The Emperor's Clothes: Court and Justice Initiatives to Address Family Violence

The emperor's new clothes: Court and justice initiatives to address family violence

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This article explores the current debate about and development of court- and justice-based initiatives to address family violence through the experience of the Australian Capital Territory Family Violence Intervention Program (FVIP). Some critical issues about problem-solving courts and therapeutic jurisprudence, as they apply to family violence offences, are considered. The FVIP as a "specialist jurisdiction" is presented as a third way between the rigid and output-focused processes of traditional criminal justice, and the opaque or therapeutic language and open-ended processes of problem-solving courts. The article concludes that comprehensive victim advocacy is essential in a family violence specialist jurisdiction.

INTRODUCTION

Community lobbying for improved criminal justice responses to domestic and family violence has been a persistent theme in Australia and overseas for 30 years. It is an indication of the success of the movement(s) against domestic and family violence that today there is such innovation in so many areas of social and justice policy. That our allies in the drive to end domestic and family violence are – in so many locations around the country – the magistrates, prosecutors, police and administrators who may previously have appeared to sit on their hands, is also testimony to that same success.

But as this innovation leads us deeper into areas of significant human, ethical, legal and political complexity, it can be difficult to stay focused on what the key issues and objectives are as they relate to victims of domestic and family violence. The partnerships that are being forged are generating challenges to the leadership of change, and of priority and perspective.

This article seeks to explore some of these challenges as they emerge from justice or court-based initiatives to address domestic and family violence. It also touches on how these initiatives intersect with new conversations about restorative justice, therapeutic jurisprudence, specialised jurisdictions, collaborative justice and problem-solving courts.

There is a degree of awkwardness between the language about problem-solving courts and related approaches such therapeutic jurisprudence, and the practicalities of Australian criminal justice initiatives addressing family violence.[1] Perhaps some meaning is lost in translation between the North American origins of problem-solving courts and therapeutic jurisprudence, and the Australian landscape and history. Judge Hal Jackson of the Western Australia District Court, in discussing the

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[1] For a discussion on the implications for Australia of problem-solving courts, see three articles by Phelan A. "Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part I" (2003) 13 JJA 98; Phelan A. "Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part II" (2004) 13 JJA 137; and Phelan A. "Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part III" (2004) 13 JJA 244.

changing roles of the judiciary envisaged by proponents of therapeutic jurisprudence,[2] sought to pierce the fog and to discuss therapeutic jurisprudence in the Australian criminal law context, "where it fits and some issues that its implementation raises". He made "a plea for clarity and the debating of real issues". In choosing to invoke the classic children's story about the child in the crowd watching the emperor's procession, this article echoes Judge Jackson in asking if there is substance to some of the approaches as they apply to domestic and family violence. At the very least, we should take a long, hard look at the appropriateness of the attire.

The Family Violence Intervention Program (FVIP) in the Australian Capital Territory (the Territory) commenced in 1998 and is described here as a "specialised jurisdiction". This article uses its example to explore some of what might be the "real issues", and does so neither as "an attack or an embrace", as requested by Judge Jackson.

THE AUSTRALIAN CAPITAL TERRITORY FAMILY VIOLENCE INTERVENTION PROGRAM

The FVIP is an integrated and coordinated criminal justice and community response to domestic and family violence. It took, as its inspiration, the work of the Domestic Abuse Intervention Project in Minnesota; it paused at some of the hard lessons arising from Hamilton (New Zealand); and it absorbed some of the "can-do" outlook of San Diego and Quincy (United States of America). The canniness and thoughtfulness of an approach that embodied reflective practice and that would stick was what was learned from Manitoba (Canada). Professor Jane Ursel's example of longitudinal statistical analysis in that Province has been a guiding light.[3]

The FVIP is an interagency collaboration at both a strategic and an operational level. Certain agencies are central to the program. The Domestic Violence Crisis Service (DVCS) is a 24-hours-a-day, seven-days-a-week crisis and advocacy service for anyone affected by domestic violence. The Australian Federal Police (AFP) ACT Policing focus on the collection of best evidence and constant review of officer decision-making. The Territory Office of the Director of Public Prosecutions (ODPP) has the longest-established specialist family violence prosecution team in the country,[4] and Territory Corrective Services provides a program to which convicted offenders may be mandated. All of these agencies have generated their own data sets but this article focuses on data from the Australian Capital Territory Magistrates Court.

One of the four overarching objectives set for the FVIP[5] at commencement in 1998 stated that agencies would seek continual improvement in their responses. This objective stands today and guides much of the discussion presented.

[2] Jackson H, Judge, "The Way Forward or a Fog of Confusion?", paper presented at the "At the Cutting Edge: Therapeutic Jurisprudence in Magistrate's Courts" Conference, Perth, May 2005.

[3] See Ursel J, "His Sentence is My Freedom: Processing Domestic Violence Cases in the Winnipeg Family Violence Court" in Tutty L and Goard C (eds), *Reclaiming Self: Issues and Resources for Women Abused by Intimate Partners* (Fernwood Publishing, 2002).

[4] Tasmania's "Safe at Home" initiative established specialised prosecutors in 2004. The pilot Domestic Violence Intervention Courts in New South Wales are also trialling specialist police prosecutors. The Australian Capital Territory remains the only jurisdiction with independent specialist prosecutors.

[5] The FVIP objectives were established in 1998 and signed off by Heads of Agencies. Whilst each successive planning phase of the FVIP has set different targets – for the program as a whole and for different agencies – these objectives remain. Agencies in the administration of justice and related services commit to work together cooperatively and effectively; to maximise safety and protection for victims of family violence; to provide opportunities for offender accountability and rehabilitation; and to seek continuous improvement in services.

WHAT'S IN A NAME?

The focus of the FVIP is improving the effectiveness of the criminal justice system in responding to domestic and family violence. This does not mean that the criminal justice response is elevated above other service sectors such as education or health. As we all know, what gets reported to police is less than 20% of domestic and family violence,[6] and what gets past police to the courts might be 20% to 30% of that.[7]

The FVIP's focus is on the criminal aspect of family violence. When the Territory's reform process took shape in the late 1990s, the civil protection side worked pretty well in terms of access to justice, but the criminal side functioned far less well. It was this aspect that was the realm of the FVIP.

Different labels have applied to different approaches to criminal justice and social service reform. In the early days of activism that sought change to the criminal justice system's responses to domestic and family violence, there was much talk about multi- or inter-agency approaches; then coordinated community models; then intervention programs; now it is integrated approaches and frequently nowadays problem-solving courts. To an extent, these changes reflect the growing sophistication and diversity of the actors on the stage. Each concept carries within it aspects of the other descriptions. The different approaches also reflect a logical narrowing of focus from a critique for change to explorations as to the mechanisms that might deliver change and how that change is implemented.

Central to all of these approaches is the idea of collaboration. What is embedded is the presumption that we all – notwithstanding our different orientations – would have a common goal within that collaboration. At first glance, this presumption might be a simple matter of setting a "vision" within a planning process. But unpacking the idea of "purpose" is a critical aspect of court-based developments within a criminal justice framework.

And the "purpose" of criminal justice intervention per se is a highly fluid set of concepts. The sentencing regime in most jurisdictions revolves around four key areas: deterrence, retribution, punishment and rehabilitation.[8] Some also include the protection of the community, the acknowledgment of harm and the prevention of crime. Setting aside the judicial and legal orientations to these imperatives, the different objectives of any of the justice-based family violence intervention programs across the country will reflect one or more of these orientations in their program objectives. Some will focus on the retributive and punitive importance of pro-arrest and conviction. Some will emphasise the general deterrence effect of a powerful public institution, such as the criminal court, asserting that the use of violence in intimate relationships is an aggravating factor. And some will stress optimism in scope for an offender's rehabilitation.

Many of us outside of the legal system may be forgiven for a little fudging at the edges of these objectives when our own priorities for the criminal justice system intersect with the shifting and often ambivalent ideas and expectations of our clients, be they victims or perpetrators. However, it may be possible to deal with these complexities if one acknowledges what is obvious, that "the system" is a whole with a number of component parts. Within the system the different role and function of the police may be compared to that of the prosecution, the prosecution to the defence, the judicial officer to the probation officer, and the victim advocate to all of these. From this standpoint, there is not *one* purpose to criminal justice intervention but *a number of* purposes.

In calling the FVIP – of which the court is a component part – a "specialist jurisdiction", we attempt to accommodate the multiple functions and aims of the criminal justice system. Over the chainlink of agencies that comprise the criminal justice system we have thrown the mantle of *policy* objectives that are not legislated and do not derogate from the statutory (or other) independence of agencies. We often point out that one consequence of our working so collaboratively in the FVIP has been to emphasise the boundaries between our different roles.

[6] Australian Bureau of Statistics, *Women's Safety Australia* (Commonwealth Government, Canberra, 1996).

[7] Taylor N, *Analysis of Family Violence Incidents 2003-2004, ACT Policing* (Australian Federal Police, Canberra, 2006).

[8] See Malcolm DK, Chief Justice of Western Australia, "Opening Address" to the "At the Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts" Conference, Perth, May 2005: see http://www.supremecourt.wa.gov.au/speeches viewed 17 February 2006.

One example illustrates this well. In the conversations and consultations that characterised the first phase of the FVIP (1998-1999) one often heard victim advocates criticise the police for asking women whether they wanted a perpetrator charged. Then one would hear police say how frustrated they were, when they *did* charge, that the prosecution would dismiss the matter often with reference to a reluctant victim. The prosecutors would then say that, other than the victim statement, police had given them no other evidence to proceed on and anyway, they were being pressured by the victim saying that to proceed would destroy the marriage. The feedback from justice practitioners was that they were receiving a barrage of often conflicting messages about what they should be doing in responding to "domestics". The circular argument of finger-pointing was broken in policy and in practice, and reiterated in training by saying that "if you do your job as thoroughly as you can then it puts pressure on the next one up the chain to do their job thoroughly". It might seem an overly simplistic claim but in essence it was a "back-to-basics" message about the core business (often related to statute) of the criminal system, and that each of the central agencies was critically linked and interdependent in the execution of their duties.

It is exactly on the fact of this interdependence that the terminology of "specialist jurisdiction" is preferred rather than to elevate and centralise the function of just one component – the court.

What's so special about this such that we can call it a specialist jurisdiction? Specialisation, as Freiberg writes, may be not that glamorous:

> A specialised court can be regarded as a court with limited or exclusive jurisdiction in a field of law presided over by a judge with expertise in that field. The advantages of specialisation include improved judicial decision-making through the use of judicial expertise, more efficient court processes because of judges' and counsels' familiarity with the subject matter and interlocutory processes, and reduced backlogs in the generalist courts.[9]

According to Freiberg, a specialised jurisdiction is not necessarily problem-solving, whilst a problem-solving court can be conceived of as specialised.[10] Though he prefers the term borrowed from policing – that of the problem-oriented court – Freiberg agreed with the New York Centre for Court Innovation that "it is possible to 'uncouple problem-solving' from specialisation".[11] In the family violence jurisdiction it is both possible and preferable, it is asserted, to uncouple "specialisation" from problem-solving.

Central to the literature on all models of specialist family violence courts, and indeed of any intervention focused on family violence, is the requirement that there be:

- a higher level of understanding of the pattern and characteristics of this type of offending; and
- express acknowledgment and integration of victim interests in prioritising safety and protection.

In the main, justice practitioners – police officers or prosecutors – are generalists in applying the law. In the lower courts, where the vast majority of criminal family violence matters are dealt with, this is especially so for magistrates.

A specialist jurisdiction (such as the Territory's portrayed in Figure 1) – consisting of some specific operational linkages, mechanisms that bring cases of a certain type together in certain ways, an agreed overarching policy framework that respects independent decision-making, maximisation of information flow to key decision-makers, and the attachment of specialist programs for victims and for offenders – can be accommodated within the existing generalist structure and within the generalist function(s).

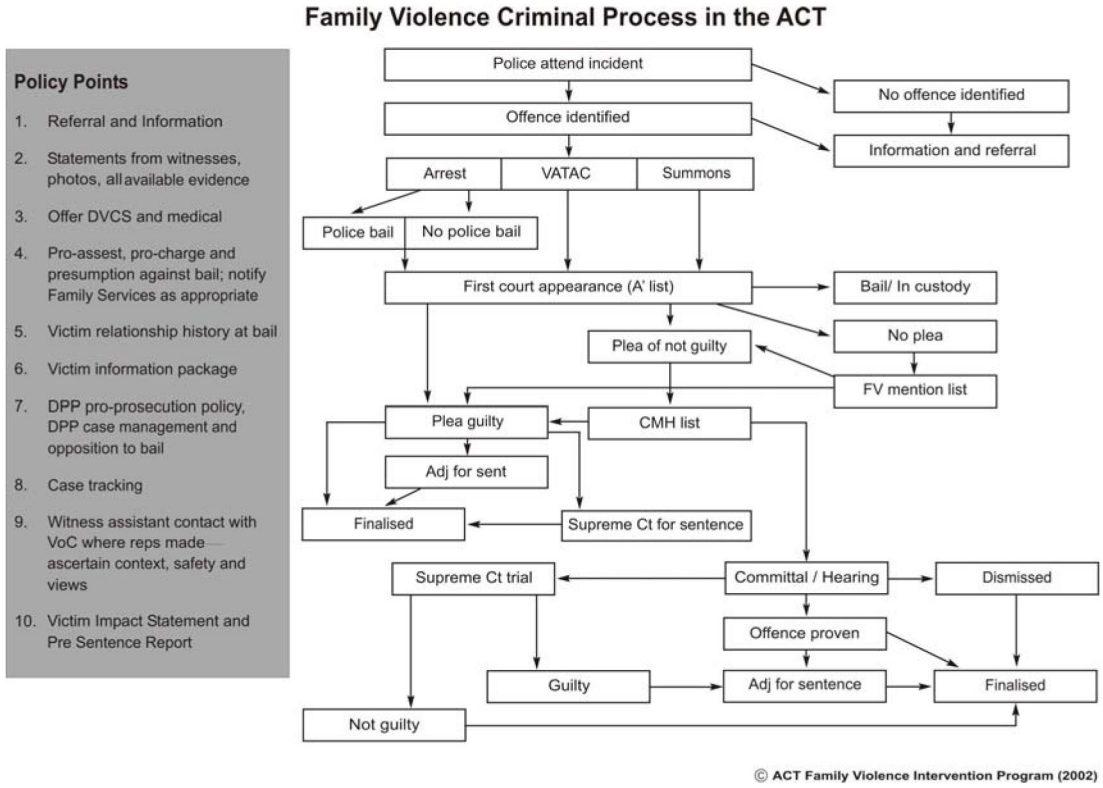
Thus – and this is a critical point for any consideration about adaptation and replication – a specialisation becomes more feasible and realistic in terms of resource consumption. Nearly every commentator on problem-solving courts acknowledges the intensive resources required. Whilst the Australian Capital Territory has not had the volume of cases that Manitoba has experienced, nonetheless the increase in matters before the court since 1998 has been significant.

[9] Freiberg A, "Problem-oriented Courts: Innovative Solutions to Intractable Problems?" (2001) 11 JJA 8 at 12.

[10] Freiberg, n 9 at 12.

[11] Freiberg A, "Problem-oriented Courts: An Update" (2005) 14 JJA 196 at 215.

FIGURE 1 Family violence criminal process in the ACT



VATAC: Voluntary Agreement to Attend Court.

CMH: Case Management Hearing.

VoC: Victim of Crime.

Figure 2 shows the total number of family violence defendants (with gender breakdown) brought before the court over the past seven years. In 1998-1999 there were 163 defendants, and in 2004-2005 there were 373, an increase of 122%. Counting the total number of defendants – as individuals before the court – provides us with perhaps the most "real" picture of the consequences (to the court) of a specialised jurisdiction. It is interesting to note from the Australian Capital Territory and the Manitoba statistics those local features that prompted "spikes" or "dips" in yearly figures. For example, in 2000 the Magistrates Court "Practice Direction on Family Violence" established the specialist jurisdiction, and in 2001-2002 the AFP applied the activities developed in one pilot patrol area to the region as a whole, thus explaining, at least in part, the flow-on "spike" in 2002-2003.

FIGURE 2 Number of defendants showing ratio of male to female

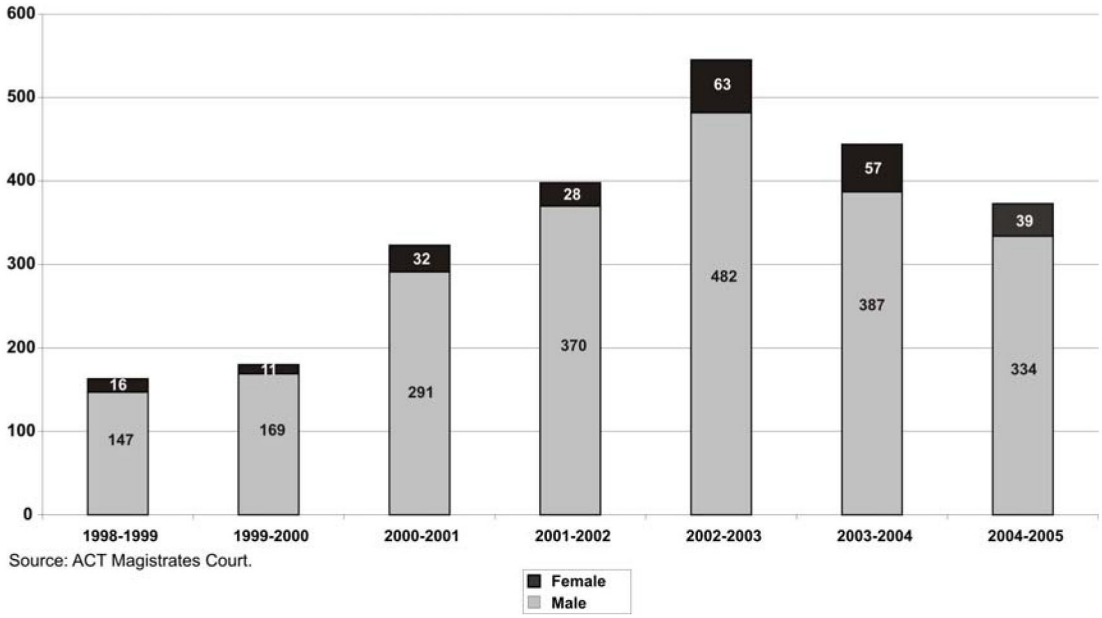


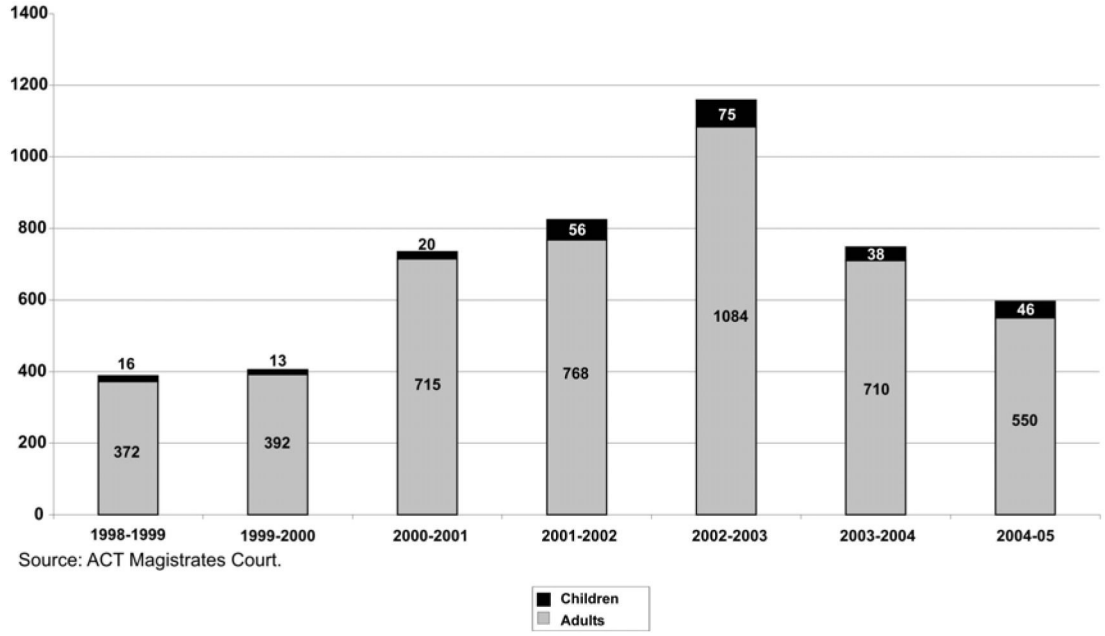
Figure 3 shows the impact of the specialist jurisdiction in the total of family violence-related charges (adult and juvenile). One defendant may have one or more charges arising from an incident. These can vary from common assault to criminal damage, for example. Over the seven-year period there has been an increase of 54% in the total number of FV charges. The dip after the 2002-2003 spike appears to relate to pressures within the system[12] unrelated to family violence to reduce the practice of "back-up" charges. However, within the FVIP it is generally preferred that the full array of charges that properly reflect the criminality of the alleged conduct of the incident are brought before the court.

In both the specialist jurisdiction and the generalist, the adjudicator and sentencer – the magistrate – is left with the job of which of those justice aims (deterrence, retribution, punishment and rehabilitation) to emphasise in any given family violence case on the evidence, submissions and information before her or him.

The idea of a specialist jurisdiction describes a systemic approach to family violence within the administration of justice. Whilst cautious, it is clearly different to traditional court practices. Is it too cautious, however? Are problem-solving courts and therapeutic jurisprudence a more radical way forward?

[12] Notably a joint ODPP and AFP Adjudicators Training Course.

FIGURE 3 Number of new family violence charges before the ACT Magistrates Court



PROBLEM-SOLVING COURTS AND FAMILY VIOLENCE

It may be a controversial suggestion to make, but the idea of a "problem-solving court" might be attractive to those who seek simple solutions to complex social issues.

Notwithstanding this perhaps brutal comment, no-one could be unsympathetic to the frustration of judicial officers and others with the roles they play in the sausage factory that is today's high-volume criminal justice system. In some ways the evolution of problem-solving courts is an attempt to reclaim the foundations of their work by those who hold very dear the principles of justice, and who hold sincerely to the view that there is positive effect to law enforcement. Perhaps one could go so far as to say that problem-solving courts, particularly drug courts and those dealing with mentally ill defendants, are initiatives designed to wrest control of the direction of criminal justice policy away from media shock jocks and back into the realm of the rule of law, and of reason.

But is there sufficient similarity in the social evils of drug abuse and family violence, eg, to provide a basis for a shared platform in problem-solving courts? As Freiberg has acknowledged, the latter deals with an offence category, whilst the former (and those dealing with mental illness) deal with the "affliction" of dependency or illness.[13] Hence the preponderance of language around "therapeutic interventions". The 2005 review of specialist courts conducted for the United Kingdom's Department for Constitutional Affairs noted a further difference in origins: "Domestic violence has a history of under-enforcement, whereas drug laws may have been ineffective through over-enforcement."[14] Early court-based drug initiatives and those dealing with mentally ill defendants were about getting the punters *out* of the system. Domestic violence initiatives are about getting them *in*. One considers a reduced role for public law institutions, and the other seeks to make the private public. The history of court sentencing in family violence matters can hardly be called "retributive"

[13] Freiberg, n 9 at 18.

[14] Plotnikoff J and Woolfson R, *Review of the Effectiveness of Specialist Courts in Other Jurisdictions* (Department for Constitutional Affairs, London, 2003).

where it may be possible to state that justice responses to drug offences have been punitive. Critical, too, in the differing histories is the centrality of the victim to domestic violence court initiatives, and their absence (or token presence) in others.

Thinking about family violence, the first question, of course, is: "What is *the problem* before the problem-solving court?" These questions could be workshopped and a wide range of views would almost immediately be recorded. As Freiberg stated,[15] "Rarely is there a single 'cause' of crime", and few are the occasions when justice or social service practitioners agree on individual "needs" arising from criminal conduct. A domestic violence court which works from a philosophical presumption that domestic violence is "caused" by communication problems within a relationship would be a very different place to one that works from an analysis that domestic violence is about the assertion of gendered power and control by one person in a relationship over another.

The second question for problem-solving domestic violence courts is then: "What is *the solution* being advanced?" In talking about the FVIP to other jurisdictions, participating agencies are particular in emphasising that as a criminal justice program it does not mean that it is a "solution" to family violence. Through which of the sentencing goals is "the solution" achieved? Do we ever hear that criminal justice intervention is a "solution" to armed robbery? On that level it is an absurd proposition.

Problem-solving courts and therapeutic jurisprudence do not always embody the same approaches. Like restorative justice, therapeutic jurisprudence questions are advanced at different stages of the criminal process. Given effect in the criminal courts, these approaches can be diversionary or post-conviction; are about the tone and language of the courtroom; or about the offender treatment that is available. It is a broad and somewhat messy church!

It has been written that therapeutic jurisprudence "is a close cousin [of the problem-solving court] rather than [an] identical twin".[16] However, in much Australian writing on the subject it feels as though presumptions are being made that a problem-solving court is nothing if it is not steeped in therapeutic jurisprudence.

The seminal author on the subject, Professor David Wexler, is more restrained in writing that therapeutic jurisprudence "is a framework for asking questions" and an approach that "encourages people to think about the anti-therapeutic impact of a sentence and to lessen that impact".[17] It is abundantly clear, however, from the Australian and overseas literature that the "unaddressed questions" within justice envisaged by Wexler are not about the victim. Nor, indeed, is the possibility that the anti-therapeutic impact of a sentence may be a lifesaver for the victim.

To be fair, Wexler does state that "therapeutic jurisprudence does not itself suggest that therapeutic goals should trump other goals",[18] assuming that a therapeutic goal is best advanced by a non-custodial rehabilitation option and "other goals" are those traditional to the criminal justice system – deterrence, retribution and punishment. This brings us right back to the central role of the judicial officer.

Many would argue that the idea of tailoring sentences and having options for offender "treatment" (or rehabilitation) is no radical departure for the modern magistrate. The Territory's new sentencing legislation captures this in the claim that "The option of 'combination' sentences will improve the ability of judges and magistrates to prevent and manage offending behaviour and rehabilitate offenders, giving the courts the capacity to impose any number of orders as part of a whole sentence".[19] As expressed in s 6 of the *Crimes (Sentencing) Act 2005* (ACT), the legislation seeks

[15] Freiberg, n 9 at 22.

[16] Malcolm, n 8, p 12.

[17] Wexler D, *Therapeutic Jurisprudence: An Overview* (1993): see http://www.therapeuticjuriprudence.org viewed 17 February 2006.

[18] Wexler, n 17.

[19] Chief Minister's Press Release, 22 November 2005.

(among other objects):[20]

> …
> (b) to provide a range of sentencing options;
> (c) to maximise the opportunity for imposing sentences that are constructively adapted to individual offenders;
> (d) to promote flexibility in sentencing;
> …

This contemporary reality asserts that *if* (and it is a big "if" in many localities) the sentencer is well informed by pre-sentence reports, victim impact statements and submissions from both prosecution and defence, then it is entirely correct that the rehabilitative goal (or indeed the retributive one) should not "trump" other sentencing goals. Put another way, sentencing discretion is absolutely central to our claims that the justice system is "fair" in its responsiveness to the circumstances of each case and the particulars of individuals. For example, what is "the solution" to a family violence defendant – previously a police officer – whose alleged conduct is sexual abuse of his wife? The "solution" for a young man – a law student – whose violence hospitalised his partner? The "solution" for a woman – abused for years by her partner – who turns and stabs him?

As specialists responding to family violence in the justice system, we now know that:

- within the broad offending category there is a difference, as Pence[21] states, between "stalkers" and "slappers";
- many offenders are at low risk of reoffending and a relatively small proportion are very dangerous (2% in Professor Ursel's sample and 10% in Quincy, Massachusetts);[22]
- a small but persisting proportion of offenders return to the criminal justice system principally because their substance use and/or their mental dysfunction does not make them particularly compliant with court orders; and
- a larger number of offenders do not come to the attention of the courts again.

It is exactly because of this more sophisticated picture of family violence offending that questions are raised about the therapeutic jurisprudence focus on "healing and wellness".[23] Not that one would not like these diverse offenders to achieve "healing and wellness", but their lack of it is not what has resulted in them being charged. It is the allegation that they have used violence against someone else that has brought them before the court.

In putting forward the potential of the problem-solving court to use its authority "to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities",[24] or the potential of therapeutic jurisprudence to harness "the healing power of the law",[25] there is a "sponginess" to exactly what is being talked about. Even that notoriously winnable body of theory, restorative justice, has become much more precise about its terminology and practice than this.

All this probably sounds very different to those working mainly in the civil or family jurisdictions.[26] There the proposition of "dispute avoidance" is very attractive, but in the criminal

[20] See http://www.legislation.act.gov.au viewed 10 February 2006.

[21] Pence E and McDonnell C, "Developing Policies and Protocols in Domestic Violence Cases", in Shepard MF and Pence E (eds), *Coordinating Community Responses to Domestic Violence* (Sage, 1999) p 10.

[22] Ursel J, "The Winnipeg Family Violence Court", Keynote speech, National Domestic Violence Conference, Adelaide, 2006: see http://www.aija.org.au; Buzawa E, Hotaling G and Klein A, "The Response to Domestic Violence in a Model Court: Some Initial Findings and Implications" (1999) 16 *Behavioral Sciences and the Law* 185.

[23] Winnick BJ, "A Therapeutic Jurisprudence Model for Civil Commitment", in Diesfeld K and Freckelton I (eds), *Involuntary Detention and Therapeutic Jurisprudence* (Ashgate Publishing, 2003) p 26.

[24] Berman G and Feinblatt J, "Problem-solving Courts: A Brief Primer" (2001) 23 *Law and Policy* 125.

[25] Wexler D and Winnick BJ, *Law in a Therapeutic Key* (Carolina Academic Press, 1996) p 26.

[26] See eg Cooke J, "Innovation and Transformation Within Australian Courts: A Court Administrator's Perspective" (2006) 15 JJA 174.

justice system it is really difficult to be tentative. There is a hard edge to the way in which principles such as the "presumption of innocence" and "proof beyond reasonable doubt" are played out on a case-by-case basis (with so many critical professionals examining what is before them). Gruelling as the criminal process may be for many victims of violent crimes, it may nonetheless be exactly the *adjudication* on the offence allegation that is important to the victim of family violence, not whether it is a "healing" process.

What is meant by this? Domestic and family violence is a hidden crime. The vast majority of victims do not disclose to police.[27] If they do chose to report, victims will have tried a number of different strategies, often over long periods of time, to "resolve" the violence – strategies such as adjusting behaviour or submitting to dominant demands or fighting back or drawing on family, friends and faith (or all of these). In essence, by the time police have become involved and it has made it to prosecution, a victim is likely to have shifted her objectives from relationship repair to violence resolution. She wants the violence to stop.[28]

Over the course of this journey she is likely to have heard, in myriad different ways, that there is nothing untoward and she is imagining a problem; that she made him do it and it is for her own good; that it is not really violence and anyway no-one will believe her. So imagine the power – to this woman (or man or child) – of the guilty finding or plea.[29]

In surveys conducted in the Territory with family violence victims whose matter had proceeded to prosecution, one could see views changing as individuals progressed through the system. Individuals stated that they were unsure they had wanted the case to proceed *and* that they felt that justice was done through the proceeding.[30] That shift from 58% feeling safe at finalisation to 75% feeling safe 18 months later is significant. More recent evaluation by DVCS of their clients (2004-2005) shows a much higher level of satisfaction from victims in that 69% found the process of prosecution of their case beneficial to them, and 74% felt that their views were taken into account.[31]

The majority of victims surveyed (2001) just after case finalisation were still in a relationship with their offender. Eighteen months later, the majority were not (2002). This confirmed an understanding about where – in the sometimes long trajectory of a victim's help-seeking around family violence – criminal justice intervention sits with perhaps a more grounded motivation of the victim to seek resolution of the violence itself as an objective above rescue or repair of the relationship. Not always and perhaps not so explicitly, but certainly the research evidence is there.[32]

With this orientation in mind, the "hard edge" of criminal investigation and adjudication has brought other unexpected consequences in the Territory that illustrate the importance of *decision* and the certainty and clarity it brings. For victims, the "solution" to "the problem" – aside from someone in authority taking responsibility for the offender for a while – may lie outside the criminal court. Victims are often engaged in other legal processes, most often in the civil and family jurisdictions. Anecdotal feedback from legal practitioners in these areas in the Territory is that they are seeking out police reports and sentencing remarks on the basis that they provide credible third-party reflection on conduct alleged in more disputed areas of law.

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[27] Australian Bureau of Statistics, n 6.

[28] Kelly L, *Surviving Sexual Violence* (Polity Press, Bristol, 1988).

[29] Humphries C and Thaiara RK, "Neither Justice Nor Protection: Women's Experience of Post-separation Violence" (2003) 25 (3) *Journal of Social Welfare and Family Law* 195.

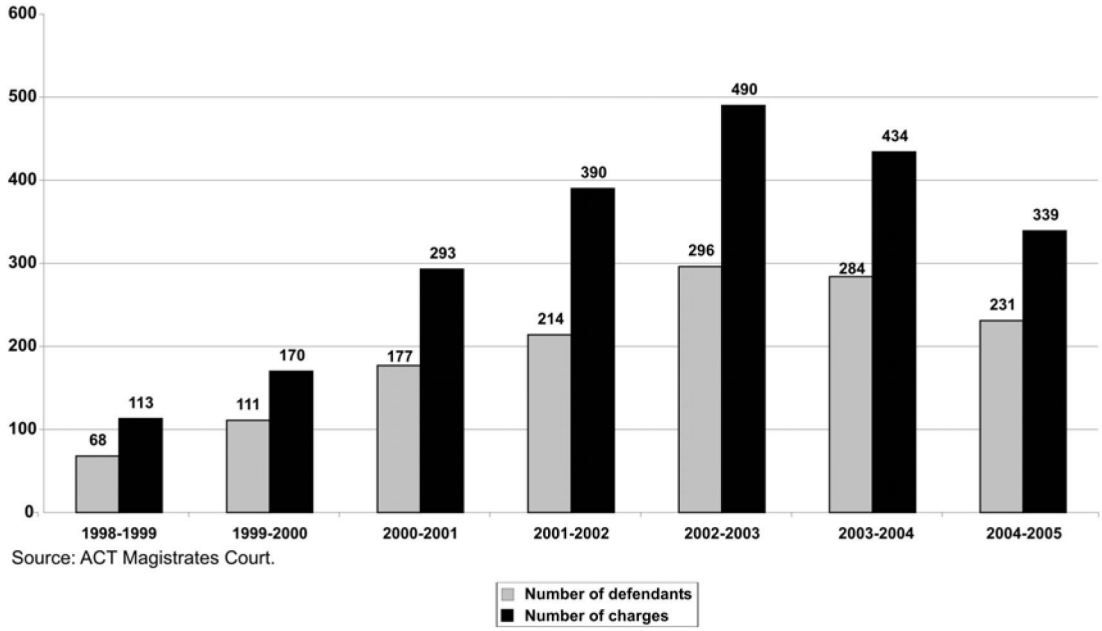
[30] According to victim responses in 2001 (Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II* (ACT Department of Justice & Community Safety, Canberra, May 2001)), 74% said they had never indicated to police, prosecution or courts that they wanted charges dropped; 51% were determined to see the matter through; and 58% felt safe at case finalisation. Twelve months later, in 2002 (Victims of Crime Coordinator, *Twelve Month Follow-up of Victims in Finalised Family Violence Matters* (unpublished, 2002)), 75% felt safe since finalisation and 50% were satisfied with the outcome and that justice had been done.

[31] Domestic Violence Crisis Service, *Client Evaluation 2004-2005* (unpublished, Canberra, 2005).

[32] See eg Abrahams H et al, *From Good Intentions to Good Practice: Mapping Services Working with Families Where There is Domestic Violence* (Policy Press, Bristol, 2000).

When the FVIP commenced in 1998, 34% of family violence *charges* resulted in guilty pleas being entered. In 2004-2005, this was 53%. Figure 4 shows the number of defendants found guilty against the number of charges. In 1998, the number of defendants convicted was 68, and in 2004-2005 the figure was 231.

FIGURE 4 Number of defendants convicted, alongside number of charges where conviction is recorded



In essence, the value of the adjudication to the victim is public recognition of the wrong. It is, as Magistrate Karen Fryar has said, calling "his behaviour for what it truly is".[33] Even with a not-guilty finding or a dismissal, there is value in having a history fully recorded and in being taken seriously.[34] There are different layers to the aim of offender accountability that do not resile in conviction alone. Nonetheless, in 2003-2004, the Australian Capital Territory Family Violence Court found that:

- 89% of defendants were male;
- 66% of defendants were convicted;
- 51% of charges were finalised by an early plea of guilt; and
- 3% of cases went to the Supreme Court.

COURT ROLES AND PROCESSES AND FAMILY VIOLENCE

Key to the idea of the problem-solving court is the proposition of judicial monitoring of the offender post-conviction. There may be merit in the idea especially with regard to high-risk offenders. Judicial monitoring is attractive partly for *requiring* probation services to provide the requisite supervision and programs for convicted offenders, and partly as a means of exercising greater control over a high-risk domestic violence offender who is nonetheless given a non-custodial sentence.

However, a cynic may wonder if the idea of judicial monitoring is really saying something about the working (and resourcing) of community corrections and the interconnection (or fragility of

[33] Fryar K, "Presiding Over the Family Violence Criminal List", paper presented to "Innovation: Promising Practices for Victims and Witnesses in the Criminal Justice System" Conference, Canberra, 2003, p 7.

[34] See Lievore D, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (Commonwealth of Australia, Canberra, 2005), discussing this with regard to sexual assault victims.

interconnection) between what judicial officers expect should happen when offenders are placed on a supervision order and what probation officers know actually happens. This line of inquiry asks whether problem-solving courts are in danger of making magistrates and judges into glorified probation officers.

That said, problem-solving courts can be more satisfying to the judicial officer than hearing two-minute pleas[35] though the author can clearly remember Magistrate Fryar baulking at the practice, espoused by a Red Hook Community Court judge in the United States, of phoning offenders at home after hours for a pep talk.[36]

Judge Hoffman of the Colorado County Court has described, rather wickedly, the seductive thrall to the judicial officer of actually being able to "solve" anything and has written of drug court initiatives as being "driven by politics, judicial pop-pyschopharmacology [and] fuzzy headed notions about restorative justice and TJ [therapeutic jurisprudence]".[37] Closer to home, Magistrate Fryar, in more measured tones, contends that courts can be "carried away with the possible good that [they] can do". "Magistrates", she says, "are lawyers, and not trained as social workers/drug and alcohol counsellors." In her view, after five years presiding over the specialist family violence jurisdiction, "family violence is an area not particularly suited to [judicial oversight] type of management, particularly where the relationship is continuing as it maintains high resentment levels".[38]

In the end, there is no getting away from the fact that judicial monitoring of compliance with court orders means that cases stay within the system for significantly longer periods of time, and that hearings that might ordinarily take five to 15 minutes might take an hour or more.

Family violence justice interventions generally take as one of their objectives to "fast track" matters. Manitoba, eg, has a benchmark of three months as optimal in which to finalise. In 1998, the Australian Capital Territory Magistrates Court set a similar benchmark. The rationale relates both to victim and offender interests. That is, it is better for the individuals involved and the relationship and family issues they are struggling to deal with if the offence allegation can be dealt with quickly; better whether they are to remain together or not; better to get the offender to a behavioural program and other interventions quickly; better to have him under supervision to enable the victim to think more clear-headedly.

So, has the Territory actually been able to "fast track"? Yes and no. When the FV Practice Direction established the specialist jurisdiction in 2000, 79% of FV matters had finalised in 12-18 weeks (the same as all other adult criminal matters). In 2004-2005, 71% finalised in 13-20 weeks. The good news is that well over three-quarters of criminal FV matters consistently finalise within four months from the date on which they enter the court.

The Territory courts have been subject to a rather mixed report from the Auditor General.[39] Struggle as everyone did to show to the auditors the complexity of multiple jurisdictions in a small Territory, the report has nonetheless thrown up a number of questions. The situation – thinking about the import of that report on the one hand, and developments about doing justice differently on the other hand – reflects the general schizophrenia about what politicians and communities want from their justice systems: that is, deal fast with the quantity or deliver effectively on outcomes.

Arguments put to the Auditor from my Office stressed recognition of the court as part of *a system*, and that the other bits of the system relied on and generated efficiencies from specialisation at the court. My Office also worked with the court and the Office of the Director of Public Prosecutions

[35] Freiberg, n 9 at 23.

[36] Comment made in question and answer session at a national conference on "Innovation: Promising Practices for Victims and Witnesses in the Criminal Justice System", Canberra, 2003.

[37] Quoted in Popovic J, "Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby Out With the Bathwater?", paper presented to "At the Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts" Conference, Perth, 2005, p 4.

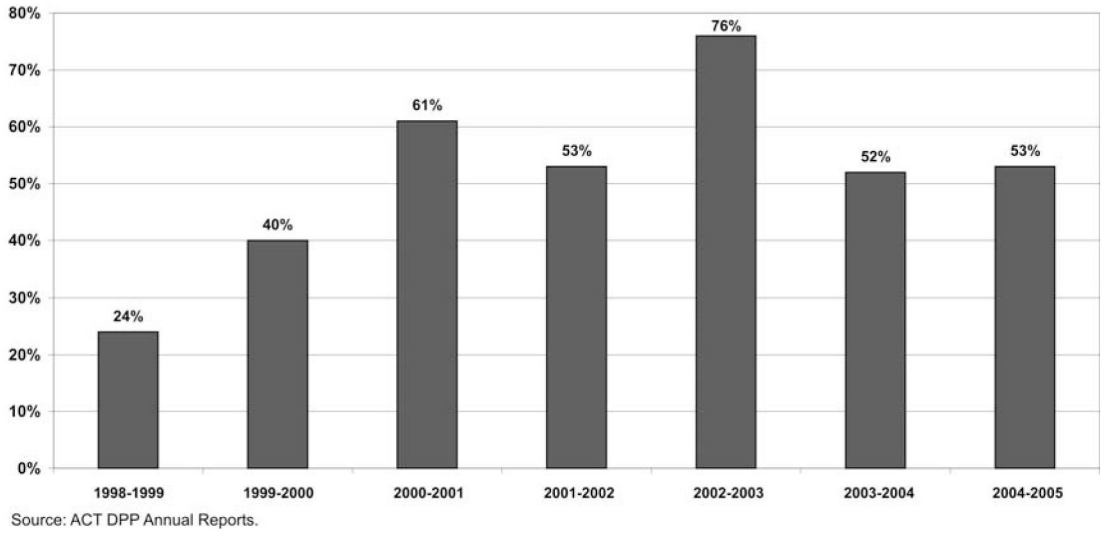
[38] Plotnikoff and Woolfson, n 14, pp 42-43.

[39] Australian Capital Territory Auditor General, *Courts Administration, Report No 4* (Canberra, 2005): see http://www.auditor.act.gov.au viewed 14 November 2005.

(ODPP) to examine those family violence cases that finalised after three months. That work has yet to come to a conclusion but anecdote suggests that there is the usual interaction between the content of cases (eg mental illness) and issues that confront any of the lists (eg defendants failing to appear).

To resolve matters quickly is consistent with other drives within the criminal justice system, not just in family violence matters. In fact, it was one of the winning arguments to Treasury in 2001 about funding the FVIP.[40] The Family Violence Court generates a higher level of early pleas of guilt than in the general criminal list as data from the ODPP shows (see Figure 5).

FIGURE 5 Percentage of matters finalised by early plea of guilty



Source: ACT DPP Annual Reports.

This early resolution is the result of a number of factors, including the vastly improved quality of early briefs of evidence and the specialised practice within the ODPP. But other measures show that "fast tracking" is more than court finalisation. This again goes to understanding that a specialised jurisdiction works *across the system* and not just in one bit. The policy of the AFP in family violence matters is that, where there is reasonable suspicion that an offence has occurred, the preference is to charge and to use arrest as the means to get a matter to court quickly and to protect any victim or witness. Using a summons can mean a delay of some months and bail conditions cannot be applied for.

In 2002-2003 criminal action was taken by police in 31% of spouse/ex-spouse incidents (n=1,370, being 58% of all reported family violence incidents) reported to them – a slightly higher proportion than in the previous year.[41] Most commonly, one or two charges would arise from each incident. In some, as many as five or more charges could arise (of 424 incidents where criminal action was taken, 886 charges arose). A total of 75% of these charges were brought before the court by way of arrest, up on 69% in the previous year.

In real terms, this means that three-quarters of all persons who have been charged with an FV offence will be before the court within 24 to 48 hours: another measure of the fast track.

[40] While the volume of family violence cases coming into the court has increased since 1998, since the advent of the Family Violence Case Management Practice Direction in 2000, a significant amount of sitting time and witness hours has been saved. In 2003-2004, nearly 300 hours were saved, and 438 witnesses were not required. See ACT Director of Public Prosecutions, *Annual Report 2003-2004* (ACT Government, Canberra) p 27.

[41] The analysis of all family violence incidents (including spouse and ex-spouse, parent against child, child against parent, sibling assault and other family assault) shows that criminal action was taken in 20% of cases. See Taylor, n 7, p 16.

ACCESSING SPECIALIST KNOWLEDGE AND INFORMATION

Returning to the problem-solving court, it is accepted that judicial monitoring of offender compliance with treatment and supervision orders is a defining characteristic of these developments. Articles written by judicial officers presiding in a wide range of specialist courts all point to the value of specialist knowledge. Certainly, in the Territory, the development of individual professional and corporate knowledge has been a key feature of the FVIP, and is a central sustainability strategy (recalling the original objective of continual improvement).

What that specialist knowledge looks like to others in the system and how it is employed is, however, a delicate issue. In the goldfish bowl that is the Territory, those on the FVIP Coordinating Committee are very aware of the *appearance* (as well as the reality) of independence and remoteness in the specialist magistrate.[42] Committee members are alert to any remark that suggests there are perceptions (in the profession, in the media, and at the Assembly) that a magistrate leans one way or the other when considering offender interests and victim interests, or that he or she is "too close" to the family violence prosecutors, or that the police are being unduly influenced by victim advocates in their charge decisions (for example).

This issue was particularly sensitive in the early days of the FVIP and certainly the ACT Ombudsman's own motion investigation (2000) into whether the AFP were applying the law in a discriminatory fashion (against males) and (incredibly) were applying it unlawfully, generated an intense level of dialogue and detailed review. These days FVIP agencies are more likely to hear that the FVIP is a Territory "flagship". Nonetheless, the adherence of FVIP agencies to the basic principles of justice and to independent and discretionary decision-making was tested and consolidated over those early years. One outcome of this is that the Territory has not had the problem of dual arrest as it is often encountered in North American family violence criminal justice initiatives. However, these days it is entirely legitimate to acknowledge that

> the court now has its own wealth of knowledge in [the] area [of family violence], the specialist prosecutors bring their own unique expertise, the local profession are more attuned to the salient issues and subtleties involved and we are no longer as reliant on ad hockery when looking at and recognising the vast array of problems presented and what possible assistance can be given.[43]

Building an improved knowledge base about family violence offending and victim responses is just one aspect of measures that a specialised jurisdiction develops. Information about the cases and individuals themselves is the other. It is in this area that great caution must be exercised. The criminal justice system is not renowned as a victim-friendly set of institutions and all sorts of rules and practices around disclosure and privacy exist. Part of this is what is legitimate and lawful; what has an evidence-base to it and what is merely a claim; and part relates to more subtle pressures about what gets acknowledged and what does not, and how.

In a thoughtful and thought-provoking paper that explored areas of judicial dilemma in utilising therapeutic jurisprudence, Victoria's Deputy Chief Magistrate, Jelena Popovic, touched on a case before her of a mentally ill woman who was "causing mayhem in her community".[44] Her Honour wrote that, out of court, she communicated with the prison psychiatrist and spoke with two other psychiatrists on the phone in an effort "to work through the issues and to make a decision based on better information". She reiterated the constitutional importance of open justice and expressed concern that she had moved from the traditional "arm's length" approach of the judicial officer. Nonetheless, she concluded that "the quality of [her] decision-making was enhanced by the inquiries made".[45]

The criminal justice system can be strongly criticised for making decisions critical to peoples' lives on very scanty information – especially so with regard to victims. Indeed, criminal justice

[42] The magistrate is, in actuality, independent of the program.

[43] Fryar, n 33, p 6.

[44] Popovic, n 37, p 3.

[45] Popovic, n 37, pp 2-3.

processes act to actively filter out relevant information regarding victims.[46] So one must applaud Deputy Chief Magistrate Popovic in seeking out expert opinion and experience to assist her.

But can you imagine the tensions in your own localities if such an approach was regularly applied to criminal family violence matters? Who would the judicial officer call? Deputy Chief Magistrate Popovic goes on to beautifully critique her inquiries by again quoting United States Judge Morris Hoffman: "I cannot imagine a more dangerous branch than an unrestrained judiciary full of amateur psychiatrists poised to 'do good' rather than to apply the law."[47]

A different example about access to and the use of information in new court developments arises from but is not exclusive to the pilot circle sentencing court in the Territory. The role of the Victims of Crime Coordinator (VoCC) as statutory advocate for victims was written into procedures of the Practice Direction, and the majority of matters assisted with over the period of the pilot circle sentencing court were for family violence (indigenous and non-indigenous victims). Every single one of the family violence victims that the DVCS or the VoCC were assisting disclosed further incidents, of varying levels of seriousness, after the initial court hearing and over the lengthy periods that the offenders were on court orders. Some of these were known to other practitioners in the circle process and information about some incidents the victims did not provide consent to release. But the vast majority of instances were not raised in court sittings with the community members (and did they know?).

This silencing effect was and is deeply troubling. As the Aboriginal Women's Action Network in Canada remarked in a 2001 report about restorative interventions (including circle processes), "the rush to implement restorative justice may place victims in danger of revictimisation especially violent or sexual assaults" – again, a possibility not confined to indigenous restorative justice initiatives.[48] An earlier report on the Hollow Water initiatives acknowledged the desire of Aboriginal women to support reform processes for the benefit of their communities as a whole, but that these are highly likely to have direct and detrimental effects on them as women and as individuals.[49]

Another example in the FVIP training program is the use a historic multiple murder-suicide matter as an illustration of how – amongst other issues – critical information was absent from the magistrate in his decision to grant bail to this particular offender. Care is taken to say that, in today's court *with* that information, it may be that the alleged offender would still be granted bail. But at least the magistrate would have a greater amount of information that was "relevant and reliable" in any opposition to bail put by the prosecution in open court.

Information is the life blood of the criminal justice system. The specialised jurisdiction of the FVIP has created and opened up a number of information channels at key decision-making points. One of these is the weekly case-tracking meetings where family violence matters that are charged and before the court are discussed. These are not like case conferences – the volume is too high and it is not a diversionary program. Case-tracking meetings are run by the Office of the VoCC and named representatives of operational agencies bring relevant case information. In a review conducted a year or so ago of the case information exchange, issues covered included:

- what information is exchanged;
- what the lawful or ethical basis of the exchange was (and between what agencies);
- with what consent (if any) of the individual (alleged offender or victim) the exchange is transacted;
- what the express purpose of the exchange is (can it be used and under what conditions?); and
- how the information is recorded (or not) and secured.

[46] See Douglas R and Laster K, *Victim Information and the Criminal Justice System: Adversarial or Technocratic Reform?* (School of Law and Justice, Bundoora, Victoria, 1994).

[47] Popovic, n 37, p 5.

[48] Stewart W, Huntley A and Blaney F, *The Implications of Restorative Justice For Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* (Law Commission of Canada, 2001).

[49] Lajeunesse T, *Community Holistic Circle Healing, in Hollow Water Manitoba: An Evaluation* (Solicitor General of Canada, 1996), quoted in Law Commission of Canada, *Transforming Relationships Through Participatory Justice, Final Report* (2003).

There have been instances – although few in number over the seven years – where victim information was wrongly disclosed to an offender, or where it was mistakenly referred to in court by a prosecutor, or where an offender has (through a freedom of information application) accessed victim information located on his file. Certainly there have been instances of fishing expeditions by defence, and a couple of times where the prosecution witness assistant has been called as a witness to be questioned about the origin of information and/or its credibility.

In addition, through the risk assessment considerations of case-tracking, attention has been given to the mercifully few cases that might give rise to a very high risk of fatal attack or self-harm. A litmus test for those considering information exchange around such individuals is what a coroner would say in reviewing the information held about such situations. This has become a guiding principle of the DVCS in its decision-making as to the circumstances in which it may release information to a justice agency, in particular about a victim (adult or child), without that person's consent.

Given that in the Australian Capital Territory, and one suspects in many other jurisdictions, there are significant question marks over the lawful basis to the exchange of victim information between criminal justice agencies,[50] these are challenging issues with very particular possible consequences. When one reads of developments in the family violence field that seek "integration" of case information, one must wonder if, and how thoroughly, these issues about information exchange have been considered.

Some problem-solving courts have gone further in how they bring information together. Many of what are called domestic violence (or family) courts in the United States combine family law proceedings with juvenile matters, civil protection applications and criminal matters. In the United Kingdom, the piloting of specialist domestic violence courts has resulted in further experimentation at Croydon in London in bringing together civil protection and criminal matters revolving around particular people and families.

A big issue about "integration" within a criminal justice framework is about the potential for compromising victim interests and victim safety. Who is to identify what these interests are, how are the concerns heard (are we paranoid feminazis?), and how authoritative is that voice? A second issue is about the extent to which "the state" "takes over" certain processes that "belong" to the parties. A third issue goes back to some of the earlier questions around purpose and content. A family law process, eg, has very different meaning to a criminal one, has very different rules and different orientations to evidence, quite apart from the fact of both parties being (usually) legally represented. One can see some benefits in some areas of timely and accurate information exchange, but it is necessary to proceed with great caution.

Court-based initiatives to address domestic and family violence should therefore access specialist knowledge and information from a basis that:

- respects court neutrality;
- ensures transparency of process;
- considers the question "Who hears what?";
- considers the legal and ethical basis for case information exchange; and
- questions the purpose and consequences of "integration".

VICTIMS IN SPECIALISED JURISDICTIONS

One thing that is strongly noticeable between Family Violence Court initiatives and other specialised areas such as drug offences or mentally ill defendants is the difference in attention to victim interests. As we know, victims of any type of offence have a very long list of complaints about the criminal process of investigation, prosecution, adjudication and sentence management, including that they

[50] See eg Douglas N, Lilley S, Kooper L and Diamond A, *Safety and Justice: Sharing Personal Information in the Context of Domestic Violence – An Overview, Home Office Development & Practice Report No 30* (London, 2004). The issue has been addressed (in part) in the Territory with a provision in the new *Crimes (Sentencing) Act 2005* (ACT) that provides authority to criminal justice entities to exchange victim information.

receive no feedback, no information and little support. Furthermore, they are often only tangentially involved, are not consulted, have no standing and receive little by way of protection.[51]

If there is one thing that is abundantly clear from the few evaluations available, it is that victims value the specialised family violence jurisdiction;[52] that is they value:

- the intensive practical support;
- the timely information;
- being heard *and* understood by specialist justice practitioners;
- the focus on their safety;
- the support at court;
- the knowledge (confidence) that justice agencies and victim advocates work together; and
- the independent victim advocacy with justice agencies.

In response to victim evaluations of the pilot specialised jurisdiction, *all* of the United Kingdom developments specifically fund victim assistance positions/programs both within justice agencies and outside of government.[53] This is in an environment where the United Kingdom Government has expressly prioritised victims of crime as being "at the heart of the criminal justice system" and has introduced a major new program called "No Witness No Justice", new legislation, and some significant operational changes between police, Crown Prosecution Service and courts.[54]

The Home Office has accepted and developed initiatives around the recognition that independent advocacy for victims within the justice system is significantly different to victim support in the community (which itself is separately funded in the millions). A whole new field of accredited training in non-legal "advocacy" has developed over the past few years and having this accreditation is a requirement in most programs.

How do we do here in Australia? The picture is very mixed and, especially in relation to justice developments, very fragile.

The Territory is immensely fortunate to have the DVCS, a 24-hours-a-day, seven-days-a-week service. The DVCS predated the FVIP but its contemporary operational relationship with the AFP and other justice agencies is vastly different to that of the early 1980s. Whilst not all DVCS clients report incidents to police, the proportion is growing. And now nearly all family violence victims who are engaged with the criminal justice system also become clients of DVCS. Under the FVIP the agency has developed and refined specific operational protocols with each of the key justice agencies (except the court). Finally, there are the witness assistants within the ODPP and the role of the statutory advocate, the Victims of Crime Coordinator, for any victim of crime within the administration of justice.

When we in the Territory sit down and think what are the critical differences that the FVIP has made in its reform of the criminal justice system, it is the system's fundamental reorientation to the victim that has been, and is, a most profound change. Within the public interest system that is criminal justice, the FVIP promotes victim involvement and participation. At the same time, the program upholds the independent decision-making that is the foundation of that public interest system.

The dangers of developing justice and court initiatives in relation to family violence that do not meet the 21st century demands of a participatory justice system that is inclusive of victim interests and considers victim safety to be a priority cannot be over-emphasised. With these interests

[51] See eg Cook B, David F and Grant A, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, Canberra, 1999).

[52] See eg Vallely C, Robinson A, Burton M and Tregidga J, *Evaluation of Domestic Violence Pilot Sites at Caerphilly and Croydon* (Crown Prosecution Service, London, 2005); and Standing Together, *Partnership in Practice at the Specialist Domestic Violence Court, West London* (Standing Together Against Domestic Violence, London, 2005).

[53] See Lord Falconer, Lord Chancellor, Opening Address to the Victims' Advocates Seminar, London, 2006.

[54] See http://www.homeoffice.gov.uk viewed 15 November 2005.

comprehensively addressed, we could quite happily state that the emperor's new clothes look very fine indeed.

