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Attention:

Justice Philip Cummins
Law Reform Commission

30 September 2015

Re: Role of victims of crime in the criminal trial process

By the time that a homicide reaches the court the victim has disappeared from human activity. This is reflected in the emphasis placed by the court in dealing with the question 'How to deal with the accused?' rather than how to prevent similar occurrences in the future. Dealing with the living rather than the dead has led the court to extend further and further the mitigation of homicide into manslaughter

'Marital murder, the police and the courts'.

Frances H Lovejoy

Women and Crime Seminar, Australian Institute of Criminology 1979

In this submission I wish to focus on the position of the female victim – and her family - of intimate partner murder, a question now placed on the national agenda by Prime Minister, Malcolm Turnbull.

Some of the points made will have relevance to other forms of violence, but essentially the paper deals with the most extreme form of gender-based

violence, what I call 'wife murder'. The term 'family violence' has the capacity to camouflage the true circumstances of the violence, for as the research confirms, such killings overwhelmingly occur either after a woman leaves an intimate male partner or threatens to leave him. In essence women are killed because they have asserted their independence. Historically this truth has been obfuscated by notions of such crimes being driven by a loss of control brought on by the behaviour of the female victim.

The Primary Victim

Apologising for past failings

Despite the progress of the law, including the abolition of the provocation law, woman killed in such circumstances continue to have their human rights substantially compromised in Australian courts. In *R v Keogh* (1989), the case involving the killing of our sister, 25-year-old Vicki Cleary, we were forced to endure the transformation of a violent man into a hapless victim found guilty of manslaughter due to alleged provocation. In what must surely rank among the most questionable provocation defences offered in Australian criminal justice history, our sister's decision to leave a violent man effectively became the cornerstone of the defence argument that her killer should be entitled to such a defence.

It is now recorded in a courtroom transcript that Peter Keogh did not murder Vicki Cleary. So too are the killer's words, 'I was angry that she would lie to me, she would be deceitful ...(and)...I have always loved Vicki.' What's not recorded is how the ruling transgressed Vicki's lawful right to control her own destiny. We can quibble about the rights of the accused at law to have everything favourable admitted in court, but this should not come at the expense of the established rights at law of women. There is after all no law that says a woman must stay with a man or that if she does she is 'deceitful' and culpable in her own murder.

That proposition was as true in 1989 as it is today, for post provocation there has been a number of murder cases under the now abandoned Defensive Homicide Law that resonate with the prejudices of the past. In *R v Sherna* (2007) for example the court heard that the killer was a 'henpecked husband' who became 'the mouse that roared. It was a trial in which the dead woman's behaviour was judged in ways far removed from the supposed application of the law. The arguments raised for the abandonment of Provocation in 2005 and Defensive Homicide in 2013 were founded on the proposition that in their application these laws discriminated against women.

It's because of this history that I have raised the question of an apology to the women whose killers were tried under the old provocation law. I would respectfully argue that it is a folly to discuss victims' rights while ignoring the treatment of past victims under a law we now accept to have been discriminatory towards women. A snapshot of criminal justice history in Victoria beginning with the publication in 1970 of Germaine Greer's *Female Eunuch* – a feminist milestone - would reveal that on current trends between 2,500 and 3,000 women have been killed in 'domestic homicides' across Australia in that forty-five year time frame. No government agency has to date provided the definitive number or accounted for how many of those homicides resulted in manslaughter verdicts.

The judicial response to 'wife killing' in Australia can reasonably be described as our 'guilty secret'. While overwhelmingly these cases are disturbing, many are scandalous. While researching trials in Victoria I discovered that no less than eight 'wife murder' cases in 1972 had resulted in not guilty verdicts. Among them was the case of Edward Quinsee, who drove to Bendigo, produced a rifle and shot his estranged wife multiple times. Offered a provocation defence, he was found not guilty of murder, whereupon Justice Gillard in his sentencing remarks concluded: 'I do not absolve you from all blame for the separation, but your wife did a harsh thing to you (Mr Quinsee) when she left'. The same prejudices were surely at work when a jury in 1979 found Max Duncombe guilty of shooting dead his 18-month-old son, but guilty only of manslaughter for deliberately shooting dead his wife only moments after killing his child.

It's my contention that the overwhelming majority of these verdicts did not turn on the question of intent or loss of control but on deep-seated anti-female prejudices at work in the society and the courtroom. For this I believe it is time to say 'sorry'. If we can't and don't apologise, any commitment to victims' rights will be compromised. We must apologise not only because it is right, but also because it will constitute a profound first step towards the cultural change identified as essential by the Prime Minister.

The Secondary Victims

Case Management

At a recent trial in Melbourne's Supreme Court I was present when the Crown Prosecutor addressed the family of 'murdered' woman in the foyer of the court. It was a far cry from 1989 when we had virtually no opportunity to express our collective concerns about the conduct of the trial, but the foyer is not the place for such discussions.

It would be my recommendation that we establish a victims' secretariat with the responsibility of liaising with the family of murdered women. Those responsibilities would include advising the family in relation to:

- The DEFENCE potentially undertaken by the accused and how it might be played out in court.
- The way RELATIONSHIP EVIDENCE will unfold in the court and the role the family might play in this and evidence regarding the homicide.
- The manner in which the case might be played out in the media and how the family might deal with the MEDIA.
- The rights of the family in relation to the status of CHILDREN and PROPERTY, joint or singular, of the deceased woman.
- The ongoing HEALTH of the family and how it might deal with such questions

Victims do not need a metaphoric 'wailing wall'. They need strategies that acknowledge the appropriateness of their interest in the conduct of the trial.

We understand that the Crown Prosecutor cannot conduct a running commentary on a trial, but that doesn't mean they can't appoint intermediary entrusted with the role of looking after the interests, immediate and longer term, of the family. That should involve the allocation of skilled professionals trained in law, psychology and social work.

The application of these views in the context of selective questions asked in the Consultation Paper

7 Should victims have a greater role in the decision to accept a plea of guilty after plea negotiations?

8 Is there adequate consultation with victims before a decision is made to continue? with charges, discontinue a prosecution or accept a plea of guilty after plea negotiations? If not, what additional consultation do victims require?

9 If the prosecution fails to consult with victims about a decision to discontinue a prosecution, or to accept a plea of guilty after plea negotiations, should this attract consequences? If so, what should those consequences be?

10 Should victims be given the opportunity to access legal advice or representation during any consultation with the prosecution?

Our Position

If the family of a victim has available to it information in relation to the OPP's considerations it will at least be in a reasonable position to make an informed decision on plea-bargaining. In R v Keogh (1989) we would never have accepted a manslaughter plea – the DPP did not – yet criminal justice is riddled with cases in which such pleas have been accepted without consultation with the family. Many of these – along with the not guilty verdicts of course – would have been psychologically devastating for families. Providing victims with legal advice will ensure that their position is not ill informed or driven by emotion alone.

Chapter 9

The victim's role in sentencing and the purposes of sentencing

35 Should the victim have a greater role in sentencing? If so, what should that role be?

36 Should the purposes of sentencing explicitly include the needs and interests of victims?

OUR POSITION

We do not believe that sentencing should be the preserve of the victim's family, only that the family should be offered the opportunity to make a submission, in much the same way the defense and prosecution do today. We accept that the sentencing remarks by judges today are a marked improvement on what happened twenty-five years ago, when such remarks might run to little more than a handful of pages. It should be incumbent on every judge to offer a detailed account of the impact of such crimes on the family.

Victim impact statements

37 Should further limits be placed on the publication and distribution of victim impact statements?

38 Should a broader group of victims be permitted to make victim impact statements?

39 Should community impact statements be introduced?

40 Should victims be permitted to make submissions in relation to sentencing?

41 What should be the role of the prosecutor in preparing victim impact statements?

We do not believe anyone other than the family has a right to make

comments in the courtroom in the form of victim impact statements. In the case of murder the pain is far too personal to allow third parties, i.e. community impact statements et al. Nevertheless, there should be provision for a victim's family to deliver statements that contextualise the act of violence the court has dealt with. That should include the right to critique the conduct of the trial and place it within the context of the national conversation we are now having around violence against women. This is consistent with our proposition that violent crimes against women are in a distinctive category.

THE VICTIMS CHARTER

56 Should the *Victims' Charter Act 2006* (Vic) be amended to include other rights, or broaden existing rights for victims?

57 Should victims have a legal right to enforce some or all of the rights contained in the *Victims' Charter Act 2006* (Vic)? If so, how might this be achieved, and in what circumstances?

58 Should there be a legislatively prescribed process for investigating and resolving complaints about breaches of victims' rights? If so, what might this process look like? Should the Victims of Crime Commissioner in Victoria have a role in complaints resolution relating to breaches of the *Victims' Charter Act 2006* (Vic)?

59 What remedies should be available for breach of a victim's rights?

60 Are there gaps in the provision of victim support services?

61 How should victim support services be prioritised?

62 How might the delivery of victim support services in Victoria be improved?

63 Do victims need personalised legal advice and assistance? If so, how should such support be delivered?

64 What role could the Victorian Victims of Crime Commissioner have in relation to victim support services?

Our Position

We believe it is time to '**broaden existing rights for victims**', however this needs to be done in new and radical ways. In the aftermath of the verdict in *R v Keogh* (1989) I wrote to the DPP seeking a review of the provocation ruling and the sentence. No such review of the ruling, under what I was led to believe were the provisions for a Director's Review, was undertaken and the sentence, of less than four years, was deemed not to have been 'manifestly inadequate'.

We believe the family of murdered women should have the capacity to take their concerns to an independent body, with legal support, to ensure that a more thorough assessment is provided. Had there been a panel or committee of this kind – with representatives from the community, academia and law - operating in the 1970s, I believe the anti-female orthodoxy of the courts would have been exposed much earlier.

Given the creation of the position of the **Victorian Victims of Crime Commissioner** it would seem appropriate that this person/office would be entrusted with the role of examining the operation of the law and the circumstances that might have contributed to the death of a woman. Whilst such findings would have no impact on the verdict or the sentence handed down, there would still exist the opportunity for the Commissioner to offer a more comprehensive assessment of the circumstances of a homicide, including the defendant's history, the media coverage and ultimately the assumptions played out in the courtroom.

Traditionally inquests into homicides have been little more than fact-finding exercises designed to determine the level of culpability of a defendant. The inquest into the 2014 murder of Luke Batty did however appear to break with the orthodoxy. In focusing on the culpability of the killer and the possible culpability of agencies and institutions in Luke's death, this inquest sought to place the murder in a social and institutional context, with Luke's mother Rosie's rights as a victim pre-eminent in the minds of those dealing officially with the murder.

It's our contention that the same imperatives that underpinned the public discussion and the inquest into Luke Batty's murder should inform our examination of the murder of a woman. Every family that has experienced such a murder deserves to have an inquiry of the kind undertaken in the Batty case. Given this will not happen at trial, and rarely are the matters properly canvassed at trial, the office of the **Victorian Victims of Crime Commissioner** seems the most logical setting for an independent inquiry.

If we are to engage in the kind of cultural change advocated by the Prime Minister as crucial to preventing violence against women we should start with the most profound act of violence, murder. Based on current trends, that means examining and inquiring into the circumstances of between 60 and 70 murders per year Australia wide and maybe a dozen at state level. In the adversarial system no such examination occurs. We would ask that the Law Reform Commission recommend that every case involving the murder of a woman, whether in 'domestic' circumstances or by a stranger, be subject to an independent inquest or examination.

Apropos this matter, although it might seem somewhat tangential, I have been extremely frustrated in my dealings with various institutions, as I've sought answers regarding the death of our sister. I recently sought access to Victoria Police's 2007 Cold Case investigation into the suspected death of Sam Pidgeon in 1966 at the hands of our sister's killer, Peter Keogh. Just as Rosie Batty wanted to make sense of Luke's death, so have I endeavoured to do the same. It might have been 28 years ago but the questions have not dissipated. I want to know as much as possible about the killer's passage

through life in order to be more informed as to what produces men like him and how we might engage in the cultural change flagged by the Prime Minister. The desire to engage in such research must be viewed in the context of my place as a victim of crime.

If the Victims Charter is to mean anything it must be sensitive to what drives people like Rosie Batty and me. To have Victoria Police deny me the right to view the investigation into Keogh's involvement in the death of Sam Pidgeon is disappointing and hurtful. It is mirrored in the difficulties I've faced seeking access to courtroom transcripts at the Office of Public Prosecutions relating to the murder of women in circumstances like those of our sister. What is the point of a Victims' Charter that dictates that as a victim of crime 'you can expect: To be treated with courtesy, respect and dignity' if such access is denied?

All matters relative to the murder of Vicki Cleary – as has been the case with the Luke Batty inquest – should be seen as critical to the rights of Vicki's family as victims of crime.

In summary

This submission deals solely with the rights of female victims of homicide, in what are deemed 'domestic' circumstances, and the rights of the family of the woman.

We would like to see the following matters addressed:

(1) The victim's rights

The role of the now abandoned provocation law in compromising the human rights of women killed by men in the context of estrangement is well documented. Nevertheless, many commentators and researchers believe the courts continue to deliver narratives in which dead women are blamed for the violent actions of a man. This view was reflected in the former Liberal government's decision to abolish Defensive Homicide and its desire to 'reduce victim blaming in homicide trials' by way of its reforms to the Evidence Act (2008).

When the current Prime Minister committed to the campaign to stop violence against women he described the violence as being predicated on disrespect. We must somehow reconcile the rights of an accused man to a robust defence with the inalienable rights of a woman. If the Law Reform Commission does no more than reaffirm this basic tenet it will be a step

forward. However, what it must surely do is pressure government to further tighten the rules governing evidence allowed at such trials.

I would further request that the LRC encourages the government to provide the funds to properly research the history of female homicide in the state – pre and post war – and the courtroom narratives accompanying those homicides. The courtroom narratives – defence arguments, sentencing remarks, police evidence – provide a window on the community attitudes and layers of disrespect that have sustained the violence. I genuinely believe that until we place the current epidemic of ‘wife killing’ in an historical context we will not properly understand the reason for the rates of murder. As previously argued, every case involving the murder of a woman should be thoroughly investigated, independent of committal hearings and inquests.

(2) The Apology

Just as Prime Minister Kevin Rudd did in delivering an apology to the indigenous ‘Stolen Generation’, so too do I believe there should be an apology to the victims of the women whose killers were tried under the abandoned provocation defence.

It’s time we did the research that enabled us to quantify not only the number of women killed in ‘domestic murders’, but also how many men were found not guilty of murder at trial. Whilst we don’t know the exact figures at present, we know the number is not insignificant. Only two month ago I spoke with ‘Nellie’, the mother of, Joy Tinetti, shot dead in 1972. Nellie told of her ongoing suffering and the pain she endured as a consequence of her daughter’s killer being found not guilty of murder. There are hundreds of women like Joy’s mother. My late mother was one of them.

Whilst there should have been an apology when the provocation law was abolished in 2005, it would be timely now given the public debate around violence towards women. The apology would carry profound symbolic significance and play a major role in the passage of restorative justice.

(3) The family’s capacity to protect a victim’s rights

As per my earlier comments, we need to institutionalise practices that enable the family of a victim to participate intelligently in the application of justice. This should not be a process driven by revenge, but one that seeks to enable the family to ensure all facts relevant to the victim’s rights are presented in court.

(4) The wellbeing of the family

Notwithstanding the inevitable and lasting trauma, engaging the victim's family in the trial process will at least ensure that the trauma is not aggravated and enhance the impact of counselling services. Equally, some consideration must be given to the impact of the trauma of murder on the health of the family. Our mother suffered acute bouts of melancholy and our sister, Elizabeth, who was only 14 years of age when Vicki was murdered has experienced some serious health issues. There should be no time constraints on the legal rights of family members to seek compensation in relation to health issues, seen or unforeseen, arising from such trauma.

Yours truly,

Phil Cleary

Independent Member
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(1992-1996)

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1998

Author: Cleary Independent (1998)
Just Another Little Murder (2002)
Getting Away With Murder (2005)