



**ROYAL COMMISSION INTO FAMILY VIOLENCE
SUBMISSION BY THE SUPREME COURT OF VICTORIA**

29 May 2015

ROLE THE SUPREME COURT OF VICTORIA

The Supreme Court of Victoria is the superior court for Victoria and comprises two divisions - the Court of Appeal and the Trial Division. The Court of Appeal hears appeals in civil and criminal matters from the Trial Division of the Supreme Court and the County Court, and in some matters from the Victorian Civil and Administrative Tribunal. In its criminal jurisdiction the Trial Division predominately hears homicide cases. The Court exercises a supervisory jurisdiction in relation to other courts and administrative decision makers. It has general jurisdiction in relation to civil matters.

The role of the Court is to apply the law in the cases which come before it in a public, fair and impartial manner. As a superior court, it is also the role of the Court to elucidate the law for others, setting precedents to be followed.

In relation to family violence, the matters coming before the Supreme Court are of the most serious nature. They represent a small, but important part of the overall response to family violence in our community.

The Commission's terms of reference have a strong focus on prevention. The focus of this submission is therefore on ways in which matters before the Court can contribute to prevention.

FAMILY VIOLENCE AND MATTERS BEFORE THE SUPREME COURT OF VICTORIA

Family Violence appears most prominently in the Supreme Court in its criminal and criminal appellate jurisdictions. While each case has its own unique facts and is dealt with individually, patterns emerge from those cases which can and should inform responses to family violence.

Trial Division

The majority of cases coming before the Trial Division of the Supreme Court in its criminal jurisdiction are homicide matters. Homicides in family situations, and in particular intimate partner homicides, make up a significant proportion of cases coming before the Court.

To give an indication, in a sample of 67 sentencing decisions in 2013 and 2014 for homicide convictions,¹ 25 involved the killing or attempted killing of a person who would come within the definition of “family member” in the *Family Violence Protection Act 2008* including parents, children, siblings, intimate partners and former intimate partners.

Not all of these cases would necessarily fall within the rubric of family violence as it is commonly understood.² However, within the broader sample are examples of homicide offences in which the victim was not a family member but where family violence was a highly relevant contextual factor.³ Outside of this sample there are also examples of convictions for non-homicide offences in situations of family violence⁴ and findings of not guilty by reason of mental impairment in relation to homicide charges which involve the killing of family members. This highlights the difficulty in accurately capturing in basic statistics the extent to which family violence is manifested in cases coming before the courts.

Court of Appeal

The Court of Appeal encounters family violence matters principally in appeals against conviction and sentence from the Trial Division of the Supreme Court and the County Court of Victoria. In addition to the homicide matters mentioned above, these include convictions for offences against the person (including sexual offences), property offences (e.g. aggravated burglary) and breach of family violence orders. It is not uncommon for an individual case to involve convictions for an offence against the person, a property offence like aggravated burglary and breach of a family violence order.

To give an indication, in a sample of 86 applications for leave to appeal against conviction and/or sentence made to the Court of Appeal between 1 July and 30 October 2014:

- four cases involved convictions for contravention of a family violence order;
- 46 cases involved offences against the person;

¹ Murder, manslaughter, defensive homicide, infanticide and attempted murder

² They include an attempted “mercy killing” and a manslaughter conviction of a mother who left her child in the car unattended.

³ E.g. the killing of a bystander who was seeking to dissuade the offender from assaulting a former girlfriend who had obtained an intervention order against him.

⁴ Many of these would have been charged initially as attempted murder, but resolved in a plea of guilty or conviction at trial for a lesser offence (e.g. intentionally causing serious injury).

- 13 involved sexual offences of which five involved offences against “family members” (within the meaning of the *Family Violence Protection Act 2008*); and
- of the 33 other cases involving offences against the person, 14 involved offences against “family members” (within the meaning of the *Family Violence Protection Act 2008*) of the applicant or their co-accused, 11 of which were intimate partners or former intimate partners.

There were four women applicants in the sample. Each of these cases involved non-sexual offences against the person, three against intimate partners or former intimate partners. In one case there was a history of family violence by the victim against the applicant and in another the applicant had perceived herself as facing a threat of rape by the victim.

Funds in Court

A lesser known function of the Court is the role of the Senior Master in administering funds ordered by courts and tribunals to be paid into court for persons under a legal disability (children or people with a disability that renders them unable to manage their affairs). These people are referred to as beneficiaries. Funds in Court is the office of the Court which assists the Senior Master with these duties and provides services to beneficiaries.

A significant number of beneficiaries are victims of crime who have been awarded compensation by the Victims of Crime Assistance Tribunal (VoCAT). Approximately half of all beneficiaries at any one time are children who have received money from VoCAT. Over 400 new accounts were opened by Funds in Court in 2013/2014 as a result of VoCAT orders. Many of these beneficiaries will be victims of family violence.

Every beneficiary is assigned a trust officer as their primary point of contact. Orders are made by the Court for the payment of the funds held to meet the needs of the beneficiary. In the context of victims of family violence this can include payments to assist with relocation, for additional counselling or security measures.

As a group, beneficiaries are some of the most vulnerable and underprivileged members of Victorian society. This is particularly the case for VoCAT beneficiaries many of whom have grown up in dysfunctional and abusive family environments. Over a third of VoCAT beneficiaries have a disability including mental disorders, intellectual disability, physical disability, vision impairment and acquired brain injury. The majority of this group have a mental disorder.

Recognising that beneficiaries as a group are at risk of family violence, Funds in Court provides an immediate single interface service to beneficiaries. Once a beneficiary informs staff of the potential of a domestic violence incident a staff member will attend the scene and provide assistance to the beneficiary. This may include employment of a psychologist, counselling and other

assistance. If an incident has occurred, after police or medical assistance, Funds in Court provides the same level of intervention until the situation is resolved. Beneficiaries with a disability are always referred to the Office of the Public Advocate for help if they require assistance from VCAT. Of the total number of beneficiaries over the last ten years, less than 1% has been referred on to the Office of the Public Advocate and VCAT.

INSIGHTS FROM HOMICIDE CASES

Homicide cases before the Supreme Court represent family violence at its most extreme. Analysis of these cases can provide valuable insights and inform prevention strategies in the broader context.

While the cases coming before the Supreme Court demonstrate a wide variety of circumstances in which some of the most grave instances of family violence—those resulting in death— occur, they also reflect some of the patterns which have been identified in academic studies.⁵ In the sample of sentencing decisions in family violence homicide cases referred to above:

- Men made up the majority of offenders (17/25);
- The majority of victims were former and current spouses/intimate partners (14/25);
- Men made up the majority of offenders in intimate partner homicides (10/14) and women the majority of victims (10/14). In six of those ten cases the victim had separated from or was attempting to separate from the offender. Child custody issues were a prominent feature in one further intimate partner homicide as well as a case of a father killing his two children; and
- Of the four intimate partner homicides committed by women, two involved women killing partners who had a long history of violence towards them.

The Court has in recent years seen a number of murders of children following the end of the parents' relationship, each motivated by the resentment of the father about that event⁶ and some in the midst of an ongoing family law dispute. These cases, together with intimate partner homicides in contexts of

⁵ See for example Cussen & Bryant, *Domestic/family homicide in Australia* (2015); Bryant & Cussen, *Homicide in Australia: 2010–11 to 2011–12: National Homicide Monitoring Program Report* (2015); Mouzos & Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004); Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002); Carcach & James, *Homicide Between Intimate Partners in Australia* (1998);

⁶ *R v Farquharson* [2010] VSC 462; *R v Freeman* [2011] VSC 139; *R v Acar* [2011] VSC 310; *R v Mihayo* [2014] VSC 652

separation, highlight these circumstances as particularly significant, even where there may not have been a history of violence in the relationship.⁷

In the cases coming before the Court, the offenders' powerful feelings of frustration, loss and resentment prior to the commission of the offence and inability to deal with those feelings are evident. This suggests that strategies which target male attitudes and behaviour as well as the safety of women and children in those circumstances, may be able to have an impact in avoiding these tragedies.

Such strategies should be informed by expert analysis both of the psychological factors which lead to these crimes and the sorts of interventions which might be able to address or disrupt the thought processes which result in actions of such devastating consequence.

THE ROLE OF SENTENCING

Sentencing for family violence offences, as with all offences, is carried out in accordance with the *Sentencing Act 1991* which sets out the purposes for which a sentence can be imposed and the matters to which the court is to have regard. The decisions of the Court, and in particular those of the Court of Appeal, instruct all courts as to the particular emphasis to be given to certain purposes when sentencing for family violence offences.

Sentencing Jurisprudence

A significant body of precedent has been developed by the Court in relation to sentencing considerations for serious offending in situations of family violence. Below are some of the principles which have been established, with extracts from the leading cases.

The Court has held that denunciation and general deterrence are important sentencing considerations in circumstances of family violence. Denunciation requires that the sentence reflect the community's abhorrence of the crime committed. General deterrence requires that the sentence be set at a level which will deter others in the community from committing a similar offence.

Historically perpetrators of family violence were rarely prosecuted. Even when offenders were convicted of such offences, they often received lenient sentences. Fortunately the criminal law now gives greater recognition to the devastating effects of family violence. It has also been recognised that women who are killed by their husband, boyfriend or de facto partner have frequently assaulted them many

⁷ While in some instances there had been extensive histories or prior instances of family violence in the lead up to the homicide, in others, the homicide appears to have been the first instance of violence.

times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partners.⁸

The taking of a domestic partner's life undermines the foundations of personal relationships and family trust upon which our society rests. The sentence must reflect both the sanctity of human life and society's abhorrence of violence towards vulnerable and trusting partners who could legitimately have expected the offender to be a protector from, not the perpetrator of violent abuse. An outburst of homicidal rage in such contexts is totally unacceptable. The community expectation is that the punishment assigned to such conduct must be condign so as to denounce in the strongest terms the abhorrent nature of domestic murder and to deter others from taking a similar course. Accordingly, the principles of general deterrence, denunciation and just punishment will ordinarily be given primacy in sentencing for the murder of a partner in a domestic setting even where there are present, circumstances of provocation or great emotional stress.⁹

General deterrence is of fundamental importance in cases of domestic violence. The victims of such violence are often so enveloped by fear that they are incapable of escaping the violence or reporting it to the authorities. The key to protection lies in deterring the violent conduct by sending an unequivocal message to would-be perpetrators of domestic violence that if they offend, they will be sentenced to a lengthy period of imprisonment so that they are no longer in a position to inflict harm.¹⁰

The Court has recognised the significant and broad reaching effects of family violence.

The effects of family violence are now well documented. They are not confined to physical injury. Victims often feel responsible for the violence and ashamed they were not able to prevent the perpetrator from offending. As occurred in this case, it is common for victims to deny or conceal their partners have assaulted them until the violence becomes unbearable...Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and long-lasting psychological trauma. As in the present case, the physical effects of the violence and its erosion of the victim's

⁸ *Pasinis v The Queen* [2014] VSCA 97 [53]

⁹ *Felicite v R* (2011) 37 VR 329, 333

¹⁰ *Pasinis v The Queen* [2014] VSCA 97 [57]

confidence can also affect their ability to participate in paid work and have other serious financial effects.¹¹

The Court has highlighted the importance of effective enforcement of intervention orders.

Intervention orders must be strictly adhered to, and it is very much in the interests of the community that those against whom such orders are made be under no misapprehension that the courts will punish severely those who breach such orders. The applicant's actions suggest that he believed he could breach the intervention order with impunity. Only by appropriately severe penalties can the courts make it clear to the applicant and the broader community that such conduct will not be tolerated.¹²

Family violence is a serious problem in Australia. In 2004, it was reported that family violence is "the leading contributor of death, disability and illness in women in Victoria aged 15 to 44 years". Breach of intervention orders is relatively common. In its report on *Breaching Intervention Orders*, the Sentencing Advisory Council said that, between July 2004 and June 2007, the Magistrates' Court of Victoria and the County Court of Victoria imposed on average approximately 14,000 intervention orders per year. Over a quarter of all intervention orders were breached.¹³

Senior Counsel for the applicant rightly conceded that general deterrence is a significant sentencing factor in this case, not only in relation to aggravated burglary generally, but most particularly in relation to violent offending against a former domestic partner. Of particular significance is the fact that the applicant was already subject to a Family Violence Intervention Order. Offending of this nature is too often perpetrated by men whose response to the breakdown of a relationship is one of possessive, violent rage. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. This Court has made it clear that such offending will attract serious consequences and even harsher penalties where it involves breach of an order which exists for the victim's protection.¹⁴

¹¹ *Pasinis v The Queen* [2014] VSCA 97 [54]

¹² *R v Cotham* [1998] VSCA 111 [14]

¹³ *DPP v Johnson* (2011) 35 VR 25, [4] per Neave JA

¹⁴ *Filiz v The Queen* [2014] VSCA 212 [21]

The Court has rejected any suggestion that murder of an intimate partner is to be treated as a separate and less heinous category of murder for the purposes of sentencing¹⁵ or that intimate partner violence is a less serious form of offending.

It is a shameful truth that family violence is a leading cause of illness, disability and death among Victorian women aged between 15 and 44. It is also sadly true that there are a great number of women who live in real and justified fear of the men who are, or were, their intimate partners. In such circumstances, the submission that the complainant's level of fear when being attacked by her ex-partner was less than it might have been if she had been attacked by a stranger should be rejected.¹⁶

From sentencing decisions to effective general deterrence

As explained above, deterring others from committing offences of family violence has been identified by the Court of Appeal as a particularly important sentencing factor. The Court of Appeal has also noted that a sentence can only have that wider deterrent effect if it is publicised across the community and especially to those who are at risk of offending.¹⁷

The Supreme Court makes its sentencing decisions available for public access via the Austlii website, its own website and social media. It will often provide an internet-based audio broadcast of sentencing remarks which is then picked up by media outlets in their coverage of the case.

There are however inherent limitations on the ability of the Court to communicate a message to the community through sentencing. While there are many media reports of sentencing decisions, they are usually limited to high profile or controversial cases. Making decisions available via the internet and social media will only reach a limited audience.

In *DPP v Russell* the Court of Appeal made the following statement

...it is the responsibility of government to ensure public safety. And Government must therefore take responsibility for communicating the deterrent message to those who need to hear it. That requires sustained effort and the commitment of substantial resources. Without that, the community simply will not derive the benefit—in greater public safety—which should flow from the painstaking work of sentencing judges and magistrates in this State. Self-evidently, if the message is

¹⁵ *R v Goodall* [2000] VSCA 106;

¹⁶ *Filiz v The Queen* [2014] VSCA 212 [23]

¹⁷ *DPP v Russell* [2014] VSCA 308

not getting through no change in sentencing law can make the difference.¹⁸

And later

...the publication of sentencing reasons can never be enough, by itself, to send 'the message' on which the theory of general deterrence rests. That requires the kind of sustained communication campaign which has been so successfully conducted by the Transport Accident Commission, in relation to death and injury caused by speed and alcohol and drugs.¹⁹

While those statements were made by the Court of Appeal in the context of alcohol fuelled street violence, as general statements about the operation of general deterrence they are equally applicable in the context of family violence. Unless those who may potentially commit offences of family violence are made aware of the significant sentences which have been imposed on others, those sentences cannot serve as the deterrent they are intended to be. Efforts are required beyond the courts to get the message across.

EDUCATION AND RESILIENCE

Judicial Education

The Supreme Court recognises the importance of judges having an understanding of social issues in general, and family violence in particular, in order to carry out their duties. A knowledgeable, skilled and experienced judiciary is critical to the administration of justice, the experience of individuals interacting with the courts and general community confidence in the courts.

Judges bring with them extensive legal and practical experience when appointed to the Court, and for many the nature and consequences of family violence will be well known. There remains a need however for specialist programs to allow all judges to be fully informed about the relevant law and the broader issues of family violence, as well as developing "court craft" skills in dealing with family violence cases.

The Supreme Court takes a leading role in supporting the work of the Judicial College of Victoria (JCV) in developing and presenting programs and resources for judges. The JCV operates on a limited budget. The JCV has an ongoing Family Violence program for Magistrates, but requires further funding to adapt and expand this program to the higher courts. From the Supreme Court's perspective such a program would be very valuable.

¹⁸ *DPP v Russell* [2014] VSCA 308 [6]

¹⁹ *Ibid* [71]

Resilience

There is also a need to consider the mental health and well-being of judges hearing trials and appeals in family violence cases and their staff. These cases expose all involved to traumatic imagery and emotional evidence. Judges and staff are often dealing with one case after another with an accumulating effect.

Cases involving sexual abuse and the killing of children are particularly difficult. Judges and staff must maintain the impartiality of the Court and this will often involve artificially containing ordinary emotional reactions to the material which is presented. At the same time they must engage directly with witnesses, victims and offenders.

The Court, together with the JCV and Court Services Victoria, has undertaken some work in this area, seeking to put in place strategies and resources to build resilience. These include providing breaks for judges following particularly difficult trials, mentoring arrangements and making counselling services available. There is a project currently underway in relation to staff regarding the assessment and control of vicarious trauma. However, it is an area where more needs to be done. Judicial experience is one of the Court's most valuable resources and these strategies are an important part of ensuring judicial longevity.

FACILITIES FOR VICTIMS OF FAMILY VIOLENCE

Providing an accessible, secure and comfortable court environment is important both to the experience of individuals involved in court proceedings and to the administration of justice. These issues are particularly acute in the context of family violence cases, where there are often security risks associated with attending court and where the participation of vulnerable victims and witnesses is critical.

The Supreme Court of Victoria operates across a number of buildings within the Melbourne legal precinct as well as regional locations. Most criminal trials are held in the main Trial Division building at 210 William Street. The building was built in the 1880s and is heritage listed. It has been added to, maintained and restored at various points in time in attempts to adapt to changing needs, however it continues to have a number of inherent limitations which are incompatible with the operation of a modern court.

One of those limitations is the lack of appropriate facilities for victims, including victims of family violence.

Court Network is an organisation that arranges volunteers to be available at the Court on a daily basis. They assist people attending court, including victims, where they can. The volunteers receive training, but do not have any particular qualification.

The Court has made available a small room for use by Court Network on an ongoing basis with tea and coffee making facilities. On an *ad hoc* basis the Court has also been able to temporarily convert office space and meeting rooms to accommodate victims and witnesses at the request of the Witness Assistance Service of the Office of Public Prosecutions.

It has not been possible to date to accommodate a larger purpose built facility on-site which would provide private break out spaces for victims and witnesses during the course of trials due to the constraints of the building and resources for capital works. Victims in family violence cases have often been found in unheated corridors and public courtyards clearly in distress.

The courtroom environments themselves are intimidating and physically uncomfortable with their imposing proportions and timber bench seating for the public.

Prisoners must be brought to and from courtrooms through public corridors. This makes it difficult to provide victims and witnesses with an environment in which they can be assured of avoiding or minimising contact with an accused.

While there are measures available to assist victims to feel more secure, such as remote witness facilities, there is significant scope to improve the levels of security and comfort for victims of family violence within the Supreme Court.