5           haven't taken those figures.

6 MS ELLYARD: Does 69 per cent feel about right to you?

7 DR BROWN: It feels about right.

8 MS ELLYARD: The clinic is staffed by a number of clinicians.

9           What are the qualifications that are required to carry out  
10          the report writing or assessment process that your work  
11          involves?

12 DR BROWN: The criteria for acceptance is normally a doctoral  
13          degree in psychology, either in forensic clinical or  
14          neuro, and 10 years of experience. We do have  
15          another - we have 46, I think it is, sessionals come into  
16          the clinic and we have seven of those who have masters  
17          degrees, but we accept them because they have got very  
18          high standing in the field.

19 MS ELLYARD: When a case is referred to you - and let's think  
20          about a family division case where an issue arises about  
21          whether or not family violence exists in the family home  
22          and what implications that has for a child's ability to  
23          remain within the family home - what's the process by  
24          which one of your clinicians will carry out their  
25          assessment?

26 DR BROWN: First of all, I think it's important that we get the  
27          right clinician for the job. So I read everything that  
28          comes in from the court and I will decide which discipline  
29          needs to be chosen. From there, the clinician will come  
30          to the clinic. Normally the assessment interviews and the  
31          tests, psychological tests if they are given, will take a

1 whole day. So at least five hours is taken with the  
2 face-to-face assessments. But the writing of a report and  
3 the contacting of people who might be needed to be  
4 telephoned, the reading of the material, the whole lot  
5 should take probably about 31 hours, we have found from  
6 research.

7 MS ELLYARD: When we think about the observational phase of the  
8 clinicians' work where they meet with or observe family  
9 dynamics, what are the different ways in which that sort  
10 of information is gathered? What kind of interactions are  
11 looked at?

12 DR BROWN: We look at the child throughout. The clinicians  
13 will see people in different combinations. So they will  
14 see a mother alone, a father alone, they will see  
15 grandparents, they will see the whole family together,  
16 they will see a carer, will watch what the child does in  
17 relation to each person, will watch what happens when  
18 there are greetings, the first greetings. So in the  
19 course of a day you will have many opportunities to see  
20 the interactions and the connectedness between the various  
21 people.

22 MS ELLYARD: How do you balance the observations that you make  
23 of the attachment perhaps that you observe against the  
24 allegations that you are aware have been made of what  
25 might have taken place in that family?

26 DR BROWN: It can be difficult. All we can do is read all the  
27 antecedent materials, talk to people who have had  
28 observations of these children and family in different  
29 circumstances, and then weigh up what we see. If we are  
30 told, for instance, that there's a very bad connectedness  
31 between a child and a parent and in our observation during

1 the course of a whole day we have failed to see any of  
2 this and in fact we might have seen something quite  
3 different, we will be reporting that. But we will also  
4 report that this is contrary to what has been suggested by  
5 some other agency or agencies.

6 MS ELLYARD: At paragraph 30 of your statement you talk a bit  
7 about the ways in which children can reveal to you the  
8 presence of family violence in their lives and the effect  
9 of that. I wonder could you speak a little bit about how  
10 children, perhaps even including very young children,  
11 non-verbal children, are able to give your clinicians that  
12 sense of what they have experienced.

13 DR BROWN: If it is a very small child indeed, if it is a child  
14 in arms, we look at whether this child will recoil from  
15 the parent, won't make eye contact with the parent,  
16 squirms away from the parent. If it's a child who is able  
17 to walk and has rudimentary language and is able to play,  
18 we will take them into a room where we have dolls houses  
19 and we will be looking at what they do with the dolls. We  
20 will watch whether there's any recoil from a parent  
21 through the day.

22 If it's a verbal child, a verbal child can tell  
23 you a great deal. Sometimes we have even used the clinic  
24 dog, the small dog that we can have on premises, and have  
25 the dog play with the child and have the child talk to us  
26 at the same time. There are a lot of things that go into  
27 a clinic interview with a child.

28 MS ELLYARD: You mentioned earlier in your evidence that  
29 assessments have become more complex. You have worked at  
30 the clinic a long time. What are the changes that you  
31 have observed in the cohort of families coming to you and

1 the issues with which they present?

2 DR BROWN: I think the degree of devastation really that there  
3 has been in social connectedness, with the poverty that  
4 people are experiencing, with the lack of opportunities  
5 for jobs for people at a very depressed level of living,  
6 I have become extremely conscious of that over time.  
7 There's been a big difference I think since the '80s with  
8 the effect of drugs. Before the '80s we weren't conscious  
9 of that at all in the court clinic. But after the '80s  
10 the drug situation hit families very hard. But of course  
11 alcohol has always been a constant.

12 MS ELLYARD: One of the things that you note in your statement,  
13 picking up your point about poverty, and I'm looking at  
14 paragraph 53 of your statement, is you make some  
15 observations about the way in which poverty might then  
16 impact on the response that a family gets from child  
17 protection. I wonder could you speak a little bit about  
18 that example that you give and whether that's an  
19 infrequent or a frequent occurrence.

20 DR BROWN: Certainly we have numbers of people who aren't able  
21 to come to the clinic because they are too poor. They  
22 will ring and say, "I just don't have the money."  
23 Sometimes they will be - and I'm often talking about  
24 people from the country, but also people from the suburbs.

25 MS ELLYARD: When we are talking about they can't afford it, do  
26 you mean they can't afford the cost of the transport?

27 DR BROWN: That's right. We refer them then to go to Human  
28 Services to get train tickets and tram tickets. They are  
29 often without food. We have had to send them up to the  
30 Salvos to get food and food vouchers to take home. So  
31 this is an increasing trend.

1 MS ELLYARD: What about issues of homelessness? You mention in  
2 paragraph 53 of your statement some issues that you have  
3 observed about families who don't have somewhere to live.

4 DR BROWN: Yes, people living in cars; people who have been on  
5 waiting lists with the Housing Commission for two and  
6 three years; people who are couch surfing because there is  
7 nowhere else to go; and that's a very dangerous position  
8 to be in because your child could well go into care in  
9 that circumstance.

10 MS ELLYARD: You mentioned drugs. Is ice in particular a drug  
11 you have observed making a difference to the lives of the  
12 families that you have been assessing?

13 DR BROWN: Ice in particular has made an incredible difference.  
14 It's far more potent, in our eyes, than what's been  
15 happening with heroin in the past. They say there's no  
16 epidemic. The newspapers say there is no epidemic with  
17 ice. As far as we are concerned it's pernicious, it's  
18 pervasive. We have an awful lot of violence coming from  
19 the ice. Young parents are taking ice, and certainly  
20 adolescents are taking ice.

21 We also have evidence from some of those  
22 adolescents that they are making the ice, that some of the  
23 biekie gangs are offering them money to make the ice and  
24 some of them come in and they have become very wealthy  
25 very suddenly, and that's from a base of being extremely  
26 poor before that.

27 MS ELLYARD: At paragraph 59 and following of your statement  
28 you reflect on the way in which you take family violence  
29 into account when weighing what's in the best interests of  
30 the child, and of course your work involves a particular  
31 aspect of this where the dispute is often whether a child



1 can remain in the family unit or has to be removed because  
2 of family violence. You make the point that there are  
3 very extreme cases where it is obvious what needs to  
4 happen, the child can't possibly be with the violent  
5 family member, but you also make the point that in many  
6 cases it's a bit more nuanced about that. I wonder  
7 whether you could speak to the Commission about why you  
8 say it is nuanced and what are some of the factors that  
9 come into play.

10 DR BROWN: We have to look not only at the risk factors for the  
11 child but we have to look at the protective factors that  
12 might obtain. There is quite a literature on this,  
13 really. If you have one parent who is a cossetting parent  
14 that's a very good protective factor. If you have a  
15 mother who is insightful, if you have a mother who's not  
16 depressed - perhaps I will just go through some of the  
17 risk factors that we look at in addition to the violence.

18 The risk factors often are poor education in the  
19 mother, depression in the mother, low birth weight at  
20 birth - low birth weight at birth and depression in the  
21 mother has often the outcome of behaviour problems in the  
22 child later.

23 With protective factors, if you have  
24 intelligence, if a child in the family has intelligence,  
25 good intelligence, if the child does not have behaviour  
26 problems to begin with, if you have one protective person  
27 in the family who is cossetting to the child we will take  
28 all of those things into account when we also look at the  
29 problem of violence.

30 MS ELLYARD: You then go on in your statement to make the point  
31 that it's very difficult, in your experience, to divorce

1 family violence from culture, and I wonder could you  
2 reflect for the Commission a bit on the role you see our  
3 present culture playing in the pervasiveness of family  
4 violence.

5 DR BROWN: I think our culture has been extremely permissive of  
6 violence with males. I think it is also in sport. It's  
7 in television. It's in films. It's in computer games.  
8 It is in films of war. There's a big literature called  
9 killology in psychology where we know a great deal about  
10 how violence becomes pervasive in the community. I'm not  
11 sure how you really tackle it except by education.

12 MS ELLYARD: What kind of education would you see playing a  
13 role here?

14 DR BROWN: I think you need to have education in schools about  
15 violence. I think that it would be very effective to have  
16 some television shots, very much like happened with  
17 anti-smoking, with what happened with the road tolls;  
18 I think if you had some television shots to make people  
19 sensitive to what violence is, how ugly it is, what it  
20 does to people, have them see children cowering behind  
21 furniture, the looks on children's faces when a couple  
22 starts fighting, they are very graphic scenes that could  
23 be used to great effect, I think, to counter violence.

24 MS ELLYARD: One of the other things you say in your statement  
25 about schools is the importance, from your experience and  
26 observation, of a child remaining at school. Can I invite  
27 you to speak a little bit more about what does being at  
28 school involve; what's the important factor for a child in  
29 education?

30 DR BROWN: There is a big literature on the outcomes if you do  
31 stay at school, outcomes other than educational

1 competence. It's a matter of belonging to a community,  
2 belonging to a community at school that is; of having  
3 friends; having a social setting; being enabled to speak;  
4 having a feeling of competence because you are doing  
5 something, you may be getting somewhere. You don't have  
6 to be a star, as long as you keep going to school.

7 Once that's taken away from a young person who is  
8 developing that becomes a considerable problem for them  
9 because they are no longer in the swim. If they leave,  
10 they have left their friends. They have to make other  
11 friends; and often other friends, if they have left  
12 school, may be friends who have problems themselves. So  
13 the school is a wonderful hub of self-esteem, being able  
14 to know that you are just like the young person beside  
15 you. It's a cossetting factor for a child.

16 MS ELLYARD: One of the opportunities that you note perhaps  
17 from things to be done a bit better is at paragraph 70 of  
18 your statement, and you say that you feel there needs to  
19 be more support for women who seek assistance and you  
20 comment on some of the observations that have been made to  
21 you about what happened to women when they sought  
22 assistance.

23 DR BROWN: Yes. I need to say that I understand why services  
24 have been joined up and mandatorially have to report to  
25 each other. But what it has meant for people in  
26 disadvantaged circumstances is that they know - and this  
27 is what's been fed to us - that if you go to the school  
28 teacher to tell them, if you go to the infant welfare  
29 nurse to tell them, if you go to the doctor to tell them  
30 that something is happening at home, this might join up,  
31 then the Welfare will come and take your child. This is

1 very concerning because they are the very people who can  
2 help them. The infant welfare sister has always been a  
3 very trusted person in the past. But the thought that the  
4 child could be taken from them if they go and complain  
5 makes them sometimes not tell anybody at all.

6 MS ELLYARD: How can we solve that problem, given as you have  
7 identified the importance of mandatory reporting to make  
8 sure that children at risk are brought to the attention of  
9 authorities?

10 DR BROWN: I think there's a system of blame. I think if we  
11 can change the system of blame to one of helpfulness and  
12 kindness, away from blame, we may well get these people  
13 who are really needing help to be able to accept it. But,  
14 if you think you are going to go somewhere and your child  
15 will be taken, you just don't go.

16 MS ELLYARD: One of the lay witnesses whom the Commission heard  
17 from on Day 9 of the hearing gave evidence that, for  
18 example, she didn't report breaches of the intervention  
19 order to police because she was worried that Child  
20 Protection might find out and think she wasn't protecting  
21 her children. Is that the kind of fear that you have had  
22 expressed to you?

23 DR BROWN: Yes, indeed.

24 MS ELLYARD: The last matter that you take up in your statement  
25 is the question of community engagement and the way in  
26 which the community can operate as a protective web around  
27 families who might otherwise be vulnerable. You give an  
28 example of the way you understand it to work elsewhere.  
29 I wonder could you speak a bit about that example to the  
30 Commission?

31 DR BROWN: Yes. I think I used the example of a former

1 professor of psychology from America who came and spoke  
2 here. It was very compelling what he was saying. He  
3 pointed out that in America, much as here, people no  
4 longer know their neighbours. I know when I was a child  
5 we used to know all the people along the street. People  
6 are much more isolated than they were before. I think  
7 this is one of the problems that we have in why cases are  
8 becoming more complex. People are isolated often in their  
9 own homes, particularly if they are disadvantaged to begin  
10 with.

11 So this professor had done something very  
12 interesting. He had looked around and thought, "Okay, our  
13 community is just encapsulated in its own homes. What do  
14 I do to bring them out?" I'm talking about Dr Gary  
15 Melton. He found that fire stations looked to be a hub  
16 where people respected the people in the fire stations,  
17 the firemen were there on the ready to go to fires but in  
18 between times had time when they could perhaps be helpful  
19 to the community.

20 So Dr Melton approached the local fire chiefs and  
21 he got them to allow the fire stations to be opened as  
22 community hubs. So people in the surrounding streets were  
23 invited to come and have coffee there when they chose to,  
24 and it became a kind of centre for older people who  
25 were - they had had their families, they were parents who  
26 knew the world, who knew how to rear families, and then  
27 they had young people who may be struggling in knowing  
28 what to do with families. So they were able to meet and  
29 to be able to discuss and help each other, and also it  
30 meant that the older people also had company. So that was  
31 very successful.

1                   From my point of view, although councils have a  
2                   lot of agencies, it seems to me that the people in council  
3                   communities don't know each other very well. So it could  
4                   be that at a local level we could have much more input in  
5                   engaging people together in ways like Dr Melton did. Then  
6                   you would have the supports that were non-statutory, that  
7                   didn't need to involve other services, but supports from  
8                   people who have lived lives that can be helpful to those  
9                   who haven't yet had opportunities to have all of the  
10                  experiences that they have had.

11 MS ELLYARD: Thank you, Dr Brown. Do the Commissioners have  
12                  any questions for Dr Brown?

13 COMMISSIONER NEAVE: No, we don't, thank you.

14 MS ELLYARD: I ask that Dr Brown be excused and invite the  
15                  Commission to adjourn for the lunch break.

16 COMMISSIONER NEAVE: Thank you very much, Dr Brown.

17 DR BROWN: Thank you.

18 <(THE WITNESS WITHDREW)

19 LUNCHEON ADJOURNMENT

1 UPON RESUMING AT 2.00 PM:

2 MR MOSHINSKY: Commissioners, the next witness is Leeanne  
3 Miller. If she could please be sworn in.

4 <LEEANNE MILLER, affirmed and examined:

5 MR MOSHINSKY: Ms Miller, could you please state for the  
6 Commission what your current position is and just give a  
7 brief outline of your professional background?

8 MS MILLER: Sure. Currently I am the Director of Child  
9 Protection for West Division, which roughly is about a  
10 quarter of the state. I'm responsible for the oversight  
11 of the operations of the child protection program, and  
12 roughly that is for the areas of Brimbank Melton, western  
13 Melbourne, Barwon, Central Highlands, Western District and  
14 the Wimmera.

15 Largely my responsibilities are to oversee the  
16 enactment of our mandate under the Children, Youth and  
17 Families Act, and in doing that it covers the areas of  
18 child protection intake for those areas, investigations,  
19 managing cases on protection orders, and responsible for  
20 the oversight of children in out-of-home care in the care  
21 of the secretary.

22 MR MOSHINSKY: Ms Miller, have you prepared a statement for the  
23 Royal Commission?

24 MS MILLER: I have.

25 MR MOSHINSKY: Are the contents of the statement true and  
26 correct?

27 MS MILLER: Yes. There is one slight amendment. In  
28 paragraph 121, the very last line just needs to be deleted  
29 with reference to those page numbers.

30 MR MOSHINSKY: Thank you. I want to start by asking you some  
31 questions relating to when Child Protection gets involved

1 with a family and how that happens and what happens. One  
2 situation that I wanted to ask you about was the situation  
3 referred to by the lay witness at the beginning of today's  
4 evidence, and I think you were here for her evidence.

5 MS MILLER: I was.

6 MR MOSHINSKY: In brief compass, a situation where there's been  
7 some violence by an ex-partner, ultimately some form of  
8 access regime is agreed but the mother then has real  
9 concerns about the child on the access visits with the  
10 father and the behaviour being very different when the  
11 child comes back, contacts DHHS and asks for a report,  
12 what happens in that scenario in practice?

13 MS MILLER: Child Protection receive reports from anyone in the  
14 community once there is a belief of significant risk  
15 identified. It's the role of Child Protection to  
16 classify, that is to gather information in relation to  
17 that to make a determination about the best response in  
18 relation to that possible risk.

19 In undertaking that role usually there are a  
20 whole lot of information-gathering processes that happen,  
21 No. 1 being from the reporter themselves, and that is  
22 really critical information. Where there is an indication  
23 of information within other jurisdictions such as the  
24 Family Court it may be that we can access - make  
25 applications to request that information to try to  
26 understand that.

27 It's usually our process to gather information  
28 from as many sources as we can, and most regularly that  
29 would involve a school because they are often the best  
30 judge of children given the frequency in which they see  
31 children and have contact with children.



1                   Certainly in this particular scenario there would  
2                   be generally a reluctance to intervene unless there was  
3                   new information or significant risk to the child given  
4                   that the exact matters were being dealt with within the  
5                   Family Court jurisdiction, and that for all intents and  
6                   purposes Ms Jones was certainly acting as a protective and  
7                   responsible parent. There was acknowledgment of the  
8                   issues, and she had taken appropriate action to ensure the  
9                   safety of herself and her child, including the access to  
10                  services, including a child psychologist that she referred  
11                  to.

12                 I guess what's not clear within the evidence that  
13                 was given by Ms Jones is whether or not other aspects of  
14                 the Family Court's role were enacted in terms of whether a  
15                 notice of risk was filed by Ms Jones or any of the other  
16                 parties, which once again is a screening tool to prompt a  
17                 report to Child Protection where it relates to risk to  
18                 children. So that's one of the most frequent ways in  
19                 which we come by knowledge of people's concerns for  
20                 children in the Family Court jurisdictions.

21                 Similarly so, if any of the other court personnel  
22                 held concerns or established concerns throughout the life  
23                 of hearings and proceedings, they could also make either  
24                 section 67ZA or section 91B reports to Child Protection or  
25                 indeed request information that we have by way of either  
26                 subpoena or by way of a section 69ZW form.

27       MR MOSHINSKY: In her case she indicated she had to be quite  
28                 insistent before Child Protection would prepare a report.  
29                 In terms of what's proper practice, would Child Protection  
30                 prepare a report in that scenario that she outlined?

31       MS MILLER: Generally Child Protection don't prepare reports at

1 the request of people phoning in. We need to largely  
2 establish that there is a threshold of immediate and  
3 significant risk before we would largely classify that  
4 report, and it seems in this instance that there was a  
5 decision made that it did not proceed to an investigation.  
6 So it appears that the department's role ceased at that  
7 point in time.

8 I'm not sure whether other referrals to other  
9 services might have been made and/or what contact occurred  
10 with, say, the child psychologist or the school in trying  
11 to understand both the child's situation but also what we  
12 often do at that point is to encourage that if they have  
13 concerns or ongoing concerns to make reports to Child  
14 Protection if it is considered that at that point the  
15 threshold of risk for further protective intervention  
16 hasn't been met.

17 MR MOSHINSKY: Is the risk that you are looking at in terms of  
18 significant risk of harm physical harm or is it wider than  
19 that?

20 MS MILLER: It is definitely wider than that, absolutely, yes.

21 MR MOSHINSKY: In her evidence it was her understanding neither  
22 the school nor the father was contacted by DHHS. Is what  
23 you are saying that in terms of normal practice that  
24 should happen?

25 MS MILLER: Yes. In my experience that would be very unusual.  
26 We would attempt to contact all sources of information,  
27 and certainly one of the benefits of the section 627Z  
28 form, which is made by any party in proceedings to court  
29 and is actually a compulsory process in the Federal  
30 Circuit Court, is that then prompts a report to Child  
31 Protection and there's a transparency in that in that all

1 of the parties are aware that that would happen and then  
2 can promote the - you know, people will then provide  
3 information and we can seek that information, which would  
4 absolutely include both parents and most usually the  
5 school.

6 MR MOSHINSKY: Is what you are saying that there is a  
7 difference that would have applied if there had been this  
8 form that had been sent in through the Family Court  
9 process compared to the mother ringing up and reporting  
10 what she did ring up - - -

11 MS MILLER: No, whether it comes by the Family Court or by a  
12 phone call, we take those as reports to Child Protection.  
13 They are classified all as reports to Child Protection and  
14 are largely classified and assessed in the same way.

15 DEPUTY COMMISSIONER FAULKNER: Can I just follow up. Would the  
16 story this morning suggest that she had been screened out  
17 at an early stage and hadn't proceeded to an  
18 investigation; is that what - - -

19 MS MILLER: That seems to be Ms Jones's account of it because  
20 she didn't indicate, from my understanding, that there was  
21 further Child Protection investigation and it would seem  
22 that it didn't progress post intake.

23 DEPUTY COMMISSIONER FAULKNER: So someone has made a decision  
24 at an early stage without all of that investigation on the  
25 information available it's not one of the ones that you  
26 see as the highest risk?

27 MS MILLER: That's correct.

28 DEPUTY COMMISSIONER FAULKNER: So it has been screened out,  
29 essentially. I don't know the facts and neither do you,  
30 but just generically that's a possibility of what  
31 happened?

1 MS MILLER: That's correct, yes.

2 COMMISSIONER NEAVE: Is it desirable that a decision of that  
3 kind be made without some investigation, for example, at  
4 least speaking to the school?

5 MS MILLER: Usually. In my understanding, it would be highly  
6 unusual that the school wouldn't be spoken to or the child  
7 psychologist or any of the other court personnel involved,  
8 including the writer of the family report or the  
9 independent children's lawyer if that were part of the  
10 features of what was reported.

11 COMMISSIONER NEAVE: As I understand it, her later  
12 concern - I think I have the sequence right - her  
13 allegation was that she was concerned about the effects of  
14 contact on the child. So in a sense decisions have been  
15 made, orders have been made, she's concerned about events  
16 which occur subsequently, which is a bit different from a  
17 situation where you have her expressing concerns to Child  
18 Protection before the Family Court order is made or  
19 contemporaneously with that discussion going on.

20 MS MILLER: Yes, that's right.

21 COMMISSIONER NEAVE: So does the department have some means of  
22 differentiating between those cases where you have sort of  
23 concurrent processes and the situation where you have a  
24 Family Court order and a parent then says, "Look, we are  
25 concerned that these things have happened on a contact  
26 visit," or something along those lines? Is there a  
27 different process in place? Are they differentiated?

28 MS MILLER: Any information is received as a report. So it  
29 could be that there are numerous reports, and that story  
30 and picture is built upon in terms of our understanding of  
31 what's happening. In this scenario I - in my experience

1 in the way that we might manage this would certainly be to  
2 clearly understand the role of the child psychologist in  
3 assisting the child to understand those behaviour issues  
4 and the trauma responses he may have been having, but also  
5 to encourage further proceedings in the Family Court by  
6 way of recovery orders or variations to the orders, given  
7 that that court was dealing with those matters and does  
8 have largely the mandate to consider that child's best  
9 interests, including being exposed to family violence.

10 COMMISSIONER NEAVE: This is a situation where she would have  
11 to initiate proceedings in the Family Court to alter the  
12 arrangements that had been reached. That was the  
13 scenario, as I understand it.

14 MS MILLER: Yes.

15 COMMISSIONER NEAVE: So in that situation you would leave it to  
16 that parent to initiate the proceedings because there were  
17 already Family Court orders in place; have I understood  
18 that correctly?

19 MS MILLER: Partly. There would be a number of factors that we  
20 would be wanting to consider. No. 1 is the protectiveness  
21 of the parent to take appropriate action and to understand  
22 the impact on the child.

23 COMMISSIONER NEAVE: But the protection she would have to take  
24 would be to go back to the Family Court and ask for  
25 another order.

26 MS MILLER: Partly, yes.

27 COMMISSIONER NEAVE: Does the department take the view that  
28 that's the appropriate response in those circumstances  
29 where the parent may well not have the resources to go  
30 back to the Family Court, which was Ms Jones's evidence.

31 MS MILLER: Certainly it would depend on the analysis of risk,

1 and in undertaking analysis of risk there are a range of  
2 dynamic factors that are taken into account. Most  
3 importantly, though, it would be around the likelihood and  
4 the significant risk of harm and immediate risk of harm to  
5 that child at that point in time. They would be key  
6 factors, along with the safety and support mechanisms of  
7 supports and services working with the family to work  
8 through those issues and to support the child.

9 COMMISSIONER NEAVE: Thank you.

10 MR MOSHINSKY: Just in terms of the people on the ground, if a  
11 woman rings up and reports to DHHS, much as the lay  
12 witness did, who is dealing with that at Child Protection?  
13 Where does that call come into? Who then manages deciding  
14 whether to screen it out or take further steps?

15 MS MILLER: Reports are received by Child Protection case  
16 practitioners, who are largely by way of background social  
17 workers or psychologists who have specific training in  
18 largely the key components of the job, including our best  
19 interests practice framework, and all of the practice  
20 guidance modules around responding to particular types of  
21 report and concerns for children. There are also  
22 particular pieces of practice advice that require certain  
23 things to happen if there are certain things indicated in  
24 a case, including those of high-risk youth and high-risk  
25 infants, where there needs to be more senior consultation  
26 that occurs.

27 One of the other parts of that practice advice is  
28 around if more than two reports are made in a 12-month  
29 period for a child that then proceeds to an escalated  
30 oversight in terms of looking at the risk assessment by a  
31 more senior person. But certainly in terms of reviewing

1 cases for closure they are also done at a more senior  
2 level as a sort of safeguard in terms of the assessment  
3 done by the practitioner who has been receiving and making  
4 decisions in relation to the intake.

5 MR MOSHINSKY: Can I ask you about a different situation. In  
6 Mr McGregor's evidence this morning he talked about a  
7 situation which they said they see a lot of where there's  
8 an offending parent and a non-offending parent, under  
9 arrangements the offending parent is not supposed to have  
10 access, but the non-offending parent is worn down and  
11 permits access - he said it happens off the record, but  
12 let's assume the non-offending parent is the mother, she  
13 permits access because of pressure and the DHHS response  
14 is, "We are taking away your children because you are not  
15 protecting them." Can you comment on how - I appreciate  
16 these are complex situations and each case will be  
17 different.

18 MS MILLER: Yes.

19 MR MOSHINSKY: But in terms of that general overall scenario  
20 how do you in DHHS manage those types of situations?

21 MS MILLER: I have heard it mentioned quite a bit around this  
22 threshold of removing children, and I think that - I think  
23 that that's really been quite overstated when you actually  
24 look at the breadth of the role and responsibility of  
25 Child Protection. For example, in the last calendar year  
26 we received 92,000 reports to Child Protection, for which  
27 we intervened and did investigations and follow-up work  
28 with families to secure the safety of children for  
29 25,000 cases.

30 We took to court around just over 4,000 cases,  
31 and even of all of those the majority of those would be

1 children on interim accommodation orders or supervision  
2 orders where they are at home with their parents. So it's  
3 only really a small proportion of children of that 92,000  
4 that would ever end up in out-of-home care, and of those  
5 all of those are privy to a judicial decision-making  
6 process. So I just want to really try and dispel some of  
7 those misconceptions that I think have permeated.

8 So very much we are working within the voluntary  
9 capacity where significant risks for children occur within  
10 that 25,000 families that we work with and undertake  
11 investigations for, and they're involved usually from  
12 three to four months with those families in trying to  
13 ameliorate the risk to children.

14 Once again, every scenario is different, which is  
15 why it is important to have a dynamic risk assessment  
16 framework. The sorts of things we certainly consider are  
17 the pattern and history of abuse, the severity of abuse,  
18 the acknowledgment of the parents of the actual impacts of  
19 the harm to children and whether or not they are  
20 responsive to, No. 1, mitigating those risks and are  
21 prepared to do something about it, but understanding the  
22 impacts of those behaviours potentially on the children;  
23 whether or not they are able and willing to address those  
24 concerns once they are acknowledged; and largely with the  
25 perpetrator what sort of information we might know around  
26 the significance of that potential harm to children and to  
27 women, most importantly.

28 So there's a whole lot of factors that play out.  
29 Certainly we are involved with women, and in all instances  
30 we seek to preserve children within their families.  
31 That's our fundamental principle of the Act, which we are



1 required and mandated to have integrity to and we do. We  
2 hold that very dearly.

3 So we may have a situation where there is  
4 ambivalence from the mother, whether - if they have  
5 separated in the scenario that you have described, there  
6 is difficulty in perhaps maintaining or adhering to the  
7 conditions of intervention orders, and there's a whole  
8 host of reasons why that occurs and we fully understand  
9 those things. It's an extremely difficult scenario to  
10 work around, particularly if there's ambivalence around  
11 the separation and mixed feelings about the relationship  
12 in the first place.

13 But we would be really trying to work with that  
14 mother to understand the impacts on the child in the first  
15 instance, and it would really only be after repeated  
16 largely breaches of an intervention order would we believe  
17 that that child is at significant risk and that the  
18 impacts of repeated contact are having a detrimental  
19 effect that we might seek a protective order, but in the  
20 first instance that would be to maintain the child still  
21 with the mother or to - worst case scenario, if really  
22 ongoing abuse to a significant level was occurring it  
23 really would be only at that point that we would seek to  
24 remove the child, bring the matter before the court for  
25 judicial oversight. So that sort of scenario.

26 MR MOSHINSKY: Can I raise with you this theme that came  
27 through quite a number of submissions and I think informs  
28 that example, and ask you to comment from an operational  
29 perspective based on your experience. I think the theme  
30 that comes through is that there might be too much focus  
31 on the responsibility of the mother to act as the

1 protective parent rather than focusing on the perpetrator,  
2 who is the one engaging in the violent behaviour.

3 MS MILLER: Certainly we work with both parents, and I think  
4 that we are probably one of the only services that  
5 does - we are not the only one, but there are many that  
6 focus on women, some that focus on men, and we have a  
7 holistic approach in the way that we work and work with  
8 both.

9 Certainly we absolutely will be working with  
10 fathers in relation to understanding the impacts of  
11 behaviour on children, particularly where there is trauma,  
12 and would be working with them to refer them into services  
13 to be monitoring that and to be working with them to  
14 reduce the risk of harms of those types. Certainly we  
15 work very closely with police where there are breaches of  
16 intervention orders in terms of holding perpetrators to  
17 account for their behaviour.

18 It is more often than not the case, though, that  
19 children are living with their mothers and are protected  
20 by intervention orders which place the children with their  
21 mothers. So by default of that a lot of the focus is on  
22 that relationship. Clearly we have a keen interest in  
23 trying to restore the integrity and the importance of that  
24 relationship.

25 MR MOSHINSKY: Are there supports that you provide in practice  
26 to mothers in that type of scenario that we are talking  
27 about, so there's a separated relationship but there's  
28 concern about what's happening when the child visits the  
29 offending parent? Are there supports that you provide for  
30 the non-offending parent in that type of scenario?

31 MS MILLER: Yes, certainly. We work with women's services and

1 family services in terms of supporting women in that sort  
2 of situation, and also with men as well.

3 COMMISSIONER NEAVE: By that do you mean that you refer the  
4 women to the service, or how far does that support go?  
5 For instance, suppose that a woman is seeking an  
6 intervention order, she has no money, she can't pay a  
7 lawyer. In those circumstances would DHHS say, "Well, we  
8 will provide you with the support necessary in order to  
9 gain that order?"

10 MS MILLER: Yes, absolutely.

11 COMMISSIONER NEAVE: Someone from DHHS might go along with  
12 the woman?

13 MS MILLER: Yes, or be the applicant on behalf of the child is  
14 also another scenario where we very much initiate  
15 proceedings for intervention orders.

16 DEPUTY COMMISSIONER FAULKNER: Just while we are in this theme,  
17 in the scenario that counsel painted earlier with the  
18 worn-down woman whose husband wants to see the children  
19 and she knows he's not allowed, and she tells you that he  
20 has seen the children on a couple of occasions, do you  
21 then report to the police that the intervention order has  
22 been breached?

23 MS MILLER: Yes, we do.

24 DEPUTY COMMISSIONER FAULKNER: Every time?

25 MS MILLER: Yes, absolutely, and we have a core role in working  
26 very closely with police in monitoring the safety of women  
27 and children in that scenario. It wouldn't bear, though,  
28 that we would also then remove that child. We would work  
29 to really support the woman, build up her self-esteem and  
30 her understanding of the risk to that child and herself.

31 DEPUTY COMMISSIONER FAULKNER: So I think your evidence is that

1 the fear about having children removed is overstated?

2 MS MILLER: I believe so, strongly.

3 COMMISSIONER NEAVE: Sorry, counsel, I did have one further  
4 question. Do you have any figures on numbers of cases in  
5 which you are the actual applicant for an intervention  
6 order?

7 MS MILLER: We don't actually keep that data. I don't know if  
8 the Children's Court - certainly it happens a lot in  
9 concurrent orders or where we may want to strengthen  
10 particular conditions in Children's Court orders which  
11 don't have a criminal outcome if they are breached, where  
12 we would supplement that with an intervention order so  
13 that if there is a breach of that condition it has a  
14 criminal consequence rather than a - within the family  
15 jurisdiction, a civil consequence. But certainly every  
16 day of the week we are in Magistrates' Courts with women  
17 as the applicant for intervention orders on behalf of  
18 children and women.

19 COMMISSIONER NEAVE: Mr Moshinsky may go on with this, but just  
20 while I'm asking about figures, you also mention the  
21 possibility of the department applying for leave to be a  
22 party to family law proceedings. Do you have any figures  
23 on the numbers of cases in which that occurs?

24 MS MILLER: So once again this is not one of the things that we  
25 keep data on. It's probably one that we should. I have,  
26 though, through our court - co-allocated court practice  
27 leader that we have embedded in the Family Court registry,  
28 who is actually present here today, she was able to  
29 ascertain some information through consultation with our  
30 Child Protection litigation office and through data  
31 through the Family Court in relation to the number of

1 proceedings that Child Protection have been involved with.  
2 We are party to proceedings in very few cases. If you  
3 bear with me a moment I will try to get that information.  
4 COMMISSIONER NEAVE: Perhaps if you could provide the  
5 information to the Commission rather than having - - -  
6 MS MILLER: Certainly.  
7 COMMISSIONER NEAVE: That would be helpful because we just need  
8 to get a feeling of the dimensions of the involvement of  
9 DHHS in those circumstances.  
10 MS MILLER: Certainly.  
11 COMMISSIONER NEAVE: That would be helpful, thank you.  
12 MR MOSHINSKY: Ms Miller, can I just turn to another topic  
13 which you deal with in your statement. At paragraph 35  
14 you outline three different ways in which a matter could  
15 be reported to Child Protection when there's Family Law  
16 Court proceedings underway, and you have mentioned them  
17 already. Then in paragraph 46 you refer to the change in  
18 the Federal Circuit Court rules in January 2015.  
19 MS MILLER: Yes.  
20 MR MOSHINSKY: Then you go on to explain how there's been an  
21 increase in the number of notifications from the Federal  
22 Circuit Court under that provision. Then in paragraphs 62  
23 and 63 you have the numbers there which show the increase  
24 in the number of these notice of risk forms coming. Then  
25 in paragraph 68 you indicate that a very small percentage  
26 of those notices proceed to investigation. It was  
27 11 per cent in the year 2013/14, and 8.8 per cent in the  
28 year 2014/15.  
29 MS MILLER: Yes.  
30 MR MOSHINSKY: That's quite a lot lower than the general figure  
31 for reporting - for investigation which you have set out

1 in paragraph 66.

2 MS MILLER: Yes.

3 MR MOSHINSKY: Why is it so much lower? Can you shed some  
4 light on that?

5 MS MILLER: I think that the notice of risk form, which, as  
6 I said, has been introduced from January of this year and  
7 is now a compulsory requirement of parties in proceedings  
8 in the Federal Circuit Court, is a fairly wide screening  
9 tool for risk. It is open to all parties to - largely a  
10 tick-a-box form and I think it is one of my attachments to  
11 my statement.

12 What we know of reports from largely family  
13 members, because it is also true of reports that were  
14 received separate to the Family Court from family members,  
15 is that there can be largely different understandings of  
16 what constitutes significant risk. We consider this  
17 notice of risk form very important because we are  
18 interested in certainly being alerted to risk to children  
19 coming through the Family Court.

20 But what we find with reports from families,  
21 whether it's, as I said, through the Family Court or  
22 through Child Protection reporting, is that there can be  
23 very different perceptions about what constitutes risk to  
24 children. So largely a threshold about what constitutes  
25 significant risk is the thing where there is largely quite  
26 a distortion at this point in time, which, as we see with  
27 the section 627Zs and the 91Bs, is quite the contrary.

28 So I think it's where you have - certainly the  
29 court personnel and the judges and magistrates have a good  
30 understanding of risk of harm and significant risk and  
31 immediate risk. Those have a very high further action

1 rate in terms of triggering an investigation by Child  
2 Protection, which isn't evident in the reports coming  
3 through by parties of themselves. So, for example, we  
4 have - and I think by way of parties being involved in a  
5 custodial dispute before the Family Court around issues to  
6 do with parenting in a highly emotive and sort of charged  
7 environment, adversarial environment, what we get in lots  
8 of those notice of risk forms might be  
9 relatively - certainly concerning for them but don't fit  
10 our definition of abuse and neglect.

11 By way of example some of the things when I have  
12 spoken to our intake staff receiving and processing these  
13 notice of risk forms might be that mum allows the  
14 11-year-old to watch an M-rated movie or mum has a new  
15 boyfriend who could be a paedophile. It could be around  
16 that a child might be having nightmares after coming back  
17 from access with dad but, once the further investigation  
18 through schools and other parents and other information is  
19 gathered, there is nothing to suggest that that child is  
20 at significant risk of harm or immediate harm. So I guess  
21 it's around understanding what people generally understand  
22 to be significant risk that would meet a threshold for  
23 Child Protection triggering involvement.

24 Often what happens with those section 627Z  
25 reports, though, the notice of risk reports, is that  
26 whilst about 8.8 per cent go on for an investigation, and  
27 that's very good, what we do with the majority of those  
28 would be to refer them to Child FIRST or other services  
29 able to support the family with those particular issues  
30 that they have.

31 MR MOSHINSKY: So some enquiries are made before the file is

1 closed?

2 MS MILLER: Yes. They are all treated as a report to Child  
3 Protection and the consistent process of gathering  
4 information, analysing information, including from police  
5 and other court jurisdictions where necessary, is applied,  
6 understanding if there is a pattern and history for those  
7 things.

8 MR MOSHINSKY: Are you saying there is a practice if it doesn't  
9 meet the level - the threshold for a significant risk of  
10 harm, so it doesn't proceed to investigation, are you  
11 saying that nevertheless there's a practice of contacting  
12 other services such as Child FIRST?

13 MS MILLER: Yes, absolutely. If there was an indication about  
14 child wellbeing rather than child protection, we would  
15 certainly make referrals in consultation with the family  
16 about that.

17 MR MOSHINSKY: I don't know whether the Commissioners have any  
18 further questions?

19 COMMISSIONER NEAVE: I have one further question. There is an  
20 allegation that in a small number of cases there is an  
21 obsessive and calculated and ongoing persecution of the  
22 parent who has the child living with them for the majority  
23 of the time - sort of a systems abuse problem in the  
24 Family Court.

25 MS MILLER: Yes.

26 COMMISSIONER NEAVE: If that were a matter that were reported  
27 to Child Protection as something which had very severe  
28 effects, psychological effects on the child, in that sort  
29 of a case would Child Protection consider seeking leave to  
30 appear as a party in the Family Court?

31 MS MILLER: Certainly we do have those cases and certainly we



1 do intervene in those matters. More often than not it  
2 would be through the Children's Court, actually, where we  
3 may say that the facts and circumstances are such that we  
4 believe that this child is at significant and immediate  
5 risk of harm. Often the Family Law Court processes can be  
6 quite lengthy. Yes, if it were able to be ameliorated  
7 fairly quickly, we could be parties to proceedings. But  
8 certainly in my understanding of exactly those sorts of  
9 cases we would be likely to actually take those matters  
10 before the Children's Court.

11 COMMISSIONER NEAVE: Thank you.

12 MR MOSHINSKY: May the witness please be excused?

13 COMMISSIONER NEAVE: Thank you very much, Ms Miller.

14 <(THE WITNESS WITHDREW)

15 MR MOSHINSKY: I now call the next witness, who is Nicole Rich.

16 <NICOLE AMANDA RICH, affirmed and examined:

17 MR MOSHINSKY: Ms Rich, could you please tell the Commission  
18 what your current position is and give a brief outline of  
19 your professional background?

20 MS RICH: Sure. I'm currently the Director of Family, Youth  
21 and Children's Law Services and the Director of the  
22 Westernport Peninsula and Gippsland regions at Victoria  
23 Legal Aid. I'm a lawyer by background. I have been at  
24 Victoria Legal Aid for about four years now. I have been  
25 in my current role for two years, and in my current role  
26 I have oversight of six family and children's law programs  
27 that cover the state, covering both the Commonwealth  
28 family law jurisdiction and the state child protection and  
29 family violence jurisdictions and the services that we  
30 provide to people that are making their way through those  
31 systems.

1 MR MOSHINSKY: Have you prepared a statement for the Royal  
2 Commission?

3 MS RICH: I have.

4 MR MOSHINSKY: Are the contents of your statement true and  
5 correct?

6 MS RICH: Yes, they are.

7 MR MOSHINSKY: Can I ask you first of all just to explain the  
8 Legal Aid funding available in family law cases? I should  
9 say at the outset that, as you make clear in paragraph 50,  
10 Legal Aid is a finite pool of funds, and I don't want to,  
11 in the limited time we have available, get into a debate  
12 about whether there should be more funds or not. But,  
13 given that context, what is the Legal Aid available under  
14 current practice in family law disputes?

15 MS RICH: I'm taking it from that question that we are talking  
16 particularly about Commonwealth family law matters and,  
17 you are right, we do have guidelines around who is and  
18 isn't eligible. We provide a range of services, so legal  
19 information, advice, duty lawyer services and so on. But  
20 I take that question as being who gets funding for a  
21 lawyer to go on the record and actually represent them in  
22 the matter and help them progress their matter.

23 So our guidelines cover both representation at  
24 family dispute resolution, which is an important part of  
25 the system and most people actually resolve their disputes  
26 through family dispute resolution, and it also covers  
27 funding for people who need to undertake Family Law Court  
28 proceedings in order to resolve their family law disputes.

29 Our guidelines focus principally on parenting  
30 matters. So there's very limited funding available for  
31 resolving property matters. So our guidelines focus on

1 where the living and caring arrangements for children is  
2 the issue in dispute.

3 In terms of who is eligible for funding there's a  
4 means test, which is probably the first consideration. So  
5 we look at income, assets, the likely cost of the matter  
6 and assessing whether someone cannot afford the costs of  
7 private legal representation. We can talk further about  
8 the means test if the Commissioners are interested.

9 There's also what's called the Commonwealth  
10 merits test, which applies in all the states and territory  
11 and it is applied in Victoria. Essentially what that  
12 means is that we look at whether someone has reasonable  
13 prospects of success in their matter and essentially  
14 whether it is reasonable to spend taxpayer funds on the  
15 matter.

16 Then there are specific guidelines around the  
17 sort of nature of the matters that we would or wouldn't  
18 fund, which can change depending on what stage you are at,  
19 whether dispute resolution or court proceedings, but the  
20 sorts of things that our guidelines look at there are  
21 things like whether there is a substantial issue in  
22 dispute or not, and family violence is a relevant  
23 consideration. We do tend to prioritise matters where  
24 family violence is a consideration in the matter.

25 MR MOSHINSKY: If we are talking about a dispute over custody  
26 of or access to children in either the Family Court or the  
27 Federal Circuit Court, under the current guidelines is  
28 there funding available for the actual contested hearing  
29 if it gets to that point?

30 MS RICH: Yes. This is a really relevant issue. When you go  
31 through family law proceedings a lot of the court

1 proceedings are based on the written material. So it's a  
2 jurisdiction where the evidence that you prepare, the  
3 orders you are seeking, the affidavits you make are very  
4 important. So our guidelines fund preparation of the  
5 material, going through all the interim stages. But  
6 ultimately you are right - a lot of matters actually  
7 resolve before you get to the final hearing. But you are  
8 right that the final stage of family law proceedings is  
9 contested hearings. We have a specific guideline  
10 currently around when we will or won't fund somebody to be  
11 represented at their final hearing. That was introduced  
12 two years ago in response to financial pressures.

13 We still fund representation for some people when  
14 they go on to the final hearing, but not all. We recently  
15 conducted a very comprehensive review of all of our  
16 Commonwealth family law services, and one of the  
17 commitments we made coming out of that was to amend that  
18 guideline and reintroduce final hearing representation for  
19 all people who are getting Legal Aid for the earlier  
20 stages, and that change will come into effect on  
21 30 October.

22 MR MOSHINSKY: So is one of the consequences, though, of that  
23 change that those people who actually get Legal Aid at the  
24 earlier stages will be narrowed?

25 MS RICH: Yes, you ask an excellent question. So when  
26 the - when Victoria Legal Aid was faced with the situation  
27 of trying to make a decision about where to put finite  
28 funds and there were financial pressures, I guess we made  
29 what I'd say was a good faith decision that we thought  
30 it's a heavily paper based jurisdiction, let's try and  
31 keep as many people eligible as possible to be assisted to

1 prepare their matters, but one of the most expensive  
2 aspects of legal representation is representation at the  
3 final hearing. So at least if we can keep as many people  
4 prepared well that's a better outcome and we might have to  
5 reduce or restrict funding for people at final hearing.

6 We had significant stakeholder feedback that was  
7 saying that there are a range of problems, which I address  
8 in my witness statement, about that, and ultimately we  
9 agreed that that feedback was valid and that's one of the  
10 reasons for the change. But you are right. There are  
11 balances that we have to make, and one of the outcomes  
12 might be that we have to further prioritise who are the  
13 clients that really can't run their matter on their own,  
14 what are the most complex issues where the children are at  
15 risk of harm and we really need lawyers in there to assist  
16 the parties and indeed the courts to make a decision  
17 that's in the best interests of the child.

18 I guess a point I would make about that is the  
19 sort of stakeholder feedback that we received about  
20 reintroducing representation funding at trial, a lot of  
21 the stakeholders that give us that feedback, they see  
22 clients who are already eligible for Legal Aid. They are  
23 not necessarily seeing people who miss out on Legal Aid  
24 altogether, for example, because of the means test.  
25 People might just miss out on Legal Aid because their  
26 means are just above our thresholds.

27 But we are highly conscious of that, and we  
28 remain very, very concerned about the fact that in  
29 Victoria in particular the means test is quite low. The  
30 truth is that you can essentially be poor and still not be  
31 eligible for Legal Aid, and I address this in my witness

1 statement.

2 The Productivity Commission did a very large  
3 review of access to justice arrangements which concluded  
4 last year and they covered the same ground in their  
5 report, and ultimately they made a recommendation that  
6 about \$200 million in additional funding across the  
7 country needs to be injected immediately, a large  
8 proportion of which should go to raising means tests for  
9 Legal Aid Commissions because too many people are missing  
10 out on Legal Aid.

11 One of the reasons that they made that  
12 recommendation is because of the family law issues,  
13 because they saw that many people who in practical reality  
14 are not going to be able to afford private representation  
15 all the way through to final hearing are not eligible for  
16 Legal Aid but they really need that help if they are going  
17 to a final hearing in family law proceedings.

18 MR MOSHINSKY: Just following on from the reference to the  
19 Productivity Commission, in paragraph 58 of your statement  
20 you refer to the Productivity Commission report and then  
21 you go on to refer in the fifth line to options to  
22 consider to perhaps look at things in a different way to  
23 resolve this issue of representation or lack of  
24 representation in Family Court proceedings, family law  
25 proceedings. Are those options there the VLA or your  
26 options that you have set out there?

27 MS RICH: Yes, they are. That said, this is not a new issue.  
28 So the issue that you are referring to is the one that,  
29 look, about 30 per cent of people in the family law court  
30 system are self-representing. It's a longstanding issue.  
31 It's not an issue that's only arisen in the last two

1 years. It's sort of been there since the history of the  
2 Family Law Courts, really.

3 But it is a significant issue, and it is a  
4 significant issue in particular where family violence is  
5 an issue in the cases because a lot of people talk about  
6 the problem, and we agree it's a problem, that you might  
7 have victims of family violence that are self-representing  
8 or the perpetrator might be self-representing or both.  
9 You have a situation where cross-examination is required  
10 for the court to test all the evidence and allow it to  
11 make a decision that's in the best interests of the  
12 children, and ultimately you have a situation where a  
13 victim might be directly cross-examined by the perpetrator  
14 of the violence or might be expected to directly  
15 cross-examine the perpetrator and because of the dynamics  
16 they might not be able to do that very well,  
17 understandably, and important information might not come  
18 out for the court to take into account.

19 So that's an issue that's been around for a  
20 while. Certainly things like raising the means test and  
21 ensuring more people had legal representation would help.  
22 But also, and the Productivity Commission recognised this,  
23 it's never going to fully address that issue, and that's  
24 why we have suggested other possible solutions that need  
25 to be looked at.

26 The Productivity Commission recommended a  
27 specific review on this issue with a view to preventing  
28 direct cross-examination where it's not appropriate. We  
29 certainly agree that a review would be timely. In  
30 Victoria, for example, you don't have a situation where  
31 direct cross-examination is permitted in family violence

1 intervention order proceedings or criminal proceedings.  
2 We think that that's a possible option that needs to be  
3 looked at.

4 But other options in my statement that we allude  
5 to include questions being routed through the judge,  
6 allowing the independent children's lawyer, if there is  
7 one in the case, to question first, maybe having an  
8 independent person who asks questions, pre-approval of  
9 questions. There's a range of creative solutions that are  
10 possible. I guess the issue is that we have never had a  
11 proper review and ultimately a decision made about what  
12 reforms are required, and then that decision implemented.  
13 That might require changes to the law, it might also  
14 require changes to court practices, but ultimately I think  
15 we need to bite the bullet on this one and actually  
16 introduce some reforms.

17 MR MOSHINSKY: The last matter I wanted to ask you about was if  
18 I could take you to paragraphs 72 and 73 of your  
19 statement. This is in terms of child protection. You  
20 talk there about a typical scenario that you or your team  
21 see in child protection matters. Can you just outline  
22 that for the Commission?

23 MS RICH: Sure. I was hear earlier, so I heard the evidence,  
24 and obviously we have talked about this a bit. So  
25 Victoria Legal Aid - we run essentially the largest child  
26 protection legal practice in the state as well. So we  
27 have a lot of experience. One of the scenarios that our  
28 lawyers can see is the situation where family violence is  
29 present in the family and there's been Child Protection  
30 involvement with the family, might be partly or solely  
31 because of that family violence and the impact that it's



1 having on the children, and we might see a situation  
2 where, for example, the mother is attempting to act  
3 protectively, to use the language of the jurisdiction, but  
4 might be struggling to do so for a range of reasons,  
5 including because of the impact of the family violence on  
6 her. The dynamics might mean that she allows a  
7 perpetrator who has been excluded from the home to return  
8 or she might have trouble saying "no" et cetera, and so  
9 she is allowing the perpetrator back or to have contact  
10 with the children.

11 I guess the situation we see is that sometimes  
12 that escalates to the point where ultimately children are  
13 removed from the home temporarily or permanently. We  
14 think sometimes it is pretty unfortunate that it escalates  
15 to that point. We do appreciate that ultimately the  
16 State, through the Department of Health and Human  
17 Services, absolutely has an obligation to protect the best  
18 interests of the children and it might get to the point  
19 where ultimately that needs to occur. But there's also  
20 plenty of evidence that shows that removing children from  
21 families and putting them in, for example, out-of-home  
22 care doesn't necessarily lead to very good outcomes for  
23 the children either. So I think it is a very dramatic  
24 thing to do.

25 We certainly believe that introducing additional  
26 supports and services earlier and trying to help a parent  
27 that's trying to act protectively to counter the dynamics  
28 of family violence and do so is a much better approach  
29 where that's going to work. This is a very complex issue,  
30 but we certainly believe that that's something where  
31 improvements could be made.

1 MR MOSHINSKY: Thank you. Those are my questions. I don't  
2 know whether the Commissioners have any questions?

3 DEPUTY COMMISSIONER FAULKNER: Just on the last point, what  
4 sort of support is the most sorely needed earlier support?

5 MS RICH: That's a great question. In our submission to the  
6 Royal Commission one of the key ones that we mentioned was  
7 housing support. So one of the issues you see is, for  
8 example, the mother might seek an intervention order,  
9 perpetrator might be excluded from the home, or perhaps  
10 the mother has left with the children as well, but if  
11 either she or the perpetrator are struggling to find  
12 housing there is a lot of pressure on that family. There  
13 might be a lot of pressure for her to return home or for  
14 her to allow the perpetrator back home. Without adequate  
15 housing support it can be very hard to resist that  
16 situation. So that's one of the key support services  
17 where we think there needs to be more resources and more  
18 of that put in place for both the perpetrator and the  
19 victim so that that doesn't occur.

20 DEPUTY COMMISSIONER FAULKNER: Thank you.

21 MR MOSHINSKY: If there are no further questions, could the  
22 witness please be excused.

23 COMMISSIONER NEAVE: Thank you very much, Ms Rich.

24 <(THE WITNESS WITHDREW)

25 MS DAVIDSON: I call Professor Hegarty.

26 <KELSEY LEE HEGARTY, affirmed and examined:

27 MS DAVIDSON: Professor Hegarty, you are a Professor of General  
28 Practice at the University of Melbourne and you are also a  
29 practising general practitioner; is that right?

30 PROFESSOR HEGARTY: Yes, correct.

31 MS DAVIDSON: You are also Director of the Postgraduate Primary

1 Care Nursing Course at the University of Melbourne?

2 PROFESSOR HEGARTY: Yes.

3 MS DAVIDSON: You are coming back to give evidence next week in  
4 relation to a lot of the research and other work that you  
5 are involved in, but you have made a statement in relation  
6 primarily to your experience as a general practitioner  
7 treating women who have experienced family violence; is  
8 that correct?

9 PROFESSOR HEGARTY: That's correct, particularly in the context  
10 of post-separation and divorce, and I'm not an expert in  
11 legal research, I'm an expert in health research, and so  
12 this is really based on my patient experience.

13 MS DAVIDSON: Are you able to confirm that the statement that  
14 you have made dated 5 August 2015 is correct?

15 PROFESSOR HEGARTY: Yes, I am.

16 MS DAVIDSON: Just picking up on some of the things that you  
17 have talked about in your statement, you have identified a  
18 concern in relation to the expectation of the legal system  
19 for women who have experienced family violence to  
20 represent themselves. You have talked about in particular  
21 the idea of a power imbalance. Can you explain to the  
22 Commission what you mean in terms of - what you have  
23 observed in relation to women and what you know about  
24 women who have experienced family violence in their  
25 relationship and ability to participate in proceedings?

26 PROFESSOR HEGARTY: I think the Commission has heard the  
27 long-term effects of a woman experiencing partner  
28 violence. Often when I see the women they are still  
29 afraid of their partner and they have been unable to  
30 advocate for themselves. They have managed somehow to  
31 leave the relationship often, but the thought of actually

1 going into a court - and we have just heard about  
2 cross-examining a perpetrator. Even just getting letters  
3 in the mail from the perpetrator's solicitor can be enough  
4 to trigger some of the post-traumatic stress disorder  
5 symptoms of flashbacks and nightmares and very anxiety  
6 inducing feelings. So the whole court proceedings are  
7 often very re-traumatising for these women.

8 MS DAVIDSON: In terms of the health impacts upon women who  
9 have experienced family violence, how might that play out  
10 in terms of the way that they present to a court or to a  
11 lawyer, to a Family Court report writer?

12 PROFESSOR HEGARTY: I think they often have great difficulty  
13 giving a coherent story, sometimes. They have taken a  
14 long time to name it as domestic violence or family  
15 violence, and so sometimes they appear chaotic or  
16 difficult or in some way they don't give a very linear  
17 story, is my experience, and that's part of my job as a  
18 general practitioner or a health practitioner to help them  
19 to name that violence and be able to give much more of a  
20 coherent story.

21 But the problem is that they can look - and often  
22 this is used against them - mentally unwell sometimes, and  
23 those diagnoses that people give, either court-appointed  
24 psychiatrists or psychologists, can often be used against  
25 them particularly in child custody disputes. In contrast,  
26 the perpetrator can often look very calm and rational,  
27 particularly if there is cross-examination across court.

28 MS DAVIDSON: We have heard about direct cross-examination, but  
29 is your view that it isn't just in the issue of  
30 cross-examination that women require assistance?

31 PROFESSOR HEGARTY: Absolutely not. We have just heard that in

1 fact many women can't get Legal Aid. So obviously they  
2 are trying to navigate the legal system, which is complex  
3 and difficult for them to do. So even if they are not  
4 being cross-examined or any of those sorts of things, just  
5 being able to get the material together, the written  
6 material together - we have just heard that - is very  
7 difficult for anybody representing themselves.

8 But the second step is even if they have got  
9 representation, my experience, and obviously I'm talking  
10 about a small number of families, is that many lawyers,  
11 solicitors and barrister, do not seem to have a great  
12 understanding of family violence. They don't seem to  
13 understand that it's not historical, that there is ongoing  
14 effects even after separation and divorce on the woman, on  
15 the children. So it's seen as "that was in the past and  
16 now we don't have to bring it up". So in many instances  
17 I think that women are discouraged from bringing up the  
18 family violence history in these proceedings and are  
19 advised that way.

20 MS DAVIDSON: From your experience, in terms of the advice that  
21 they have received about not bringing up family violence,  
22 what are they told are going to be the consequences of  
23 doing so?

24 PROFESSOR HEGARTY: They are sometimes told, in my experience,  
25 and again it's a small number of cases, that they might  
26 lose their children. They are told that they will be seen  
27 as not a cooperative parent. If they are in any way being  
28 negative about their ex-partner, they are seen as being  
29 non-cooperative, alienating the children against the other  
30 parent and that it would be much better for them if they  
31 want access and retain some custody of their children to

1 not bring it up.

2 MS DAVIDSON: In your experience is that a well-founded fear of  
3 lawyers?

4 PROFESSOR HEGARTY: Yes, I can think of cases where women - a  
5 couple of women have persisted by trying to bring up  
6 family violence issues, trying to bring up child abuse  
7 issues, and sometimes that has resulted in a negative  
8 experience for them, including having their children taken  
9 off them.

10 DEPUTY COMMISSIONER FAULKNER: When you say "having them taken  
11 from them", are you talking about in a child protection  
12 sense or family law?

13 PROFESSOR HEGARTY: No, sorry, I should make that - in fact  
14 it's gone in favour of the other person, the other parent,  
15 and they have been given full custody or majority custody.

16 DEPUTY COMMISSIONER FAULKNER: And the people who are advising  
17 them to be careful about these sorts of disclosures are  
18 members of the legal profession?

19 PROFESSOR HEGARTY: Correct. As I said, I'm talking from my  
20 own experience, but that's what I have heard.

21 DEPUTY COMMISSIONER FAULKNER: Thank you.

22 MS DAVIDSON: There have been some reforms to the family law  
23 system which are purportedly aimed at removing that idea  
24 of an alienating parent. In your experience, has that  
25 reform resulted in it completely going away or is it  
26 something that is still continuing from your perspective?

27 PROFESSOR HEGARTY: I think there is always a lag in culture  
28 and a requirement for training to overcome the lag in  
29 that. I have quoted in my witness statement some research  
30 by Professor Thea Brown and also in New South Wales  
31 research, and it seems to be, although these were done

1 prior to the latest reforms, certainly at that point in  
2 time there were a lot of concerns that I'm raising  
3 anecdotally that appeared in the online survey from  
4 Professor Thea Brown's work.

5 MS DAVIDSON: In terms of that idea or the perception that  
6 family violence might be historical, some people use the  
7 term "situational violence". Are you able to comment on  
8 that?

9 PROFESSOR HEGARTY: Yes. I think that we go back to  
10 typologies, where the terrorism versus the situational  
11 violence, and I think that that's extremely hard to judge.  
12 Even if we do say situational violence, that it was  
13 related to alcohol or stress or finances or whatever was  
14 happening in that relationship, those often still are  
15 ongoing post-separation and divorce. There's lots of  
16 times of handover and decisions trying to be made by the  
17 two parents where it still spills into it. We have just  
18 heard where women sometimes end up giving access back to  
19 an offending parent.

20 MS DAVIDSON: In terms of situational violence you have talked  
21 about stresses such as alcohol and those sorts of things.  
22 Is one of the stresses the individual woman? Is that part  
23 of a situational violence, or are we talking about - - -

24 PROFESSOR HEGARTY: No, my understanding of situational  
25 violence is that there are circumstances surrounding that  
26 relationship that make that violent rather than "it's that  
27 woman".

28 MS DAVIDSON: What about the position in relation to the way  
29 that people or the legal system understands the impacts  
30 upon children? From your experience, what do you see?

31 PROFESSOR HEGARTY: What I see, and I think this bears relation

1 to what's been said today, is that often when women are  
2 telling me, like we just heard before, that children are  
3 coming back from access visits and they are very  
4 disturbed, they are often phoning the mother and crying  
5 endlessly on the phone, they are saying they don't want to  
6 go to the fathers, they are saying that they would like to  
7 die sometimes, and so in these sorts of situations I feel  
8 that that's significant risk for these children. I have  
9 phoned Child Protection. I think this is again where,  
10 because the mother is being protective, as we have just  
11 heard, often in those situations it's very difficult for  
12 it to reach the threshold for significant harm when  
13 there's a protective mother. But of course she's not  
14 present when they are with the father.

15 I have struggled to try and find help for  
16 children who are showing behavioural signs of violence.  
17 Interestingly, they are often still doing well at school  
18 because some children who have the traumatic effects  
19 actually become perfectionists and they do quite well at  
20 school. Obviously if abuse keeps going, then it can  
21 deteriorate at school.

22 So in these situations I have often been referred  
23 to Child FIRST, and my experience there is that they are  
24 still not working with the father, they are working with  
25 the mother, who is already parenting quite well, and they  
26 are often sent to parenting programs, whether she is still  
27 parenting quite well, and so she feels very judged by that  
28 process; and the father still has not had an assessment in  
29 any way. It's only once, as we have just heard, Child  
30 Protection is engaged that then that broader assessment of  
31 the whole family seems to operate. So obviously as a



1 practitioner I'm frustrated trying to help these children  
2 stay safe when they are with their father.

3 MS DAVIDSON: From your experience, where a woman has opposed  
4 contact, say, in the Family Court and the court has  
5 determined that it is reasonable to continue contact with  
6 the father, it is theoretically open for the woman to go  
7 back to the Family Court when further concerns arise. In  
8 your experience, is that a realistic expectation of the  
9 woman?

10 PROFESSOR HEGARTY: No. One, she usually has run out of money.  
11 Often she isn't eligible for Legal Aid. She is very  
12 frightened of the court system. She has been told that  
13 maybe if she goes back and makes allegations of child  
14 abuse - I think it is completely different if Child  
15 Protection are involved, and I think that this is where  
16 the line is. I think if you can engage Child Protection  
17 you are more likely once you go back to court to have  
18 these issues seriously dealt with. If you can't engage  
19 Child Protection because it doesn't meet the threshold,  
20 although I think it's harmful to the children that I see,  
21 then we are left in this limbo where they can't go back to  
22 court because the orders may end up being worse for them.

23 MS DAVIDSON: We heard earlier on in the hearings from Anita  
24 Morris, who talked about her research demonstrating a need  
25 for ongoing monitoring of children post a family law  
26 order. What's your view about that?

27 PROFESSOR HEGARTY: Absolutely. I don't think children's  
28 voices - I know Anita spoke about that; I supervised her  
29 research. I don't think children's voices are heard.  
30 Some women I'm just telling "wait till your child is over  
31 12 and can be listened to". In the Family Court reports

1 I have seen, in the psychologist's assessments, the  
2 psychiatrist assessments, often the children's voices  
3 saying they want to live with mum, they want to live with  
4 dad, whatever, they are really discounted, and I really  
5 think that we are not particularly listening to them. My  
6 experience of the court reports I have seen and the  
7 psychiatrist reports of the women, they really don't have  
8 an understanding of family violence. They really don't  
9 seem to see - they see it as historical or they see it as  
10 false accusations. They don't see it as real, and they  
11 are making assessments on often an hour with the mother on  
12 a couple of occasions, and an hour or so with the children  
13 on a couple of occasions. So I just see it as an area  
14 where it needs reform.

15 MS DAVIDSON: You may or may not be able to answer this off the  
16 top of your head, but what are the rates of false  
17 allegations; do we know by any research?

18 PROFESSOR HEGARTY: I'm not an expert in that, but my  
19 understanding is that - I can find it out for you and  
20 check - it's a very low percentage. It's under  
21 five per cent, two per cent, something like that. Yet  
22 I know that some court report writers and also  
23 psychiatrists involved in the system may think it's much  
24 higher.

25 MS DAVIDSON: I have no further questions for Professor  
26 Hegarty.

27 COMMISSIONER NEAVE: I have one question. Have you seen  
28 examples of situations of systems abuse, that is where one  
29 parent continually initiates, usually the parent who can  
30 afford to do so, many proceedings as a means of  
31 maintaining a relationship of a kind with the other

1 parent, the parent who has the children?

2 PROFESSOR HEGARTY: Yes. I have seen that. I have also seen

3 where women consent to orders under duress and then later

4 realise what they are doing and in fact they end up going

5 back to court trying to get their children back. So they

6 sometimes look like that as well. So it goes both ways.

7 But I really see that particularly when it's been a very

8 long history the potential for that is enormous, yes.

9 COMMISSIONER NEAVE: Thank you very much.

10 MS DAVIDSON: Professor Hegarty won't need to be excused as

11 such because she is coming back next week, but perhaps we

12 could have a five-minute break.

13 <(THE WITNESS WITHDREW)

14 (Short adjournment.)

15 MS ELLYARD: We have a panel of Ms Formica, Ms Counsel and

16 Ms Matthews. I ask that they be sworn in, please.

17 <LEE FORMICA, sworn and examined:

18 <CAROLINE MARITA ANNE COUNSEL, affirmed and examined:

19 <HELEN LOUISE MATTHEWS, affirmed and examined:

20 MS ELLYARD: May I start first with you, please, Ms Formica.

21 You are an accredited family law specialist practising as

22 a consultant at Taussig Cherrie Fildes Lawyers?

23 MS FORMICA: That's correct.

24 MS ELLYARD: You have made a statement for the Royal Commission

25 that is dated 6 August 2015. Are the contents of that

26 statement true and correct?

27 MS FORMICA: Yes.

28 MS ELLYARD: Over what period of time have you practised in

29 family law?

30 MS FORMICA: I have been practising in family law for 30 years.

31 MS ELLYARD: Over the course of your practice have you acted

1           both in property and children's matters and in matters as  
2           an independent children's lawyer?

3 MS FORMICA: That is correct.

4 MS ELLYARD: I turn to you, Ms Counsel. You are also an  
5           accredited family law specialist?

6 MS COUNSEL: That's correct.

7 MS ELLYARD: And carrying on practice in your own practice; is  
8           that correct?

9 MS COUNSEL: Correct.

10 MS ELLYARD: How long have you been practising family law?

11 MS COUNSEL: Thirty years plus.

12 MS ELLYARD: As in the case of Ms Formica, your practice has  
13           covered both children's and property matters?

14 MS COUNSEL: Correct.

15 MS ELLYARD: Your statement to the Royal Commission is dated  
16           5 August 2015. Are its contents true and correct?

17 MS COUNSEL: Correct.

18 MS ELLYARD: Ms Matthews, you are also an accredited family law  
19           specialist? Where do you work at present?

20 MS MATTHEWS: At Women's Legal Service Victoria.

21 MS ELLYARD: What kind of family law do you practise in at that  
22           service?

23 MS MATTHEWS: We practise in a full range of family law  
24           services, both children/parenting matters and property  
25           matters.

26 MS ELLYARD: How long have you been practising family law?

27 MS MATTHEWS: I have been practising family law for about  
28           28 years.

29 MS ELLYARD: Your statement to the Royal Commission is dated 5  
30           August 2015. Are the contents of that statement true and  
31           correct?

1 MS MATTHEWS: Yes, they are.

2 MS ELLYARD: May I begin with a historical perspective, and  
3 each of you in some senses have touched on this in your  
4 statement, but may I start with you, Ms Matthews. When we  
5 speak about the family law system, if we think of  
6 ourselves as speaking about that system which exists under  
7 the Family Law Act, which is a Commonwealth piece of  
8 legislation, to what extent is family violence a relevant  
9 matter that the court considers, and how has the extent to  
10 which family violence is relevant changed over time?

11 MS MATTHEWS: In the practice that I have had in family law  
12 it's always been a relevant matter, and my initial client  
13 group were referred to me by women's refuges, but the  
14 response to family violence earlier in my practice was to  
15 be rather more conservative than it is today. So there  
16 was a concern that people would be at risk of not being  
17 believed if they were to raise things. I don't think that  
18 is the same risk at the moment.

19 My earlier practice was probably one, as  
20 I mentioned in my witness statement, where I would have  
21 been cautious about identifying in the documents that  
22 initiate family law proceedings maybe the extent of the  
23 violence or putting in the notice of risk that would apply  
24 to violence or abuse against children for some concern  
25 that maybe that would trigger an unwelcome intervention by  
26 the Department of Human Services or Child Protection  
27 processes. That certainly ceased to be my practice quite  
28 some time ago out of concern that children might have been  
29 put at risk if that were the case.

30 There has been a gradual change I think in the  
31 attitude of a number of the stakeholders in the family law

1 system towards family violence. Some of those changes  
2 have been good. Some of them are represented in  
3 legislative changes, such as expanding, as they did in the  
4 2011 amendments, the definition of "family violence".  
5 Some stakeholders possibly have not made sufficient  
6 changes and developments along the way, and I think we  
7 refer to some lack of understanding that might be present  
8 among family consultants and family report writers.

9 MS ELLYARD: May I turn to you, Ms Counsel. In your witness  
10 statement you reflect on the different ways in which  
11 changes to the legislation over time have affected the  
12 extent to which family violence matters can be taken up on  
13 behalf of clients. Could I invite you to expand from your  
14 perspective on how the importance of family violence and  
15 how it can be articulated has changed over time and  
16 perhaps where in the swings of the pendulum we are at the  
17 moment?

18 MS COUNSEL: The legislative framework, I think, recognises  
19 family violence. I don't think the legislation  
20 necessarily is the difficulty that we confront at the  
21 coalface of practice. I think it's really a case of  
22 understanding how violence intersects with family law and  
23 how to best advocate on behalf of a client who may have  
24 been the victim of violence, experienced violence and yet  
25 not have any evidence that supports that. I think this is  
26 the truly vulnerable woman, because there is a real risk  
27 in the family law context that that allegation may not be  
28 believed. This is not somebody that's come to the  
29 attention of the police, this is not somebody who has an  
30 intervention order, but certainly has experienced violence  
31 within the statutory definitions under the Family Law Act.

1           The difficulty will rest in parenting matters  
2       where there is a perception, rightly or wrongly, that if  
3       that argument is pushed she may not be believed. She may  
4       be perceived as what we would colloquially call her a no  
5       contact mum or an unfriendly mother who's trying to  
6       minimise the relationship between the children and the  
7       other parent.

8           I think there is an undue emphasis, if you will,  
9       on certain stakeholders, and that would include judiciary,  
10      to promote the relationship between the child and the  
11      other parent, the perpetrator of violence, rather than  
12      focus on the violence per se and how that has played out  
13      in the family dynamic. Therein lies the difficulty for us  
14      as practitioners representing that sort of woman who has  
15      been a victim of violence.

16 MS ELLYARD: Ms Formica, in your statement one of the things  
17      you note at paragraph 10 and following is family violence  
18      might not always be what the client tells you about,  
19      although it's part of the matrix that brings him or her to  
20      you. Can I invite you to reflect a little on how a lawyer  
21      encourages a client to give instructions about matters of  
22      family violence so that they can then be taken up through  
23      the family law process.

24 MS FORMICA: I think part of our role is to actually listen  
25      intuitively. When we listen to our clients you are  
26      listening to what they say but you are also trying to fill  
27      in the gaps and fill in the silences. There's also a  
28      question of the relationship that you build with the  
29      client. So there's the trust issues, there's a rapport  
30      that you have to build with them and a sense that they can  
31      rely on you. That's a big part of what we do. So it's a

1           personal relationship that we develop. It's a  
2           professional relationship, but it's also a personal  
3           relationship. One of our skills is actually to listen.  
4 MS ELLYARD: Does that involve then knowing what to listen for  
5           where we are thinking about family violence?  
6 MS FORMICA: Yes, you need to listen intuitively to them and to  
7           their experiences and to have a sense of where they are  
8           coming from and what their personal experiences may be.  
9 MS ELLYARD: Each of you has been in practice in family law for  
10          a long time. So you did your training a long time ago.  
11          But when you did it were any of you trained in family  
12          violence and what to look for?  
13 MS COUNSEL: No.  
14 MS MATTHEWS: No.  
15 MS FORMICA: No. In fact when I started in family law it was  
16          really a given that even if a child had experienced or  
17          witnessed family violence that the fallback position was,  
18          "He's a good dad. He's only violent to mum." So we have  
19          moved from that perspective, and certainly there's much  
20          more awareness of the impact of violence on children. But  
21          there's still plenty of work to be done.  
22 MS ELLYARD: To what extent is a knowledge of family violence  
23          and its impacts now requisite knowledge for family lawyers  
24          in the sense of being tested for or required as part of  
25          family law practice?  
26 MS COUNSEL: I might answer that, if I may. It's not.  
27          Certainly the specialisation brand at the Law Institute of  
28          Victoria, and I'm a member of that board, we are very  
29          interested in ensuring that across the board when  
30          specialisation is undertaken that family violence feature.  
31          I think this Royal Commission is going to show the



1 spotlight on where some of that learning has fallen by the  
2 wayside. Certainly I am urging across the board learning  
3 so that the lawyer learning isn't siloed, if you will, off  
4 to one side but rather it fits into the entire family  
5 violence piece together with the judiciary and together  
6 with other people, allied professionals, that work in the  
7 area. I think it's really important for us to sing from  
8 the same song sheet, if I may use that colloquialism.

9 I think it's key to private practice that you do  
10 develop that intuition and you do develop an ear for the  
11 client narrative even when it's not being uttered, because  
12 if you don't you won't have a client base. What has  
13 happened, I believe, over time is that more cases rather  
14 than fewer cases have hallmarks of violence in them. So  
15 again ignore that at your peril as a private practitioner  
16 because your clients simply will not remain your clients.

17 So it's been something that's evolved, if you  
18 will, organically lawyer by lawyer, but it's not systemic  
19 and we certainly are not required to do it. I know in the  
20 most recent cohort of specialisation exams in family law  
21 family violence did feature, as with children's law. It  
22 did not feature in the criminal specialisation exam.

23 MS MATTHEWS: I also agree that it really has not featured as  
24 part of the formal training of lawyers at all. I have  
25 noticed since putting in my witness statement seeing a  
26 couple of family law conferences or training materials  
27 where they are actually looking at family violence, which  
28 is really pleasing to see. I'm not sure who the providers  
29 of those trainings are going to be.

30 Our service does a fair amount of training in  
31 family violence. We provide training to other community

1 legal service lawyers who will be involved in duty lawyer  
2 services at the Magistrates' Court. So we certainly have  
3 developed a training framework for family violence and we  
4 are looking at hoping to expand that to provide those  
5 particular group of lawyers with training on family law  
6 issues that they might be coming across while they are  
7 working as duty lawyers in the family violence sector.

8 So there's a need for training going both ways;  
9 family violence practitioners needing to understand the  
10 family law implications for their clients and those  
11 lawyers practising in family law to be able to identify  
12 family violence when it occurs.

13 It is something that certainly with experienced  
14 practitioners who have had a number of people come to them  
15 over a period of time, you recognise that people are not  
16 going to necessarily self-identify that they have been  
17 victims of family violence. It might be something that  
18 you need to drill down and get. But there certainly needs  
19 to be some tools available to newer practitioners and to  
20 people who have not regularly come across that sort of  
21 problem in their work so that it doesn't go unnoticed.

22 MS ELLYARD: Can I turn then to the question of the family law  
23 system. The Family Law Act in its guidance to judges in  
24 relation to children's matters makes it clear that the  
25 best interests of the child is to be the paramount  
26 principle, but it's also apparent that once you get to the  
27 courts it's an adversarial approach to resolving what  
28 those best interests might be.

29 I wonder if I could ask each of you, starting  
30 with you, Ms Matthews, to reflect on, leaving aside those  
31 cases that go to court, what other opportunities are there

1 in the current models that we have for people to try to  
2 work out what's in the best interests of the child without  
3 the adversarial approach of a full court hearing?

4 MS MATTHEWS: In most cases where there is a dispute about  
5 parenting, parties are required to go through a family  
6 dispute resolution process to try to resolve those issues  
7 without court intervention. So that's a preliminary step  
8 if you were going to issue court proceedings, but really  
9 the step is designed to resolve the issues. It's a good  
10 opportunity to do that in a number of matters, and I think  
11 Ms Rich said in her evidence that a great deal of matters  
12 are actually resolved at the family dispute resolution  
13 process. We are strong advocates for using that process,  
14 particularly where people have been victims of family  
15 violence.

16 MS ELLYARD: Can I interrupt you there. I think it's the case  
17 that in fact a history of family violence can be a reason  
18 why people are excused from the obligation to mediate.  
19 Why is it, in your view, that mediation is a good option  
20 for people who are family violence victims?

21 MS MATTHEWS: That's right, and there was an initial exclusion  
22 for people who had experienced family violence that did  
23 not have to go through that process; they were able to  
24 litigate if they wanted to. It in fact had the  
25 unfortunate effect of basically denying people who might  
26 have experienced family violence the benefit of that  
27 mediation process.

28 We support it where the victim of family violence  
29 is supported by a lawyer; so it's a lawyer assisted or  
30 legally assisted family dispute resolution process. That  
31 then enables the power imbalance that might exist where

1       there has been - which is likely to exist, in fact -  
2       family violence to be accounted for and addressed in the  
3       process of the mediation.

4               But why we think it's a good process is that with  
5       complex families who are struggling to deal with issues  
6       which might be family violence, it might also be  
7       complicated by drug or alcohol abuse or a range of  
8       different things, or it might simply be that matter of  
9       that power imbalance, they are not necessarily going to  
10      fare better or the victims of family violence are not  
11      necessarily going to fare better going into the court  
12      system.

13             As has already been mentioned to the Commission,  
14      the court system is an expensive system, it's a complex  
15      one to negotiate without legal representation, and it puts  
16      people at risk of being cross-examined by the perpetrators  
17      of violence against them. So, even if you are represented  
18      yourself and the victim of family violence but the other  
19      person has chosen or is not represented, they have access  
20      to you in a highly adversarial court setting where the  
21      court is going to allow them a fair bit of leeway in  
22      prosecuting their own case.

23   MS ELLYARD:   Ms Counsel, in your witness statement you give  
24                   some examples of differing ways of trying to resolve  
25                   family law disputes that might operate in, dare one say, a  
26                   more therapeutic approach than the one that's available  
27                   through the courts. Could you expand on those matters,  
28                   please?

29   MS COUNSEL:   The irony is that most clients when they go  
30                   through a court system, particularly a court system like  
31                   the Family Court system, are expecting some sort of

1 therapeutic model. The reality is that many years ago  
2 there was the counselling adjunct that sat in-house at the  
3 Family Court that has ceased to exist eons ago. So it is  
4 in fact not about therapy. Whereas the more therapeutic  
5 models like family dispute resolution or indeed the method  
6 that part of my practice includes is collaborative  
7 practice, where the practitioners work in a  
8 multi-disciplinary team, including a psychologist,  
9 including a child psychologist if that's what the family  
10 requires, so it's tailor made to meet the needs of the  
11 specific family before them. There is also a financial  
12 planner.

13 The non-lawyers are in fact collaboratively  
14 trained and they are also neutral. So they are not there,  
15 if you will, to side or be part of that adversarial  
16 process. It's not like having a single expert and a  
17 shadow expert in the context of a property dispute in the  
18 Family Court. It's more focused on, "What does this  
19 particular family need in terms of getting from here to  
20 properly separated and supported through that separation  
21 process," because the dynamics of separation are  
22 incredibly volatile in and of itself without the addition  
23 of family violence. There are all sorts of complex  
24 relationships within the family unit that need to be  
25 recognised and need to be supported.

26 So part of the difficulty at the moment with the  
27 family dispute resolution model - and I am trained in that  
28 model as well - is the lack of funding and also the fact  
29 that it may not go far enough to provide all the added  
30 support that a family experiencing violence might need.

31 Having said that, I have also worked in that

1 model where violence has been a feature and you can effect  
2 - particularly in a strong co-mediation model with lawyer  
3 involvement - or start to effect some transformative  
4 change, particularly in the mind of the perpetrator if you  
5 have time enough.

6 So I think it's an ill-conceived idea if we are  
7 thinking of replacing court with a therapeutic or  
8 mediation model if it's perceived to be a cheaper model.  
9 It will not be a cheaper model. It will be hopefully a  
10 better model for families who have experienced violence.  
11 But I wouldn't necessarily imagine in that full range of  
12 service model that it's going to be any less expensive  
13 than court.

14 MS ELLYARD: Ms Formica, can I invite your comment on the  
15 differing non-court based ways in which family law  
16 disputes can be resolved and your sense of whether they  
17 are applicable or useful for a family violence context.

18 MS FORMICA: I think Caroline did pick up the point that I was  
19 going to raise which is that in that collaborative  
20 process, which has its merits in many, many ways, it is an  
21 expensive process when you have a number of professionals  
22 involved with that family. So again it becomes a cost  
23 issue of how you can assist a family who is experiencing  
24 family violence or has experienced family violence and how  
25 you manage that in an adversarial process or a  
26 collaborative process or the FDR process. Ultimately it  
27 becomes a question of financial resources and how it can  
28 fit into something like that.

29 Therapeutic counselling has worked in some  
30 cases. I have managed work with psychologists who will  
31 work with a family, provide that therapeutic counselling

1 but without the involvement of lawyers. But that places a  
2 lot of trust in someone who has the requisite skills and  
3 understands family violence and is able to work with that  
4 family.

5 MS COUNSEL: Can I just add one more thing, and I know we will  
6 talk about family reports. But there is a positive use of  
7 the family report pre-litigation. For private  
8 practitioners where clients have financial means and are  
9 willing to participate in the process, what we may do is  
10 refer the family through to somebody that is capable of  
11 writing family reports and is probably at the high end of  
12 the family report writing culture. They are able to then  
13 make recommendations, and that may include ongoing work  
14 with that particular person.

15 So what they might trial for a period of time is  
16 a recommendation from the report writer. The report  
17 writer will literally not produce the report unless and  
18 until they have to. That almost is what used to be the  
19 case when we had in-house counselling at the Family Court.  
20 So pre-litigation counselling allowed parties to go and  
21 explore what might work for their family over a period of  
22 time. They went away. Did they need to litigate? Could  
23 they work further with that counsellor or not? That sort  
24 of got lost, and it had to be farmed out, if you will, to  
25 private psychologists who were also known for being able  
26 to produce reports for Family Court purposes.

27 MS ELLYARD: We will come back to the issue of family reports,  
28 but before that can I touch on the question of culture and  
29 start with you, Ms Counsel. You talk in your statement  
30 about the importance of a strong court culture or kind of  
31 legal practice culture in responding to family violence,

1 particularly across jurisdictions, and you make some  
2 comments on the extent to which that culture might  
3 presently exist in one court versus another. Can I invite  
4 you to expand on those comments.

5 MS COUNSEL: There are huge gaps, if you will, in the various  
6 cultures of the various courts, and that has what I call  
7 the trickle down effect. If you have a court that has  
8 best practice or has a good strong culture - we are  
9 getting certain glimmers of that, if you will, and a  
10 roadway, a pathway, with the Magistrates' Court in terms  
11 of their additional magisterial training, and also the  
12 fact that they are aiming for the hubs, to create centres  
13 where they know certain things, certain services, certain  
14 combinations of doing things for families who experience  
15 violence works well.

16 That can be a little patchy in other  
17 jurisdictions, particularly those jurisdictions where  
18 judiciary might be under-resourced and time poor. We are  
19 definitely seeing where the bulk of family law disputes  
20 are decided, and that's in the Federal Circuit Court of  
21 Australia, you have a judiciary that's under an enormous  
22 amount of stress, we have delays exponentially increasing,  
23 we have retiring judicial officers with seemingly no  
24 replacements, and therefore you can have from a client  
25 perspective a very sort of patchy ride in that particular  
26 jurisdiction because of the way in which violence might be  
27 homogenised.

28 So the client experience, having gone from best  
29 court culture where the family violence sits front and  
30 centre, admittedly the subject matter of the matter that  
31 was before the Magistrates' Court, to being one of many



1 factors before the judicial officer in the Family Court  
2 system, and that being minimised or blatantly ignored.

3 MS ELLYARD: Can I invite you to comment on this issue,  
4 Ms Matthews, from your perspective. The Women's Legal  
5 Service provides family violence duty lawyer services as  
6 well as family law services. Ms Counsel is talking about  
7 the different primacy or perception of the value of or the  
8 importance of family violence in the intervention order  
9 system as opposed to the family law system. Can I invite  
10 you to comment on those matters.

11 MS MATTHEWS: I agree that the Victorian Magistrates' Court has  
12 to be congratulated on having a compulsory roll-out of  
13 family violence training. I think that's terrific. Our  
14 experience as a legal service that actually tries to  
15 connect with other community legal services about their  
16 experiences in the family violence courts let's us know  
17 that there is a great variation in the standard of  
18 practice in different courts and the experiences that  
19 clients have. So there is not a uniform application of  
20 the decision-making framework being applied in the  
21 Magistrates' Court, from what we hear. It is a court  
22 system that is also under a great deal of pressure.

23 Our regular duty lawyer service practices at the  
24 Melbourne Magistrates' Court and we also provide a  
25 back-up, if you like, service for the Neighbourhood  
26 Justice Centres. Both of those courts are comparatively  
27 well resourced and have a very positive attitude towards  
28 bringing about the best practice in the application of the  
29 family violence legislation. I don't think that that's  
30 necessarily uniformly the case, and I also think that  
31 those courts are operating under a great deal of pressure

1 of matters before them.

2 There is a lot of pressure on the duty lawyer  
3 services to bring about resolution of matters, otherwise  
4 the court would collapse under the weight of disputed  
5 matters going before them or it would be appearing very  
6 inefficient as people failed to turn up for their final  
7 hearings when that finally came about.

8 We also see a great sort of gap between people's  
9 understanding of what that particular court system can  
10 deal with. So we might find ourselves doing family  
11 violence applications for somebody who has come back for  
12 their second or third one, so they are sort of three or  
13 four years along the track of their family violence  
14 experience that brought them to court in the first place,  
15 and they are mainly doing it to provide protection for  
16 their children; but in the meantime they haven't received  
17 any family law advice, they haven't been involved in any  
18 family law process. So they don't necessarily get that  
19 connection that there is another system that's meant to be  
20 dealing with the longer term arrangements for their  
21 children.

22 MS ELLYARD: One of the things that was adverted to in evidence  
23 given by the magistrates who attended earlier this week is  
24 of course there's a jurisdiction that is given by the  
25 Family Law Act to magistrates in state Magistrates' Courts  
26 to exercise family law powers. You mention in your  
27 submission, Ms Matthews, a concern about the  
28 undesirability of family law matters being dealt with too  
29 quickly in the Magistrates' Court. But can I invite each  
30 of you to comment on the extent to which you would see  
31 there being a greater role for the Magistrates' Court

1 exercising family law powers as I think perhaps it used to  
2 do more in the past?

3 MS MATTHEWS: It used to be very common to issue your family  
4 law proceedings in the Magistrates' Court as a bit of a  
5 fast-track process, and then the moment it became a  
6 dispute you moved yourself across to the Family Court of  
7 Australia. Then they introduced the Federal Magistrates'  
8 Court, now the Federal Circuit Court. Anyway, that's all  
9 a long history.

10 But there are a couple of issues about the  
11 exercise of the family law powers. There is a problem  
12 with the section 68R power that the magistrates have which  
13 is to suspend Family Court orders regarding parenting of  
14 children, parenting arrangements. There is a problem with  
15 that in that section 68T limits the suspension for  
16 21 days, which is an absolute disconnect with the time it  
17 takes to go back to family law proceedings and actually  
18 try to resolve those issues.

19 There is an inconsistency on whether or not the  
20 magistrates will apply that legislation in the first  
21 place. They should turn their mind to it. If they are  
22 requested to, they often will. But they are aware that  
23 there is a real limitation in its effectiveness because  
24 after the 21 days, if matters between everybody aren't  
25 resolved, either the person who is trying to act  
26 protectively of their children is going to act in breach  
27 of family law orders that exist and not make children  
28 available, for example, or they are going to put the  
29 safety of their children as a secondary concern and comply  
30 with the existing family law order. So that's a problem  
31 area which I think you have been alerted to already.

1           So the magistrates are not moving beyond dealing  
2       with that sort of area in their family law jurisdiction  
3       decisions in the metropolitan courts. In regional areas  
4       they may well exercise greater or involve themselves more  
5       in making parenting decisions. But they are going to be  
6       by consent, those sorts of applications that come to that  
7       court.

8   MS ELLYARD: Ms Counsel, in your witness statement you suggest  
9       that there ought to be some reform in this area to  
10      increase the power of the Magistrates' Court in this area.

11   MS COUNSEL: Yes. Obviously Ms Matthews and I are completely  
12      ad idem in relation to the 21-day requirement lapsing.  
13      That would obviously need to be extended because it  
14      doesn't bear any reality, if you will, to a seamless case  
15      management transfer between the Magistrates' Court and the  
16      Federal Circuit Court.

17           The magistrate in fact would be best placed to be  
18      able to decide what sort of time period the suspension of  
19      parenting orders should occur for. They might also be  
20      best placed knowing that the violence, in whatever shape  
21      that takes before them, may require them to exercise other  
22      powers under the Family Law Act. That would be totally  
23      appropriate if they were to do so, particularly in  
24      relation to, say, the financial aspects. If there is  
25      financial abuse, they might be able to make orders of a  
26      financial nature.

27           Cognisant of course of the demands already placed  
28      on the Magistrates' Court and their enormous workload,  
29      they would have to have additional resourcing in that  
30      regard and also training. But what we are trying to  
31      imagine, if you will, is a system where gaps are narrowed,

1 if not eliminated altogether. So if the magistrate is  
2 best placed to make those sort of interim holding  
3 arrangements or suspension arrangements they should also  
4 be able to make a decision as to time, and there should be  
5 that flow of information between the two courts as to  
6 availability.

7 I have also included in my statement the need for  
8 them to be able to make, for example, an order for a  
9 section 11F report which, if you will, is an interim  
10 family law report that may be able to assist in the proper  
11 preparation of the matter as it transfers from the  
12 Magistrates' Court over to the Federal Circuit Court.

13 MS ELLYARD: Ms Formica, some of the evidence that the  
14 Commission has heard this week is that in many cases  
15 people arriving at the Magistrates' Court for an  
16 intervention order application are doing so having only  
17 just decided or perhaps not even yet decided finally to  
18 separate from the partner who has been violent, and there  
19 have been some suggestions from other witnesses that  
20 that's often not the right time for people to make  
21 complicated decisions about their and their children's  
22 futures.

23 Can I invite you to comment on, against that  
24 backdrop, what you would see as being the greater role, if  
25 any, for the Magistrates' Court when it is seized of  
26 intervention order matters to make longer term parenting  
27 based decisions?

28 MS FORMICA: I endorse the comments that have been made already  
29 because, whilst I appreciate that sometimes things have  
30 moved so quickly, perhaps it's been a family safety  
31 violence notice that has brought them to the court and

1 things are moving very quickly, but if there is a  
2 cessation of the relationship and things need to be looked  
3 at in respect of further parenting arrangements, then that  
4 is the right forum and venue for that to occur. So  
5 I would endorse that there be some ability for the  
6 Magistrates' Courts to have an opportunity to look at and  
7 making parenting orders.

8 One of the things that does worry me, and I have  
9 seen it in my practice, is where people somehow within a  
10 space of a few hours without having had any input from  
11 counsellors or even family law input end up with a  
12 parenting plan that's been signed off by each of the  
13 parties, and I will see some of those clients and you will  
14 ask them, "How did this occur," and they say, "It all  
15 happened really quickly, and the barrister or the  
16 solicitor who was there said, 'This is a good idea,' and  
17 we could present it and the parenting plan could be  
18 attached to the intervention order." So that does worry  
19 me, that things can sometimes take place in such haste.

20 MS ELLYARD: Ms Matthews, you comment on this in your witness  
21 statement. To some extent the pressure for that comes as  
22 part of a magistrate's concern to settle intervention  
23 order proceedings.

24 MS MATTHEWS: There is pressure coming from a couple of  
25 different directions, and one is to actually get out of  
26 there and not have to come back to that court to argue  
27 further about whether or not this becomes a final order.  
28 So a common negotiating tool might be, "If you sign a  
29 parenting plan now, it sets up the time that the  
30 perpetrator will be having with the children. Then we  
31 will agree to a final order." But also, unfortunately,

1 sometimes that pressure is coming from the magistrates  
2 themselves, and I think this is where we have magistrates  
3 who do not have a background or an understanding of family  
4 law. They are mistaken in thinking that this is something  
5 that is standard and should be agreed to.

6 I find that when we go through the process of  
7 legally assisted mediation or collaborative processes or  
8 negotiating parenting arrangements lawyer to lawyer you  
9 might be spending many, many hours actually looking at  
10 that and having gathered a lot of information beforehand;  
11 you are not deciding it quickly because there's been an  
12 expression from the bench that, "Maybe you should go off  
13 and agree to a parenting plan, and then I will make the  
14 order for you."

15 MS ELLYARD: Ms Counsel, what status does a parenting plan have  
16 once made? Can't someone just say later on, "But that was  
17 in haste. Now we want to do it again"?

18 MS COUNSEL: No, if only. A parenting plan would be produced  
19 in the Family Court as evidence of what had been agreed,  
20 and the request of the court would be, "Why should we in  
21 fact move away from this parenting plan?" So evidence  
22 would have to be adduced as to why that parenting plan is  
23 not a satisfactory plan and why should the court in fact  
24 make orders in the face of the existence of that plan.

25 I think the haste with which those parenting  
26 plans are decided upon comes, if you will, from the  
27 magistrate's current inability to deal with those sort of  
28 contested issues. So if you removed that barrier,  
29 particularly when speaking to magistrates, more often than  
30 not a lot of the intervention orders are unopposed and  
31 they are not able to effectively deal with any of the

1 adjunct or add-on or parenting orders that that woman may  
2 want to seek at that juncture. So they are somewhat  
3 hamstrung by the legislative framework. So if you are  
4 able to change that I think that need to put out a  
5 parenting plan in haste would dissipate fairly quickly.

6 MS ELLYARD: Can I take up the matter that you raise about  
7 magistrates not necessarily having time and information to  
8 assess matters. The lay witness who gave evidence earlier  
9 today, and I think each of you has seen a copy of the  
10 summary of her evidence, gave evidence of her experience  
11 in the Federal Circuit Court of having gone through the  
12 process of preparing affidavits which for her part  
13 detailed her experience of family violence, but on coming  
14 on the first return date before the court finding that  
15 there was literally no time for those issues to be  
16 agitated, there was no space for an analysis of who was  
17 telling the truth and that rather the focus was very  
18 swiftly on, from her perspective, the father, who was the  
19 perpetrator, getting access to his child and no time at  
20 all for an investigation, so she felt a similar degree of  
21 pressure to agree to something in the short term.

22 Can I start with you, Ms Formica. From your  
23 experience, is that experience of that witness common in  
24 that issues - perhaps very serious issues - can't be  
25 agitated at an early stage in Family Courts?

26 MS FORMICA: Regrettably that is the case. Interim hearings  
27 are just not set up to test the evidence. So the judicial  
28 officer relies on the affidavit material in the sense that  
29 no findings of facts will be made and it's really just an  
30 opportunity to manage. It's a case management event,  
31 really. Procedural orders will be made. Certainly



1 interim orders will be made to move the case along, but  
2 there is no real investigation.

3 MS ELLYARD: Ms Counsel, from your perspective is there  
4 anything that can be done under the current legislation  
5 that might permit greater early examination of family  
6 violence issues? The victim in the case we heard of this  
7 morning had very serious allegations to make that were  
8 just completely denied but from her point of view were  
9 central to the question of what access ought to exist  
10 between the child and his father.

11 MS COUNSEL: Not presently, but I think it's that whole  
12 information flow from Magistrates' Court through to the  
13 Federal Circuit Court. That should be happening. It's  
14 self-evident that that should happen. It doesn't always  
15 happen. It relies on people, not process, to ensure that  
16 that information is brought before the court. It relies  
17 on people that have had to cope, if you will, with a round  
18 of examination in the Magistrates' Court.

19 For women who are the victims of violence, the  
20 onus on them to have to repeat their story in another  
21 place when they can barely tell their story a first time  
22 because of the effects of violence, I just think that puts  
23 them at an enormous disadvantage; even for those women  
24 that can articulate what they have been through, the sheer  
25 pressure of volume of work and the lack of opportunity to  
26 explore that.

27 So in instances where there has been family  
28 violence certainly the framework should be altered to  
29 ensure that no judicial officer weighs in on making  
30 interim determinations until such time as the family  
31 violence material has been read, comprehended and

1 submissions have been allowed to be made as to the import  
2 of that violence, the currency of that violence and the  
3 necessity therefore as to how that judicial officer should  
4 weigh up that violence even in making interim  
5 determinations.

6 MS ELLYARD: Part of the evidence that the lay witness gave  
7 this morning was that she would have been happy enough to  
8 tell her story of violence, but no-one she felt - not even  
9 her own lawyer - wanted to hear it because even her own  
10 lawyer had the sense that now wasn't the time or place for  
11 that analysis to happen; the focus had to be on access  
12 between the father and the child whom he hadn't seen for  
13 some time, which raises issues of the extent to which  
14 lawyers in the system are properly responding to issues of  
15 family violence.

16 MS COUNSEL: I alert to this in my statement, and that's what  
17 I referred to as the trickle down effect. When you have a  
18 judicial officer making it very clear that because of the  
19 weight of matters or because of the variety in a given  
20 family that they need to adjudicate on in a very short  
21 space of time, the violence gets put to one side or  
22 ignored totally. It's either homogenised or it's not of  
23 any import or moment.

24 Now, when an advocate, a barrister in particular  
25 on their feet, is putting the client's concerns about the  
26 violence and they are told in no uncertain terms that it  
27 is not a matter of great relevance for that judicial  
28 officer, that has the effect of altering the way in which  
29 that advocate will pursue submissions in relation to  
30 family violence, not only in that case but in future  
31 cases.

1           That then gets telegraphed, if you will, to the  
2           instructing solicitor. "The court, the judicial officer,  
3           simply isn't interested at that particular point in time  
4           given the variety of matters that they are being asked to  
5           decide, so don't bother."

6           That in turn then adversely impacts or rather it  
7           changes the way in which the solicitor has to manage the  
8           family violence and the claims made by the client before  
9           them. You have to prepare that client to be disappointed  
10          because, if you do not manage that client's expectations  
11          from the get-go, you risk losing that client, and that of  
12          course is not good in private practice.

13          So from the outset you are managing the client  
14          instead of advocating most strongly for what is their core  
15          belief, what are their values, what's at the heart of  
16          their matter as they perceive it. You have to get them to  
17          try and change their framework lest you get on the wrong  
18          side of a judicial officer who simply hasn't got time and  
19          isn't focused on that issue of violence. There is a  
20          perception it's been dealt with elsewhere. "You have an  
21          intervention order. Why am I being bothered with this?"

22   COMMISSIONER NEAVE: Ms Ellyard, can I just pursue that.

23   MS ELLYARD: Of course.

24   COMMISSIONER NEAVE: So you are contemplating that at that  
25          point there would have been an investigation of the  
26          allegations. I'm just thinking about how this would  
27          actually work in practice, because you are going to have a  
28          whole lot of people in the Federal Circuit Court wanting  
29          to have some determination about interim contact with  
30          children. Often you will have an intervention order which  
31          has been made on the basis of the parties consenting to

1 it. So you won't have had a real finding of fact at the  
2 Magistrates' Court level. I'm just thinking about how you  
3 would actually manage it. I don't know how many of these  
4 a day a judicial officer would be dealing with in the  
5 Family Court.

6 I understand the sense of what you are saying and  
7 it's a much more client focused way. But I'm also looking  
8 at it from the point of view of how you would do it. You  
9 have 15 people all wanting intervention orders for access.  
10 Then you have more than one where there is an allegation  
11 of family violence. You have an intervention order which  
12 is by consent, so no finding of fact. How would you  
13 actually do it?

14 MS COUNSEL: I have alerted to this before. In the golden era  
15 of the Family Court when we had interim family reports,  
16 which still exist in the guise of the section 11F report,  
17 I believe a magistrate should be able to make an order for  
18 that to occur. It is a resourcing issue.

19 They are not your full-blown family report. So  
20 in terms of the dollar spend it is less than a family  
21 report. It certainly would require a report writer to  
22 meet with the parties, to interview children if it is  
23 considered to be child inclusive, or adduce evidence or  
24 inform themselves as to what the children's views may be  
25 even if they decide at that juncture not to interview the  
26 children.

27 But the magistrate in passing the matter, if you  
28 will, if the entry point has been an intervention order of  
29 course, over to the Federal Circuit Court could make that  
30 order, that could actually be happening whilst the matter  
31 is then being prepared and time and space made available

1 in the Federal Circuit Court list, so that the Federal  
2 Circuit Court judge, with properly trained report writers  
3 who are alive to family violence issues, would be able to  
4 canvass how that family violence has played out with that  
5 family and what the areas of concern are.

6 So, yes, I am harkening back to the golden era  
7 when those reports were more readily available. I think  
8 we have lost a lot as a jurisdiction in not having that  
9 body of knowledge and that body of skills in-house, if you  
10 will. The report writing has been scattered to the four  
11 corners of the globe, and I think we have lost a lot by  
12 virtue of not having that collective in-house learning and  
13 that advanced knowledge, working exclusively in a  
14 separation environment, if you will, rather than having  
15 individual practitioners as report writers with a mixed  
16 practice, with different emphasis, noting that couples  
17 counselling is all about keeping a couple together, so you  
18 might be spending three days a week keeping couples  
19 together and then one day a week report writing about  
20 couples who are not going to reconcile.

21 COMMISSIONER NEAVE: Could I just ask the other two members of  
22 the panel very briefly, because I'm sure Ms Ellyard has  
23 other matters she wishes to pursue, just to comment on  
24 whether you think that would work. I think it's probably  
25 a pie in the sky to think that there will be counsellors  
26 put back into the Family Court, so that won't happen. You  
27 have two very stressed jurisdictions. You have the  
28 Magistrates' Court, which is probably even more stressed  
29 than the Federal Circuit Court. Would that be workable,  
30 would that proposal be workable?

31 MS MATTHEWS: Caroline has taken her ideas through to a sort of

1 worked out model in a way, which we haven't done in our  
2 submission. We have suggested a sort of one court, one  
3 family court hub. Again, we have not worked that out to  
4 its enth degree, just really looking at it as a pilot, as  
5 a way of looking at other ways of working things.

6 We have seen as the Family Court has developed,  
7 and the Magistrates' Court and then the Federal Circuit  
8 Court, all of those things had certain ideas which didn't  
9 quite pan out when the demands on that court or each of  
10 those courts sort of grew much more than anybody had the  
11 imagination to see. So I haven't got a particular plan  
12 other than to say we need to have a consistent  
13 decision-making framework that's going to be applied from  
14 one jurisdiction to another or that's existing in a one  
15 family, one court, court hub.

16 With the example of the woman who had the awful  
17 experience in court, what I see is that the pressure is on  
18 that particular woman to have to manage the legal advice  
19 that she's receiving. So that might be that she's  
20 alleging family violence, that she's been told, "You are  
21 not going to get the opportunity to be heard today.  
22 I can't tell you whether or not this particular judicial  
23 officer is going to have read your affidavit or not. But  
24 we will get a feel for that when we walk into the  
25 courtroom." I might say to you that, "If we go in there  
26 saying 'no time' the judge might give an indication that  
27 they don't think that's a good idea for a child of this  
28 age to have to wait that long regardless of the family  
29 violence that might have been alleged." I might say to  
30 the client, "We could suggest supervised time in the  
31 meantime so you don't look like you are trying to stop the

1 re-establishment of that, but you are going to have to  
2 wait for six or nine months to get into a contact centre."

3 So what I'm really doing is putting an awful lot  
4 of pressure on an individual woman who has experienced  
5 family violence, has to understand my legal advice, has to  
6 guess the attitudes of the judge and has to overcome the  
7 lack of resources herself. So I would like to see us  
8 piloting some things to take the pressure off that  
9 particular individual 100 times over in the court each  
10 week.

11 COMMISSIONER NEAVE: Thank you. Do you want to add anything,  
12 Ms Formica?

13 MS FORMICA: Was the question about - - -

14 COMMISSIONER NEAVE: I just wanted - because this is a small  
15 but - it's not that small, but a smallish but concrete  
16 proposal for how you might deal with that issue of a  
17 person appearing in the Federal Circuit Court, interim  
18 order is made, no exploration of the issues of family  
19 violence, the problem being partly that the evidence isn't  
20 there, and if you had a full hearing then you wouldn't be  
21 able to hear all the other applications for contact.

22 I just wondered if you had a reaction - you may not want  
23 to comment - to Ms Counsel's proposal.

24 MS FORMICA: I prefer to be nostalgic, and I miss those days  
25 when you could rely on the in-house counselling section to  
26 prepare a very - it was an immediate report, the cases  
27 sometimes were stood down, the parties would go and see  
28 the counsellor, the counsellor would speak with them,  
29 prepare a just issues summary for the purpose of the court  
30 and assist in that way.

31 The section 11F reports are prepared still, less

1 so in terms of volume, and practically what it means is  
2 the case can be adjourned for a short period of time and  
3 come back. So there is really no loss of time for either  
4 parent as such. But it's a question of funding and how  
5 frequently they can be done and also the calibre and  
6 quality of the report writer.

7 COMMISSIONER NEAVE: Thank you.

8 MS ELLYARD: May I turn then to the question of family reports.

9 As you will have seen from the witness statement of this  
10 morning's lay witness, she had a very particular  
11 experience of the family report writing process, which  
12 from her perspective included a complete lack of  
13 understanding about the impact of family violence and  
14 repeated misunderstandings or mischaracterisations of what  
15 she had said in what she understood would then be an  
16 overwhelmingly influential document in her proceeding.

17 Turning first to you, Ms Matthews, each of you  
18 have talked about this in your witness statement, but from  
19 your perspective what are some of the issues that  
20 presently arise in the way in which family reports are  
21 written and used?

22 MS MATTHEWS: They are very influential. They influence a  
23 whole range of things. For example, for somebody who  
24 might be in receipt of Legal Aid for their funding of  
25 their legal process, if the family report is saying, "We  
26 don't support this person's point of view," Legal Aid  
27 might say, "We are not going to continue to fund you to  
28 dispute this." So there are very practical consequences  
29 early on which have nothing to do with the influence on  
30 the judge at the end.

31 We do see a great deal of inconsistency in the



1 standard of the reports. We see inconsistency in the  
2 behaviour of the report writers in just setting up the  
3 logistics of actually coming to the services. Again, as  
4 most of it is outsourced to private psychologists or  
5 social workers that are seeing people offsite, out of the  
6 court, there are no controls in place for women who might  
7 have been victims of family violence whether or not they  
8 are leaving in a safe environment or arriving in a safe  
9 environment. Even for those report writers who are  
10 sensible enough to say, "You are going to arrive half an  
11 hour early and you are going to leave half an hour  
12 before," they are not actually out there checking to see  
13 who is loitering in the car outside. So there's a lot of  
14 problems in those sort of practical ways.

15 As far as the family report writers'  
16 understanding of family violence, we do see many occasions  
17 where it is clear that that has not been understood, that  
18 the impact on the woman is minimised, that - I'm trying  
19 not to draw too much on specific ones that have come to my  
20 attention very recently, but there are expressions such as  
21 the woman wanted to concentrate on historical matters, not  
22 actually describing those historical matters but really  
23 giving her that she's got to get over it and get on with  
24 it, she's got to stop trying to make her fears the fears  
25 of her children and so on. So there's a lot of  
26 expressions of opinion from the family report writers that  
27 you sometimes think are not - are indicating a lack of  
28 understanding of the dynamic of family violence.

29 Then there are other report writers who will  
30 report quite fully on it, have clearly read the material  
31 that's been provided by the parties, have given

1       credibility to what the woman might have had to say, but  
2       then in their recommendations to the court they do not  
3       appear to be consistent with those observations that they  
4       have made throughout their interviewing and preparation  
5       process.

6               There's an awful lot of problems, but there's no  
7       avenue to actually address the problems that might arise  
8       unless you are actually in court, and for the clients that  
9       we see they are only getting a full-blown family report  
10      because it's the ones that are funded by the Federal  
11      Circuit Court just prior to them going to a final hearing,  
12      which is really unfortunate. It might have been helpful  
13      much before then. As Caroline was recommending, it could  
14      be available to people who have the funds to pay for a  
15      private report outside of litigation.

16             So at that point in time you can cross-examine  
17      the family report writer, you can put things to them, you  
18      can challenge their conclusions, but that's something that  
19      a skilled advocate can do. That's not really something  
20      that the person who has been involved or who is a party to  
21      the proceedings is going to be able to do effectively.  
22      But there is no other avenue of challenging the content of  
23      that report.

24   MS ELLYARD:   Ms Counsel, you have already commented to some  
25                   extent on this but can I invite you to add - - -

26   MS COUNSEL:   I agree with Ms Matthews. It's very much the lack  
27                   of consistency and it is the lack of accountability in  
28                   relation to the report writers, family report writers, and  
29                   the currency of their skill base. So there's no real way  
30                   of assessing beyond their obvious qualifications what  
31                   their training has been of late in relation to family

1 violence, and that is why you get that variety of reports,  
2 some that comprehend, some that lack comprehension of the  
3 dynamics of family violence.

4 There's also that whole emphasis of the  
5 importance of the report in the scheme of things in terms  
6 of the piece of litigation, and it becomes a default  
7 provision, if you will. Instead of it being a piece of  
8 evidence that should be challenged, can be challenged,  
9 it's considered to be inviable to cross-examination or  
10 attack, if you will, and that's at best. At worst, if you  
11 are proposing to cross-examine and do it with rigour there  
12 is a perception that somehow your client will be tarred  
13 with the brush of not accepting that which the writer has  
14 decreed and in fact your client can then be perceived as  
15 being a difficult woman or a "no contact" woman.

16 That can in fact play out in the dynamics of  
17 cross-examination. So the report writer can in fact end  
18 up hardening their attitude if they perceive that their  
19 report is being challenged, and challenged with vigour.  
20 That really goes back to court culture. In a good court  
21 culture there should be robust examination without that  
22 concern that somehow this will adversely impact on a  
23 client's case.

24 But it is that lack of consistency, lack of  
25 accountability and lack of currency in training that is of  
26 concern to those of us that practise and have to live, if  
27 you will, with reports together with the fact that reports  
28 are used to inform things such as Legal Aid Funding for  
29 the more disadvantaged women.

30 MS ELLYARD: Ms Formica, would you wish to add anything to  
31 those remarks?

1 MS FORMICA: I would endorse what has been said. But I would  
2 also like to say that the flip side of that is sometimes  
3 challenging the family report writers in cross-examination  
4 has the effect that they actually retreat from their  
5 position and you can get them to actually view things  
6 quite differently and they will make concessions in the  
7 witness box that you obviously can't get when you just get  
8 their report. So there is hope in the sense that you can  
9 cross-examine them and successfully.

10 MS ELLYARD: May I turn to a different issue. One of the  
11 pieces of material that I think you were given in advance  
12 of today is the witness statement of Anita Morris, who  
13 gave evidence before the Commission on Day 2 of the  
14 hearings, and the research that she conducted which  
15 involved speaking to women and children in the aftermath  
16 of family law matters about the experience of children who  
17 were then having contact with parents pursuant to family  
18 law orders, and one of the observations that she made was  
19 the absence of any way, it seemed, for children to be  
20 heard in the aftermath and the need for some ongoing  
21 supervision of what's happening to those children after  
22 they have left the purview of the court.

23 Ms Formica, you were I know in the past an  
24 independent children's lawyer and there used to be a  
25 practice of independent children's lawyers remaining in  
26 their appointment for a period of time after Family Court  
27 orders were made.

28 MS FORMICA: Yes, 12 months.

29 MS ELLYARD: Up to 12 months. When that process existed, what  
30 was the role of the independent children's lawyer during  
31 that period?

1 MS FORMICA: The role of the independent children's lawyer was  
2 really to monitor and supervise the implementation of the  
3 orders. So there was a voice for the children because you  
4 were still involved. So you would either receive a phone  
5 call from one of the parents, if they were acting for  
6 themselves, or you would get a call from the lawyers that  
7 there was a difficulty, you would see the children, you  
8 would arrange a meeting. There was the capacity to  
9 facilitate and assist.

10 I'm not aware of the Legal Aid funding protocols  
11 as such, but I understand now that once final orders are  
12 made a discharge of the appointment of the ICL is required  
13 because - for funding purposes. So there isn't that  
14 ongoing ability to assist a family.

15 MS ELLYARD: From the perspective of the other members of the  
16 panel, would that be a useful thing, if there were some  
17 independent monitoring of whether the orders that have  
18 been made in good faith are having the effect that  
19 everyone hoped they would have?

20 MS MATTHEWS: I think it would be a great improvement or great  
21 to return to a similar model. A number of women that we  
22 see at our service are women who might have been  
23 unrepresented or unable to fund proper representation at  
24 their final hearing. There was a lot of pressure on the  
25 Federal Circuit Court to actually resolve issues, to not  
26 have them sort of lingering on in the court system, and so  
27 what we do see are people having agreed to orders that are  
28 not going to work or orders are being made with the best  
29 intentions but in fact the issues have not been properly  
30 explored.

31 So from the clients that would come in and see us

1 we may well have people coming back within sort of six  
2 months time saying, "I have these orders. They don't  
3 work." It is a very expensive, then, process systemically  
4 to be going back to court to review that, to have all the  
5 arguments and take on them when some ongoing supervision  
6 to see whether or not this can work or the capacity for  
7 the court to put some orders in place and say, "We will  
8 come back and review this in six to 12 to 18 months time,"  
9 that actually might be a really helpful process rather  
10 than the sort of cutthroat arrangement that exists now and  
11 the ongoing return of matters that have supposedly been  
12 dealt with finally.

13 MS ELLYARD: Ms Counsel, one of the things that emerges in  
14 Ms Morris's statement is comments from some children who  
15 plainly knew that they had to go to contact and who were  
16 unhappy while they were going but there was a limited  
17 ability on the part of the mother to raise those issues  
18 again. From your experience, is that something that  
19 happens and what might the solution be?

20 MS COUNSEL: Yes, because I think the so-called final order is  
21 only the beginning of the next chapter, if you will, in  
22 the saga of the separation, particularly if it's been one  
23 marred with violence. That doesn't go away. That doesn't  
24 diminish. I talk about the lack of parent capacity  
25 through a litigation process. There's no emphasis on  
26 reskilling parents or altering the way in which they are  
27 going to interact in the aftermath of a final hearing.

28 I think the continuation - because along with  
29 Ms Formica I was - I think we were one of five independent  
30 children's lawyers before a watershed case that worked in  
31 Victoria, and the involvement in that family for that

1 12 months coupled with the report writer - so if the  
2 independent children's lawyer still had access to the  
3 person that was able to review that family and the  
4 dynamics in the family, and often independent children  
5 lawyers these days will interview children in the presence  
6 of the report writer, in any event. If that could remain  
7 in place it would give women who are financially  
8 disadvantaged after very expensive and extensive  
9 litigation somewhere to go that enables people who are  
10 informed about that family and that particular family  
11 dynamic to be able to not have to return to court but  
12 perhaps come up with a solution that might work better for  
13 that family.

14 MS ELLYARD: Do the Commissioners have any further questions  
15 for these witnesses? In that case I ask that all of them  
16 be excused with our thanks.

17 COMMISSIONER NEAVE: Thank you very much indeed.

18 <(THE WITNESSES WITHDREW)

19 MS ELLYARD: That concludes the evidence for today.

20 ADJOURNED UNTIL MONDAY, 10 AUGUST 2015 AT 9.30 AM