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Recent Developments in Domestic-Violence Law in Canada, Australia, and New Zealand

Wayne K. Gorman

With the demise of the Law Reform Commission of Canada, proposals for changes to our criminal-law processes at the federal level tend to be statutory in nature. In this edition's column, I want to review some recent studies and reports in the area of domestic violence released in Canada, Australia, and New Zealand.

CANADA

A recent call for proposals from the Public Health Agency of Canada contained an interesting review of the problem of domestic violence in Canada. The Public Health Agency of Canada is a governmental agency designed to “promote and protect the health of Canadians through leadership, partnership, innovation and action in public health.”¹

It issued a *Call for Proposals: Supporting the Health of Victims of Domestic Violence and Child Abuse through Community Programs*. The Agency invited “eligible organizations” to submit applications for projects that “will address gaps in current knowledge about the effective design and delivery of community-level and multi-sectoral programs that address the physical and mental health needs of victims of domestic violence and child abuse.”² Though the call for proposals has been placed on hold, the material attached to the call for proposals includes a very interesting analysis of domestic violence in Canada. The fact that a national health agency would see domestic violence as a “health” issue rather than simply a criminal-law issue reflects the widespread impact of domestic violence on Canadian society.³

THE HEALTH AGENCY'S RESEARCH CONCLUSIONS

The Public Health Agency notes that the “research evidence points to the lifelong health effects of violence”:

Women abused by their partners experience high rates of injury, chronic pain, post-traumatic stress disorder, and substance use problems. Children who have been abused or who have been exposed to domestic violence need immediate attention to support their recovery and help

mitigate health problems later in life (e.g., mental health issues such as depression, anxiety, self-harm, and risk-taking behaviours).⁴

The Public Health Agency suggests that approximately 30% of women in Canada have reported experiencing domestic violence in their lifetimes. However, the Agency suggests that “this statistic does not represent the true proportion of victims in Canada because many do not report their abuse.” In fact, “[d]ata from a Canadian self-reported survey indicated that only 24% of women who had been abused reported it to the police. Rates of domestic violence are higher for women compared to men in every age group, and Aboriginal women experience rates more than two times higher than non-Aboriginal women.”⁵

The Health Agency summarized its findings on the “health problems” engendered by domestic violence by pointing out that it impacts both victims and their children:

Research indicates that domestic violence and child abuse cause a range of short-term and long-term health problems and can even result in death. The impacts of violence can be physical, emotional, and behavioural. For example, women who have been abused by partners suffer high rates of injury, chronic pain, post-traumatic stress disorder, and substance use problems. If a child is exposed to violence or has been abused, the effects on health can last a lifetime. Childhood abuse is associated with chronic diseases later in life such as heart disease, mental health issues such as depression, anxiety, and problematic behaviours such as self-harm and risk taking.

Research shows that the longer and more severe the abuse, the worse the health impacts. There is also evidence that suggests that children and youth who witness violence between their parents, compared to those who do not, are more likely to seek medical attention for eating disorders, sleeping and pain problems, poor mental

Footnotes

1. *About the Agency*, PUBLIC HEALTH AGENCY OF CANADA, http://www.phac-aspc.gc.ca/about_apropos/index-eng.php.
2. *Call for Proposals: Supporting the Health of Victims of Domestic Violence and Child Abuse through Community Programs*, PUBLIC HEALTH AGENCY OF CANADA, <http://www.phac-aspc.gc.ca/sfv-avf/proposal-proposition/index-eng.php>.

3. See also THE CHIEF PUBLIC HEALTH OFFICER'S REPORT ON THE STATE OF PUBLIC HEALTH IN CANADA 2016: A FOCUS ON FAMILY VIOLENCE IN CANADA (2016), <http://healthycanadians.gc.ca/publications/departement-ministere/state-public-health-family-violence-2016-etat-sante-publique-violence-familiale/index-eng.php>.
4. *Call for Proposals*, *supra* note 2, at Section 1.
5. *Id.* at Appendix A.

health, and substance use problems. They are more vulnerable to suicide.⁶

NEW ZEALAND

The New Zealand Department of Justice and the Law Commission of New Zealand have recently released a number of reports assessing the extent of the problem of domestic violence in New Zealand.

THE DEPARTMENT OF JUSTICE

For instance, on September 13, 2016, the Department of Justice of New Zealand announced that it had reviewed the *Domestic Violence Act 1995*. The Department of Justice announced that the changes it was proposing would include:

- getting help to those in need without them having to go to court;
- ensuring all family violence is clearly identified and risk information is properly shared;
- putting the safety of victims at the heart of bail decisions;
- creating three new offences of strangulation, coercion to marry, and assault on a family member;
- making it easier to apply for protection orders, allowing others to apply on a victim's behalf, and better providing for the rights of children under protection orders;
- providing for supervised handovers and aligning care-of-children orders to the family-violence regime;
- making evidence-gathering in family-violence cases easier for police and less traumatic for victims;
- allowing a wider range of programmes to be ordered when a protection order is imposed;
- making offending while on a protection order a specific aggravating factor in sentencing; and
- enabling the setting of codes of practice across the sector.⁷

THE LAW COMMISSION OF NEW ZEALAND

On May 11, 2016, the Law Commission of New Zealand announced that it had been asked to conduct a reexamination of whether the law in respect of a victim of family violence who commits homicide can be improved. Such an examination had been recommended by the New Zealand *Family Violence Death Review Committee*.

In its Fourth Annual Report, published in 2014, the *Family Violence Death Review Committee* concluded that “New Zealand is out of step in how the criminal justice system responds to [victims of family violence] when they face homicide charges for killing their abusive partners.”⁸ To address this, the Committee recommended that the government reexamine the

options for amending the defence of self-defence and introducing a targeted partial defence to murder.

The Law Commission of New Zealand announced that as part of this review, it would consider:

- (a) whether the test for self-defence, in section 48 of the *Crimes Act 1961*, should be modified so that it is more readily assessable to defendants charged with murder who are victims of family violence;
- (b) whether a partial defence for victims of family violence who are charged with murder is justified and, if so, in what particular circumstances; and
- (c) whether current sentencing principles properly reflect the circumstances of victims of family violence who are convicted of murder.⁹

THE LAW COMMISSION'S REPORT

On May 12, 2016, the Law Commission of New Zealand released its report *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*.

The Law Commission suggests that New Zealand “has the highest reported rate of intimate partner violence in the developed world. Intimate partner homicides are all too common. Most of the time, they are committed in the context of an ongoing abusive relationship, by the person who, in the history of that relationship, has been the abuser (the ‘predominant aggressor’). However, in a small number of intimate partner homicides, it is the primary victim of the past abuse who kills the predominant aggressor.”¹⁰

The report notes that gender “is a significant risk factor for family violence victimisation and harm across all forms of family violence, and in intimate relationships women are more likely than men to experience severe physical and psychological harm. Three-quarters of all intimate partner homicides in New Zealand are committed by men, while three-quarters of the victims are women. However, where the homicide offender is the primary victim of family violence, they are overwhelmingly women.”¹¹

The Commission made the following recommendations:

- continued education to support an improved understanding of family violence among judges, lawyers, and police;
- reforms to the *Crimes Act 1961* and *Evidence Act 2006* to improve the accessibility of self-defence to victims of family violence;
- reforms to the *Sentencing Act 2002* to promote consistent consideration of a history of family violence as a mitigating factor in sentencing; and

6. *Id.*

7. See *Safer Sooner: Strengthening Family Violence Laws*, JUSTICE.GOV.NZ, <http://www.justice.govt.nz/justice-sector-policy/key-initiatives/reducing-family-and-sexual-violence/safer-sooner>.

8. FAMILY VIOLENCE DEATH REVIEW COMMITTEE, FOURTH ANNUAL REPORT: JANUARY 2013 TO DECEMBER 2013, at 102 (2014), <https://www.hqsc.govt.nz/assets/FVDRC/Publications/FVDRC-4th-report-June-2014.pdf>.

9. *Id.* at 20.

10. LAW COMMISSION, UNDERSTANDING FAMILY VIOLENCE: REFORMING THE CRIMINAL LAW RELATING TO HOMICIDE 5-6 (2016), <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/R139%20Understanding%20Family%20Violence%20-%20Reforming%20the%20Criminal%20Law%20Relating%20to%20Homicide.pdf>.

11. *Id.* at 6.

- Ministry of Justice consideration of how the “three strikes” legislation applies to victims of family violence who commit homicide and how it could be amended to allow judges to impose a sentence other than life imprisonment in deserving cases.¹²

STRANGULATION IN A DOMESTIC-VIOLENCE CONTEXT

On March 8, 2016, the Law Commission of New Zealand issued its report *Strangulation: The Case for a New Offence*, in which the Commission recommends that a specific offence of strangulation be enacted. In the introduction to its report, the Commission suggests that strangulation is “very common, particularly between intimate partners”:

In the past decade, there has been a rapid growth internationally in understanding the role played by strangulation in family violence. It is now known to be very common, particularly between intimate partners. The harm caused by strangulation ranges from struggling to breathe, to loss of consciousness, to death. The psychological impact on victims can be devastating. It is often said that, while the abuser may not be intending to kill, he is demonstrating that he can kill. It is unsurprising that strangulation is a uniquely effective form of intimidation, coercion and control.¹³

The Commission indicates that two key factors distinguish strangulation from most other forms of family violence:

First, it is an important risk factor for a future fatal attack by the perpetrator. Victims of family violence who have been strangled have seven times the risk of going on to be killed than those who have suffered other forms of violence but not strangulation. . . . Second, it characteristically leaves few marks or signs, sometimes even when it has been life threatening. That presents unique challenges for prosecution and contributes to the dangerousness of strangulation being underestimated and the perpetrators not being held appropriately accountable.¹⁴

VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE

On November 11, 2015, the Law Commission of New

Zealand released its issues paper *Victims of Family Violence Who Commit Homicide*. In a description on its website, the Commission indicated that the paper:

considers the law that applies when victims of family violence kill their abusers. It identifies three main areas in which there is a risk the current criminal justice system is not adequately providing for victims of family violence who commit homicide. These areas include the operation of self-defence, how the law recognises the culpability of these defendants when self-defence is not available (given the absence of any partial defence), and persisting myths and misconceptions about family violence which mean these defendants can struggle to have their experiences understood and may receive inequitable treatment before the law.¹⁵

AUSTRALIA

In Australia, the Sentencing Advisory Council for the State of Victoria and the Sentencing Advisory Council for the State of Tasmania have both released reports in 2015 and 2016 considering the issue of domestic violence in Australia.

VICTORIA

On September 12, 2016, the Sentencing Advisory Council for the State of Victoria announced it had received terms of reference requesting that it provide advice for “‘swift and certain’ approaches to the sentencing of family violence offenders.”¹⁶ The Sentencing Advisory Council indicated that it would “shortly begin preliminary consultation with key criminal justice stakeholders, in advance of the publication of a consultation paper in the last quarter of 2016.”¹⁷ At the time of the submission of this column, the consultation paper had not been issued.¹⁸

INTERVENTION ORDERS

On August 23, 2016, Victoria’s Sentencing Advisory Council released its report *Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending*. The report considered offending and reoffending for 1,898 offenders sentenced for breaching a family-violence intervention order or family-violence safety notice in Victoria in the financial year 2009-10.¹⁹ The study found that those sentenced for breaching family-violence intervention orders had had a

12. *Id.* at 185-86.

13. LAW COMMISSION, STRANGULATION: THE CASE FOR A NEW OFFENCE 4 (2016), <http://www.lawcom.govt.nz/sites/default/files/project/AvailableFormats/NZLC-R138.pdf>.

14. *Id.*

15. *Victims of Family Violence Who Commit Homicide*, LAW COMMISSION, <http://www.lawcom.govt.nz/our-projects/victims-family-violence-who-commit-homicide>.

16. *Swift and Certain Approaches to Family Violence Sentencing*, SENTENCING ADVISORY COUNCIL (Sept. 12, 2016), <https://www.sentencingcouncil.vic.gov.au/news-media/news/council-receives-terms-reference-swift-and-certain-approaches-family-violence>.

17. *Id.*

18. See *Swift and Certain Approaches to Family Violence Sentencing*,

SENTENCING ADVISORY COUNCIL, <https://www.sentencingcouncil.vic.gov.au/projects/swift-and-certain-approaches-to-family-violence-sentencing>.

19. SENTENCING ADVISORY COUNCIL, CONTRAVENTION OF FAMILY VIOLENCE INTERVENTION ORDERS AND SAFETY NOTICES: PRIOR OFFENCES AND REOFFENDING, at xiii (2016), <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Contravention%20of%20FVIOs%20and%20FVSNs%20Prior%20Offences%20and%20Reoffending.pdf>. Legislation allowing for spouses to apply *ex parte* for family-violence protection orders is very common in Canada. For instance, in Newfoundland and Labrador, such applications can be made pursuant to the *Family Violence Protection Act*, SNL 2005.

higher five-year reoffending rate (53%) than offenders in general (37%).²⁰ Over half of the family-violence offenders had prior convictions (58%).²¹

The report also examined the group's offending over an 11-year period from July 1, 2004, to June 30, 2015, inclusive. Over this period, the 1,898 offenders were sentenced for 28,749 charges, and over half were sentenced for at least one assault-related offence.²² The report found that the more often an offender was sentenced for breaching an intervention order or safety notice during the study period, the more likely that offender was to also be sentenced for an assault/cause-injury offence (against anyone).²³ Over two-thirds (68%) of young adult (18-24) male offenders and 59% of young adult female offenders were sentenced for at least one assault-related offence in this period.²⁴

The report concludes with the following observations:

For family violence related offences, it is crucial that the sentencing exercise is treated by courts as an opportunity to intervene, to prevent behaviour escalating, to assess and address risk, and to ensure that the sentence imposed is effective and purposeful. Where a contravention offender is fined and the fine is unpaid and/or the recipient reoffends (particularly with further violent or family violence related offending), there is a strong argument that the sentence imposed was ineffective, in that it served none of the purposes of sentencing offenders set out in the *Sentencing Act 1991* (Vic). Furthermore, it is difficult to see how the use of a fine in such cases is consistent with the purpose of the *Family Violence Protection Act 2008* (Vic) (which establishes the contravention offences): 'to maximise safety', 'reduce family violence', and 'promote the accountability' of the offender for their actions.

Where a contravention charge is accompanied by factors that indicate a heightened risk—such as a previous or co-sentenced assault—specific deterrence and community protection are particularly important. In some cases, the best long-term protection may be achieved by sentencing dispositions such as community correction orders or adjourned undertakings, which are able to couple strong deterrence measures with measures designed to facilitate the offender's rehabilitation through behaviour change programs and other treatment programs. In other cases, the incapacitation of the offender through a custodial sentence may be required. Critical to sentencing contravention offenders is ensuring that the sentence imposed is an effective vehicle for achieving its intended purposes. A clear risk of ineffective sentencing of contravention offences is that the system of intervention orders and safety notices will be undermined.²⁵

TASMANIA

On December 7, 2015, Tasmania's Sentencing Advisory Council released its report *Sentencing of Adult Family Violence Offenders*. The report "provides advice on the sentencing of adult family violence offenders in Tasmania and includes consideration of the range and adequacy of sentencing options and support programs available and the role of specialist family violence lists or courts in dealing with family violence matters."²⁶

The report also notes that "family violence is a gendered crime":

This Report contributes to the now extensive debate on family violence by focusing primarily on one aspect, sentencing. Information on the prevalence of family violence and sentencing outcomes for offenders has a vital role to play in sketching the extent of the problem of family violence and the adequacy of the justice system response.

Women and men may be both victims and perpetrators of family violence. However, there can be no doubt that family violence is a gendered crime. The Australian Bureau of Statistics' 2012 Personal Safety Survey (PSS) estimated that 16.6% of all women over the age of 18 had experienced violence from a partner or ex-partner since the age of 15 compared to 5.3% of all men. A recent report on patterns and trends in family violence reporting in Victoria shows that men consistently made up 80% of respondents in finalised protection order applications and were the perpetrator in 80% of reported family violence incidents. An examination of the data prepared for this Report shows that women constituted less than 15% of all those convicted of a family violence offence since the commencement of the Family Violence Act 2004 (Tas). This Report does not suggest that men can never be victims but it reflects the gendered reality of family violence, in most cases using gender-specific pronouns for victims and perpetrators.²⁷

PLEA NEGOTIATIONS

On plea negotiations in such offences, the report indicates:

Plea negotiation can have adverse consequences in the family violence context if the offences to which the offender agrees to plead guilty do not adequately reflect the seriousness of the offending conduct. This may be particularly problematic where, in cases involving multiple charges, no evidence is tendered on some charges as part of a plea negotiation. Effectively, these charges are dismissed. As a consequence, should the offender come before the court for similar offences in the future, evi-

20. *Id.* at 33.

21. *Id.* at 25.

22. *Id.* at xvi, 103.

23. *Id.* at 40.

24. *Id.* at 42.

25. *Id.* at 78.

26. SENTENCING ADVISORY COUNCIL, SENTENCING OF ADULT FAMILY VIOLENCE OFFENDERS, at ii (2015), http://www.sentencingcouncil.tas.gov.au/__data/assets/pdf_file/0018/333324/SAC_-_family_violence_report_-_corrected_accessible_version_for_web.pdf.

27. *Id.* at 1.

dence of the earlier violence may not be led by the Crown. This is entirely appropriate since the accused may in fact be innocent of the allegations and in any case is entitled to the benefit of the acquittal on those charges. However, there is a risk that potentially relevant relationship evidence is excluded and the court may receive a distorted picture of the extent of the history of offending. An agreement to plead to a lesser offence will also somewhat artificially diminish the severity of the record of prior offending which a sentencing officer will have before them in sentencing for subsequent offending.²⁸

SENTENCING

The report contains a number of “observations,” including the following on the impact of sentencing practices:

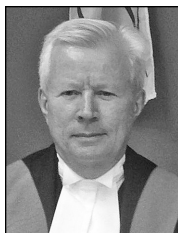
The adverse effects of the sentence on the victim should be taken into account. However, victims’ wishes should not be given undue weight. If an appropriate sentence is to be imposed that prioritises the victim’s safety but also promotes the aims of rehabilitation and family reintegration the sentencing Magistrate must be able to call on relevant background information from other agencies.

.....
 The imposition of sanctions alone is not bringing about a change in offender behaviour. It may be that a greater investment in rehabilitative interventions and the adoption of a more therapeutic approach to sentencing should be considered.

Consideration should be given to inserting a sentencing aggravating provision in the summary offence of common assault (s 35 POA) which applies in cases where the person assaulted was a pregnant woman.²⁹

CONCLUSION

These various reports from three countries with common legal systems illustrate how domestic violence is ingrained within their criminal-law systems. The reports consider various issues, but the common theme throughout is the prevalence and unceasing nature of this crime. The statistics differ, but all express a common theme of high rates of violence in intimate relationships with low reporting rates. Thus, the problem is much worse than even the startling reported statistics suggest.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up Is Hard to Do: A Trial Judge’s Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial Judges’ Journal. Judge Gorman’s work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.

28. *Id.* at 36.

29. *Id.* at vii.

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