*What Do Women Want? Prosecuting Family Violence in the ACT**

Robyn Holder & Nicole Mayo[1]

This article explores contemporary debate about the efficacy of criminal justice interventions in family violence. It describes an integrated criminal justice program in the ACT and, in particular, the interventionist prosecution policy adopted by the ACT Director of Public Prosecutions and its outcomes. The decision to prosecute is discussed with reference to case examples and new research as to victim preferences. In the context of the statutory constraints to the prosecution role, the article argues that it is in the interests of victims of family violence that discretion to prosecute remains with the prosecutor. It is found that victims of family violence value consistency, early information, dialogue and sustained support in their engagement with the criminal justice system. The research concludes that a 'pro-prosecution' policy is effective in improving victims' safety from violence, and in achieving satisfaction with prosecution authorities.

While Mel Gibson's film character might claim to know '*What Women Want*', this article does not make so bold a presumption. Rather it seeks to explore an issue that is contentious in recent literature on the criminalisation of domestic violence (Mills 1999; Hoyle 1998; Hanna 1996), namely women's choices, or the lack thereof, in the decision to prosecute and the context for that decision.

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* In the ACT we use '*family violence*' as an overarching policy term to describe the range of inter-personal violence that takes place in an intimate or family setting. In the FVIP Protocols (1998), the definition is acknowledged to derive from the ACT *Protection Orders Act* 2001. The protocols further acknowledge that some domestic violence behaviours are abusive and controlling but not necessarily defined as criminal offences. Within the FVIP, the types of cases prosecuted include sexual and physical offences where the victim is either a child or an adult, and female or male. The defendant may also be a juvenile or an adult and may be male or female. The relationship context may be parental or sibling assault, spousal assault (being *domestic violence* per se), or violence in a lesbian or gay relationship. In this article we use gendered pronouns for the victim/witness and for the offender in recognition of the fact that between 90–95% of charged matters are male against female, and the vast majority are adult offenders.

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Women's advocates have, for over 30 years, campaigned strongly for the criminalisation of domestic violence (Dobash & Dobash 1992; Hopkins & McGregor 1991; Hanmer et al 1989). Over that time, law reform efforts have begun to acknowledge the ineffectiveness of the police response (Grace 1995; Easteal 1993; Edwards 1989) and the inaccessibility of civil protection measures (Egger & Stubbs 1992; Seddon 1993). Recently, notably in North America, this focus has shifted to bolster the role of the prosecutor in the law enforcement process (Hoyle 1998; Rebovtich 1996; Ford & Regoli 1993). In Australia, however, little if any research has examined this crucial area.

The authors are both practitioners (although with significantly different roles) within the criminal justice system in the ACT. In this article we explore the issue of 'choice' within the parameters of Australia's criminal system and the dynamic interaction of women's views with the various decision-making points of that system particularly at prosecution. We will draw first on the academic literature as influential upon our reflections. We will then briefly describe the ACT Family Violence Intervention Program (FVIP) and some of the operational outputs that have been achieved, before exploring the role of the prosecutor and the parameters of that position. The new policy position of the ACT Director of Public Prosecutions is then outlined so as to provide context for a discussion on and case examples that explore the decision to prosecute vis a vis 'the reluctant victim'. Our predominant information sources are the evaluations, surveys and operational data of the ACT's FVIP.[2]

As practitioners we conclude that neither women's interests nor the interests of justice are served by rigid adherence to policies that claim 'no-drop prosecution' (Gwinn undated; Asmus et al 1991). Policy and procedural guidance that is oriented towards a more assertive and consistent prosecution practice can add significant substance to the policy position of the Australian Heads of Government, including the ACT Government, that 'many forms of domestic violence are against the law'.[3] However, in the ACT, these have not been applied in a manner that disregards women's (diverse) views nor that is unresponsive to the circumstances of individual cases. Nor have they been applied in a systemic vacuum.

Family Violence & Criminal Justice

Advocates for a strong criminal justice response to family violence have argued on the basis of a number of claims. First, that it sends a strong *message* to the community that this type of violence will not be tolerated. Second, that by *punishing* transgressors it may act to *deter* offenders and potential offenders from engaging in family violence, and hence *prevent* violence occurring in future. Third, that it may *protect* a victim from further violence. And finally — though perhaps a more recent claim — it may *rehabilitate* the offender so that he does not again engage in such violence against his partner or another woman (Lewis et al 2000; Stark 1996). But, of these claims, what do women who experience family violence uphold and how do we know?

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2 There have been three evaluations being: Keys Young (February 2000), *The ACT Pilot Interagency Family Violence Intervention Program*; urbis keys young (May 2001), *ACT Family Violence Intervention Program Phase II*; urbis keys young (April 2001), *Evaluation of the Learning to Relate Without Violence and Abuse Program*. All three were published by the Partnerships Against Domestic Violence, Commonwealth of Australia, Canberra. They can be located from the Partnerships Against Domestic Violence website via <www.osw.dpmc.gov.au/>.

3 Statement of Principles agreed by Australian Heads of Government at the National Domestic Violence Summit, Canberra, 7 November 1997.

Some commentators (Buzawa et al 1999; Mills 1999; Snider 1998) have begun to throw doubt on these predominating assumptions. To some extent the positions taken have been influenced by theoretical debates about the role of the state and its agencies — is it enabling or oppressive in its patriarchal authority? Others have examined activity data as providing an indication of 'successful' interventions — or, more usually, of failed criminal justice interventions. These activity-based claims argue that increases in arrest, charge and conviction rates are an indicator of an improved criminal justice response that is more effective in meeting women's needs for safety (Jaffe et al 1993; Gamache et al 1988).

Writers have also explored, from class, race and ethnicity perspectives, the unintended consequences of a criminalising approach to family violence (Blagg et al 2000; McGillvray & Comaskey 1999; Snider 1998; Ruttenberg 1994; Sherman et al 1992).

A number of authors (Holder 2001; Lewis et al 2000; Hanna 1996) reflect that, to some extent, the debates originate from a rather fruitless dichotomising of the woman experiencing violence as either a passive victim or an active agent. Women, they say, are not only trying to end the violence but also to minimise its impacts, forestall negative consequences, and continue to manage the usual activities of life.[4] With this more contextualised framework, they suggest that there needs to be an examination of what a woman may seek from the various services she contacts or encounters, and how she experiences the process of her interaction with them.

In our article we want to acknowledge the importance of the operational context of the criminal justice system in exploring these encounters. A social and political analysis of the role of the system in tackling family violence is essential. However, a more nuanced understanding becomes apparent through the day-to-day decisions of the system's many and varied practitioners. First, there are the different criteria around the different decisions of practitioners — say, between the decision to grant police bail and the court's bail decision. Second, decisions are also made with differing levels of access to case relevant information — say, the information available to the officer deciding to charge and that available later on to the prosecutor when deciding on which charge, if any, to proceed to prosecute. Third, women's levels of satisfaction with system responses will fluctuate and change not only because these responses constitute a process but because the offender's behaviours towards her will also be influenced by those system responses.

We seek to draw together some of the competing claims about the role of criminal justice in family violence on the basis that they are not necessarily in irreconcilable conflict. Measures of satisfaction and safety — key needs for victim/witnesses — have been utilised in the evaluations of the FVIP. We focus these measures on points related to criminal procedure. Partially, this reflects the legislative framework on victims 'rights' that exist in the ACT,[5] partially because they are actually measurable. But more fundamentally it is because this area — called procedural justice — is consistently noted in the literature as critical to the satisfaction or otherwise of the crime victim with the criminal justice system (Paternoster et al 1997; Wemmers 1996; Tyler 1990; Lind et al 1990).

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4 Liz Kelly (1999) describes a series of internal processes that women go through — in addition to externalised help-seeking — to end the violence being perpetrated against them. The extent to which support workers and other professionals understand and work with these processes can enable quicker movement through them for the woman concerned.

5 The ACT *Victims of Crime Act* 1994 located at <www.legislation.act.gov.au/>.

We suggest that these measures, combined with activity data from justice agencies, give positive though somewhat tentative credence to the effectiveness of a criminalising approach to family violence in the ACT. Furthermore, it is possible for the criminal justice system to meet both women's needs and its own corporate goals.[6] These latter ideas may reflect a '"new managerialist" strand' that is challenging justice administrators (Lacey 1994:535). It is urgent, however, that researchers, advocates and administrators find concrete methods upon which to base claims about the effectiveness of justice interventions in family violence or indeed in any other offence area.

The ACT Family Violence Intervention Program (FVIP)

The FVIP is not Australia's only venture into justice reform around family violence.[7] It is, to the best of our knowledge, the country's only fully coordinated and integrated criminal justice and community response to family violence.[8] That is, a program that integrates internally to the justice system the activities of police, prosecution, courts and corrections, and coordinates externally with other key agencies such as domestic violence advocacy services. When the FVIP commenced in 1998 family violence prosecutions stood at around 160 per year. Over these five years that number has soared to over 500 with an 86% conviction rate.[9]

The FVIP is a concerted and sustained attempt to improve criminal justice responses to allegations of family violence in the ACT. It operates at the macro level of policy, administrative and technological infrastructure and legislation; and at the micro level of case management, individual practitioner decision-making and the monitoring of those decisions. The co-ordinated inter-agency response was recommended, after many years of community lobbying, by the ACT Community Law Reform Committee in 1995 and accepted by the ACT Government in 1996. In 1997, a working group devised a broad outline of a pilot program. This pilot received Commonwealth funds under the national *Partnerships Against Domestic Violence* initiative. Since 1998, the FVIP has evolved as a phased and strategic program of system-wide change. The core participating agencies[10] are the Australian Federal Police, the Office of the ACT Director of Public Prosecutions, the

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6 Whether the criminal justice system *as a whole* can be said to have 'corporate goals' is a contentious point. There is also an unanswered question in how the traditional standards of an independent, fair, accountable and efficient system are measured. The ACT Justice Strategy 2002–2005 takes as its goals to (a) prevent and reduce crime and its impacts, (b) bring offenders to justice, (c) administer justice fairly respecting the rights of the victim, the community and the accused, and (d) administer sentencing outcomes efficiently and effectively. Each individual agency within the system has goals set within their own legislative framework. The agencies involved in the FVIP agreed, in 1998, on four overarching goals being to (a) work cooperatively together, (b) improve victim safety, (c) provide opportunities for offender rehabilitation and accountability, and (d) seek continuous improvement in operations.

7 Some other examples of interagency work focused on criminal justice include at Joondalup (WA), the Gold Coast (Qld), Adelaide (SA) and projects such as the cross-border Atunypa Wiru Minyma Uwankaraku Project (NT/WA/SA) and the Domestic Violence Integrated Information Project (Tas).

8 The 'gold standard' in such programs is described in Shepard & Pence (eds) (1999) *Coordinating Community Responses to Domestic Violence: lessons from Duluth & beyond*, Sage.

9 In 2001 the program achieved a Certificate of Merit in the Australian Violence Prevention Awards. In 2002, the police and prosecution training program for FVIP won an Australian Violence Prevention Award. The FVIP has also been recognised as a benchmark of justice in *Access to Justice: a national report of initiatives* (Commonwealth of Australia 2002).

10 Other participating agencies are the Departments of Education, Youth and Family Services and Justice and Community Safety, the Victims Services Scheme and SAAP women's services.

Magistrates Court and ACT Corrective Services; the independent offices of the Victims of Crime Coordinator and Legal Aid (ACT); and the non-government Domestic Violence Crisis Service and Relationships Australia Canberra and Region.

The FVIP has been variously described as 'a series of processes and procedures' and as a program that 'is part of a political movement that challenges men's violence against women'.[11] The core components of the program that have been progressively implemented over the past 5 years include:

- the development of consistent and inter-connecting policy frameworks across the key criminal justice agencies and with particular non-government services;
- the creation of specialist positions, procedures and practices within the mainstream context of key justice agencies;
- implementation of joint training between police and prosecution and including other practitioners;
- equipping general duties police with Family Violence Investigator Kits;
- monitoring of case decisions and the implementation of case management procedures throughout the criminal system;
- the implementation of an integrated perpetrator education program as a sentence option;
- strategic inter-agency program planning; and
- continuous data collection, monitoring and evaluation.

That the ACT is perhaps a small and unique jurisdiction in Australia may limit the relevance of the FVIP's findings to the larger states and territories. However, the Territory's distinctive characteristics carry both benefits and burdens. The ACT is obviously small in size, the administrative boundaries of government all overlap, it has just two court levels, and the independent Office of the ACT Director of Public Prosecutions (DPP) conducts all summary and indictable Territory prosecutions.

Achievements of the FVIP

Instances of charge, arrest, prosecution and conviction are the key activities (or *outputs*) of the law enforcement and prosecution processes. Researchers and advocates have tended to use the low rate of these activities as evidence of poor performance in criminal justice interventions in family violence (Buzawa & Buzawa 1996; Dobash & Dobash 1992; Hopkins & McGregor 1991).

The evaluators of the FVIP worked closely with justice agencies to determine what data already collected may be useful, to create the means to collate it and to establish benchmarks from which to measure changes. Subsequent upon these external evaluations, ACT justice agencies committed themselves to self-resourced and on-going data collection, analysis and publication. This is significant for the level of human and agency resource it requires and for its contribution to a publicly accountable and transparent system.

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11 The first comment was made by Ken Archer, (then) ACT Deputy Director of Public Prosecutions, and the second by Dennise Simpson, Manager of the Domestic Violence Crisis Service. The context to the comments was a meeting to explore the operation of the FVIP in relation to juveniles suspected of committing a family violence offence (Canberra 2002).

These agency sources reveal that:

- The proportion of incidents where police took some legal action (arrest, caution, summons, breach of the peace or mental health crisis team) increased from 27% to 47% over a nine month period in the pilot patrol area (urbis keys young 2001a:54);
- There was a 320% increase over four years in cases prosecuted that involve an FV offence (from 168 matters prosecuted in 1998/99 to 538 in 2001/02);[12]
- There was an increase from 24% to 61% of early pleas of guilty from 1998/99 to 2000–2001;[13]
- There was an increase in the number of defendants convicted of one or more FV offences from 68 defendants in 1998/99 to 298 defendants in 2001/02; and
- 86% of all family violence matters commenced and completed resulted in a conviction in both 2000/01 and 2001/02.[14]

Whilst police say (urbis keys young 2001a:49) that the new emphasis on early evidence-gathering has added to their time in attending an incident, the benefits to them have shown up further down the process. The high rate of early pleas of guilty is in part the result of better evidence and better early briefs. An early plea obviates the obligation on police to submit a full brief of evidence. This results in a significant resource saving for police. From April 2000 to end June 2001 835 police days were saved from attending court on family violence matters. In further savings for court administrators, the Family Violence Case Management Hearing process[15] saved 120 hours court time and 271 witnesses from attending court in 2001. This was further increased in 2002 to a saving of 483 hours of court time and 942 witnesses.[16]

Sentencing patterns are also evolving. Five years ago it would have been commonplace for the imposition of a fine or monetary penalty in a family violence matter. This practice is now almost obsolete with a marked increase in the number of offenders referred to the ACT Corrective Services mandated perpetrator program.[17] This may reflect a change in judicial attitudes based on a better understanding of the dynamics of family violence. Alternatively, it may also reflect the availability of a better range of more appropriate sentencing options.

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12 Statistics from points 2 to 5 derive from ACT Director of Public Prosecutions, *Annual Reports 1999-2000, 2000-2001, 2001-2002*, Canberra.

13 In the year 2001/2002 the number of early pleas of guilty reduced slightly to 53% of FV matters prosecuted (ACT Director of Public Prosecutions, *Annual Report, 2001-2002*, Canberra).

14 The term 'conviction' includes matters where the Court found the offences proved but proceeded without recording a formal conviction pursuant to s402 of the *Crimes Act* 1900 (ACT).

15 The Practice Direction 2 of 2000 Family Violence Case Management Hearings, ACT Magistrates Court, forms the basis of a 'problem-solving court'.

16 Director of Public Prosecutions, *Annual Reports 2000-2001, 2001-2002*, Canberra.

17 The Learning to Relate Without Violence & Abuse Program is for adult males convicted of an offence against their current or ex female partner. Men already under supervision for other offences for whom domestic violence is identified as a problem may also be directed to attend. The program is managed by ACT Corrective Services and provided under contract by Relationships Australia Canberra & Region. A separate one-to-one program is provided to FV offenders who do not fall into this specific category such as women, people with special needs and offenders whose offence was committed in a gay or lesbian relationship. An emerging issue in the ACT relates to juveniles convicted of a FV offence. For further information contact <dymphna.lowrey@act.gov.au>.

These five years of reform have brought the ACT criminal justice system to a level of functionality from which certain key questions may now be examined. Continuing challenges exist in relation to the role of the victim in prosecution decision-making and in determining if and how victims' safety and their satisfaction with justice practitioners are improved through more assertive and integrated intervention. However, these questions cannot be fully explored without a description of the role of prosecution within the broader system.

The Prosecution Role in the ACT

For the first 200 years in this country prosecutions were largely conducted as they were in England. Under this system the Attorney–General or a person appointed by the Governor was the only person authorised to present indictments. This power was eventually transferred to the Office of the Crown Prosecutor (Refshauge 2002).

In 1973 the Federal Attorney–General announced that the prosecuting section of the police force in Canberra would be transferred to the Deputy Crown's Office and they were subsequently transferred to the Director of Public Prosecutions when that office was created. Initially that responsibility lay with the Commonwealth Director until the ACT Office was established in 1990 after the ACT gained self-government.[18]

Prosecutors in the ACT are bound by legislative provisions and guidelines with respect to when and if a prosecution (of any type of offence) can proceed.[19] The initial consideration will be *the adequacy of the evidence*. A prosecution should not be instituted or continued unless there is reliable evidence, duly admissible in a court of law, that the person accused has committed a criminal offence. This consideration is more than a technical appraisal — the evidence must provide reasonable prospects of a conviction. If a particular case does not pass this evidential test then the case cannot proceed.

If the assessment leads the prosecutor to conclude that there are reasonable prospects of a conviction then they are required to apply the second test and consider whether it is in the *interests of the public* that the prosecution proceed. There are many factors that may be relevant to that decision.[20] They include the seriousness of the offence, antecedents and background of the alleged offender, prevalence of the alleged offence and the need for deterrence, both personal and general, whether the alleged offence is of considerable public concern and the attitude of the alleged victim to a prosecution.

ACT Family Violence Prosecution Policy

As mentioned previously, most Australian research and policy has focussed on police responses to family violence. In their meta-evaluation of the US arrest experiments, Garner & Maxwell have however concluded (2000:108) that:

> The policy debate on alternative police responses to domestic violence is no longer about alternatives to arrest but alternatives to what the police and other agencies should do after arrest.

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18 For a more detailed discussion on the history of prosecution in Australia see Refshauge, R (2002) 'Prosecutorial Discretion in Australia' in Moends and Biffot (eds) *The Convergence of Legal Systems in the 21st Century. An Australian Approach*, CopyRight Publishing Company Pty Ltd, Qld.

19 The *Director of Public Prosecutions Act* 1990 can be found at <www.dpp.act.gov.au/>. In the ACT all Territory prosecutions are conducted by the ACT Director of Public Prosecutions (ACT DPP). The ACT does not have police prosecutors, unlike many other Australian jurisdictions.

20 For the detail of the ACT DPP Policy and Guidelines for Prosecutors see <www.dpp.act.gov.au/>.

Considering arrest simply as the preferred method of getting a matter into court following the decision to charge,[21] the prosecution function then becomes pivotal. Prosecutor and legal academic, Cheryl Hanna (1996), asserts that prosecutors' lack of resolve in tackling family violence serves to corrupt the very system of justice. So central is the role of the prosecutor that it can, equally — and as has been the case in the ACT — act to transform and revitalise how and with what objectives the criminal justice system processes family violence cases (see also McGuire 1998).

However, prosecutors have often been heavily criticised for their inaccessibility to and remoteness from the victim/witness and the lack of transparency in their decision-making (Samuels 2002; Hart 1993). Partly this is due to the separation of investigation and prosecution that exists in Australia. Partly it is because prosecutors are required to disclose to the defence any inconsistent statement made by the victim. As a result of this, at a practical level, there may be good reasons why a prosecutor may wish to limit his or her exposure to a victim in the interests of justice. A victim/witness who has given a couple of different versions of the events to police may be 'explainable' in terms of the circumstances of the event and/or the relationship and in relation to other available evidence. However, a victim who gives five or six different versions will be attacked in court by defence counsel as an unreliable witness who is without credibility. This scenario serves neither the interests of the victim nor the administration of justice.

For these reasons, organisational change has often been found necessary by reformist prosecution offices (Rebovitch 1996). For the ACT DPP, new procedures and new and specialised positions have served to provide clarity of function and of boundaries between prosecutor and victim, between prosecutor and police investigator, and between prosecutor and victim advocacy services. The policy now sets out where and how victim input is sought in the prosecution process. In particular it states that victims should be consulted before making decisions to discontinue any proceedings.[22] Likewise, requests by the victim for a withdrawal of the charge are to be examined closely to identify the reasons behind the request. It is relevant, for example, to identify the intimidation, coercion, harassment or inducement of a witness. So far as it is ascertainable, the reasons behind a reluctant attitude of a victim should be learnt and considered. They will often impact on decisions relating to the future of the prosecution. A Witness Assistant within the Office of the ACT DPP conducts or facilitates most victim contact in relation to family violence matters.

A specific Family Violence Prosecutor position also generated and consolidated the specialised knowledge and training required within the Office. If personnel availability is not specifically addressed in the context of the DPP's primary legislative duties, then some obligations, particularly to victims of crime, will not be met (Davis et al 2002).[23]

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21 S212(2) of the ACT *Crimes Act* 1900 authorises police to arrest in 'domestic violence offences'. In all other offences police have first to consider a range of criteria before deciding that summons is not an appropriate method to bring the charge before the Court. The policy of ACT Policing supports the use of s212(2) as the quickest and surest method of bringing a defendant to court thereby maximising safety for the victim and reducing the scope for intimidation of witnesses. Police data show that, where officers have a reasonable suspicion that an offence has taken place, they tend to charge and arrest. Other police-initiated legal actions include, for example, summons and a Voluntary Agreement to Attend Court (VATAC).

22 This is consistent with the obligation contained in the ACT *Victims of Crime Act* 1994 Part 2 s4(d) and (e). It is also consistent with the recommendations of the Samuels Report into the charge bargaining process within the NSW DPP (2002).

23 This fact is recognised in research by the Vera Institute of Justice in NYC into the factors that impacted upon effective implementation of victim's rights legislation. This research identified the resource impact on prosecution offices in particular (Davis et al 2002)

In addition to these structural reforms, prosecution policy on family violence in the ACT was modified in 2000–2001 to emphasise the importance of continuance with prosecution action.[24] A basic proposition of the new policy is that, in the vast majority of cases, the interests of the public will only be served by the deterrent effect of an appropriate prosecution for family violence matters. Prosecutors have an obligation to remind victims throughout the prosecution process that victims do not 'own' prosecutions. Rather, it is the responsibility of the DPP to carry on prosecutions on behalf of the community. Victims cannot 'press' or 'drop' charges.

Although it is impossible to generalise, if physical violence is alleged, and the more serious the violence involved is, the ACT DPP has decided that the more likely it is in the public interest to prosecute, notwithstanding a victim's request that the proceedings be terminated.

A further challenge faced by prosecutors is the requisite standard of proof required in criminal matters. There is often misunderstanding about what it is that must be established. As part of the inter-agency FVIP, the ACT DPP has been heavily involved with ACT Policing in new training on investigation practice and the preparation of briefs of evidence. Notwithstanding this attention and the emphasis that has been placed on police to explore potential sources of evidence other than the victim, in a large number of matters the only evidence available will be that of the victim to be heard against that of the offender. In these circumstances, the Court's duty is to do much more than choose one version over the other. For a Court to find a criminal offence proved, all elements of the offence must be proved beyond reasonable doubt. This requires the fact finder (usually a Magistrate in the ACT) to accept the version of evidence from the victim and positively reject the version given by the defendant. This is often an difficult task. If the Court cannot reach the conclusion that the defendant is not telling the truth, even if the Court has strong suspicions of this, then the offender must be given the benefit of the doubt and the charge dismissed. Likewise, it is for the prosecution to negate beyond reasonable doubt all defences available at law rather than the defendant having to establish that they exist.

A certain level of risk-taking is required of prosecution authorities conducting reform in the area of family violence. A prosecuting authority is established to prosecute on behalf of the community and, in so doing, to take into account all interests in the justice process. As such it carries a considerable weight of responsibility. However, these risks are mitigated when a stronger preparedness to prosecute on the adequacy of the evidence and with reasonable prospects of conviction even with a reluctant victim/witness is undertaken *within* a system where police investigators have gathered evidence from sources other than the victim *and* where the victim is supported by independent advocacy. Institutional risk is more manageable when there is trust that the other parts of the system function properly.

Victim Reluctance and the Decision to Prosecute

The moment one looks at what happens after arrest, one is confronted by the contentious problem of the so-called 'uncooperative victim' or, in the terms we prefer, the 'ambivalent or reluctant witness'.[25] It is on this critical issue that the so-called 'no drop' prosecution policies of some US jurisdictions flounder. Hoyle (1998), Rebovtich (1996), Lerman (1986)

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24 Note, however, that the family violence policy is still consistent with the DPP's legislative obligations. A full version of the DPP Family Violence Policy can be requested from the Director of Public Prosecutions, GPO Box 595, Canberra City 2601.

25 S34 *Evidence Act* 1995 Cth uses the term 'unfavourable witness'.

and Ford & Regoli (1993) have identified that the level of victim non-cooperation is far higher in the prosecution of family violence cases than in cases involving stranger violence. In essence, the research indicates that, through police intervention, women may have met their short-term goals for the immediate cessation of violence and a readjustment of the power balance (albeit temporary), and are reluctant to participate in a process the outcome of which is shrouded in *maybe's* and *perhaps-es* (see for example, Hoyle & Saunders 2000; Hoyle 1998; Ford 1991).

In the US, prosecutors have indicated that family violence victims were 'uncooperative' in nearly 50% of cases (Rebovitch 1996). In Australia's only research in this area, the proportion was far less. In the ACT, we surveyed the views of victim/witnesses whose matter had been finalised in the criminal courts.[26] In 2000 urbis keys young surveyed 39 victim/witnesses (20% of the total of finalised matters in the survey period). Twenty (20) of these respondents agreed to be contacted again twelve to eighteen months later. At the second survey period 15 of those 20 completed a further survey.[27]

In the first survey, 74% of victim/witnesses in cases that were prosecuted and finalised stated that they had never indicated to the police, the prosecution or the court that they had wanted the charges dropped (urbis keys young 2001a:78). Probing their attitude to prosecution, 51% of victims indicated that they 'were determined to see the case through no matter what'. Reasons given related to a wish to see repeat offending stopped, to show the perpetrator the violence was unacceptable, because they felt free from pressure, and to 'shame' the perpetrator through public disclosure of the violence. Comments included (urbis keys young 2001a:78):

> [I] wanted it sorted out once and for all.
>
> I felt no pressure whatsoever as I was not the one pressing charges.
>
> I needed my partner to understand that violence is wrong and utterly unacceptable both to me and our society.

A further 23% said that they were 'not sure whether or not they wanted to proceed'. These respondents spoke of the 'hassle', their concern about the 'unchartered waters' of going to court; and concern about what the outcomes might be. One woman said 'Because I did not know what will happen next. I was a bit scared.'

21% of victim/witnesses indicated that they wanted the charges dropped at some point in proceedings (urbis keys young 2001a:77–78). Some thought that prosecution was inappropriate in the circumstances; some felt it would cause more stress or problems than it would solve; or that they thought the offender had learned his lesson and was unlikely to re-offend.

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26 For the first survey, victim/witnesses were posted a self-complete survey with a request that it be returned to urbis keys young. A maximum of three follow-up phone calls were made. Out of 196 possible respondents 39 (20%) replies were received. For the second survey, 20 of the first cohort of respondents who had agreed to be contacted again by the Office of the Victims of Crime Coordinator and were sent another survey. Of this twenty (20), sixteen (16) replies were received but 15 were included in the analysis.

27 A total of 16 responses were received but one response was excluded from calculations as the incident described did not have a family or relationship context.

Other surveys suggest that, for a significant proportion of victims of family violence, fear of retaliation by the alleged perpetrator and an experience of that person being all-powerful drive them to seek, as they see it, the lesser of the two evils.[28] Sue's case[29] is an example to point.

> Sue was nearly beaten to death by her de facto partner, Sam. She had initially given a full statement to police, having fled to a refuge, and the medical and circumstantial evidence supported the original version of events that Sue gave to police. When Sam found her and threatened their child Sue went back to him and sought to have charges withdrawn. Despite unwavering support from her sisters, Sue refused any contact with services and refused to talk with the prosecutor. She wrote a letter to the Magistrate that she read out from the witness box and pleaded that the matter be dropped. Sam was nonetheless convicted and sentenced to serve 9 months. So far as we are aware, Sue maintained contact with Sam for the duration of his custody. For Sue, her experience and fear of Sam's violence and seeming omnipotence over-rode the support of her family and the intervention of the criminal justice system.

For others, there is deep confusion about the system and its processes, and a lack of information, experience and understanding of where it is taking her — in essence, taking her interests, her family, her security, and her future. For example, in our base sample of 39 victim/witnesses, 49% (n=18) felt unsure of what was going to happen next following police attendance at an incident, only 40% (n=10) of women said that they felt well prepared for giving evidence and 49% (n=14) indicated that there was a lot they didn't understand during the court case (urbis keys young 2001:pp 76–80).

In their work in the criminal courts in Washington DC, Bennett, Goodman & Dutton (1999) identified how significant it is to a woman's choice to participate in prosecution when she is fully informed, involved and supported. In the next case example Anna's distress related to her deep feelings of shame and responsibility for her family. These feelings were, however, exacerbated by her lack of knowledge about the process before her.

> Anna's husband was arrested and charged when he threatened to kill her with a knife. This wasn't the first time and George had been under the influence of alcohol. Anna and her teenage children attended the hearing and gave evidence in a very distressed state. The Magistrate stood the matter down and sought the assistance of the victims of crime office. Anna explained that in her Island culture the maintenance of the family was her responsibility and that 'things would be made worse'. In particular, she worried that, on her testimony alone, George would be sent to prison. The office spent time with Anna talking about how she felt, explaining the process, how it worked, how long it took and the opportunities she would have for independent input, and the low likelihood of a custodial sentence on the charge. Anna wanted George to 'get help'. The matter continued and Anna gave some carefully worded pleas in mitigation for her husband in her Victim Impact Statement. George was placed on a Griffiths remand and ordered to supervision and attendance at the perpetrator education program. Anna later reported a stronger sense of 'leverage' over her husband's behaviour through the involvement of criminal justice agencies and some sense of control through the contact opportunities provided both at court and during the probationary period.

As stated previously, under a quarter of the respondents to the first survey remained antipathetic to the prosecution process despite continuous support independent of the prosecution authorities. Gordana's circumstances illustrate this.

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28 For findings about the experience of fear and re-assault see, for example, Klein 1996; Goodman, Bennett & Dutton 1999; Jaffe et al 1993; Ford & Regoli 1993, and Buzawa, Hotaling & Klein 1999.

29 Whilst all cases are prosecuted in open court and are therefore public, these examples have been made anonymous so as not to inadvertently reveal confidential details.

> Gordana had been married for 20 years and had experienced varying levels of abuse over that time. The first time the violence came to police attention, Marek was arrested and charged. Gordana gave a full statement on the incident and described prior incidents to the police Victim Liaison Officer. Under considerable family pressure however, Gordana later called every single day to the police to seek withdrawal. When, from the witness box, Gordana denied the facts of the precipitating incident the prosecutor sought to have Gordana declared 'an unfavourable witness' and to admit the prior inconsistent statements she had made to police. Their 13 year old daughter was subpoenaed to give evidence as a direct witness of the incident and did so by way of CCTV. Marek was convicted and sentenced to probation supervision and participation in the Perpetrator Education Program. At the conclusion of the hearing, Gordana screamed at the prosecutor that she had 'ruined' her life and she would never call police ever again. We do not know whether Gordana was re-assaulted or whether she has had cause to call for police assistance again. Gordana felt very deeply a sense that the maintenance of family harmony, respectability and cohesion was her responsibility. She experienced considerable blame and pressure from her adolescent children and other family.

In our experience, most victims of family violence have — understandably — a range of expectations and misunderstandings about the prosecution process. Also in our experience, a more considered and inclusive procedure with clear frameworks for decision-making allows for victim views that change and adapt in the face of an unfolding process. For the prosecutor there is a significant difference between a victim/witness who is reluctant to testify — such as Anna — and one who denies or changes her original statement to police – such as Gordana. But it is cases such as these in the ACT that have forced consideration and still further consideration of practices based on policies of 'pro-prosecution'.

Gordana was one of the very few victim/witnesses compelled to give evidence. This decision is one that should never be made lightly. It is, at least in the ACT, rare. In a case file analysis of 300 completed matters prosecuted over 12 months in 2000/2001, 183 resulted in an early plea of guilty. Of the 20 cases that went to a full contested hearing, only 3 of the victim/witnesses were sought by the prosecutor to be declared 'unfavourable'. That is less than 1% of *all* family violence cases prosecuted in that year.

On the flip side of this argument, there have been a very small number of matters in the ACT where, despite sufficiency of evidence, prosecutions are discontinued as a direct result of the reluctance of the victim to participate in the process. It is useful to provide some case examples of instances in which discontinuance may be influenced by a victim's view and circumstances.

> Peter was charged with assault after an incident with his wife, Jane, at a function. He was under the influence of alcohol at the time. Police were called after he refused to leave the matrimonial home. Jane made a complaint of assault. He admitted slapping her. He was arrested and charged. Jane later sought the matter be withdrawn. There was sufficient evidence to proceed. There was no evidence of prior violence, there was no evidence of significant alcohol abuse, and there was evidence that the extended family had been involved in counselling Peter. Peter's employment could have been jeopardised by a conviction. The prosecutor's assessment was that this was an isolated incident involving a low risk of reoffending. To proceed may have resulted in potential for significant financial hardship for all family members. The prosecution was discontinued.

> Gertrude had been the victim of domestic violence in the past at the hands of her husband, Jim. On this occasion she was charged after Jim called police following an incident. She admitted the offence. He subsequently sought withdrawal of the matter. There was evidence that both parties were attending counselling to address relationship issues and the use of violence. There was no evidence of a need for police intervention subsequent to the offence date. There was evidence of a medical condition that may have contributed to Gertrude's behaviour at the time. The matter was discontinued after a lengthy adjournment without incident. The prosecution assessment was that positive and reliable rehabilitation steps had been taken and it was a minor offence. The history of the relationship between the offender and victim, for the incident in question, was taken into account.

Programs such as the FVIP do not erase victims' ambivalence about or reluctance to participate in the prosecution process. Nor do they eliminate the reasons behind those feelings. What intervention programs can do is to help practitioners manage the situations better so that women's concerns are, at least, not exacerbated. Prosecution authorities are exhorted to prosecute family violence matters on the basis of public interest, that is, the message of disapproval and deterrence. However, each case presents its own complications around the core ambivalence of the victim/witness and the sufficiency of evidence. In now playing a part in the social and political movement to bring private violence into the public arena, the prosecutor must in effect then balance the public interest with that of the private individual.

Measuring Victim Interests in the Prosecution Process

It is clear, from the ACT surveys, that the views of private individuals as victim/witnesses in the prosecution process coalesce into three main groupings. These findings, combined with the data on the volume, nature and processing of matters, has enabled the agencies involved in the FVIP to reach the stage at which we can ask — 'to what effect' are we charging, prosecuting and convicting?

Hence we move to the key issues of victim satisfaction and victim safety. The ACT FVIP is a developmental program that continues to evolve. The research is offered not as providing conclusive findings but rather as indicators towards more accurate and more focussed questions for the future. In so doing we would like to emphasise again our experience of how profoundly the policy, procedural and operational environment of the criminal justice system can affect research and evaluation.

Eminent criminologist, Eve Buzawa, has asserted that measures of victim satisfaction may present more meaningful and accurate indicators for justice reform in the area of family violence (Buzawa, Hotaling & Klein 1999) than do conviction rates. However, this begs the question of 'satisfaction with what?' We think it is possible to link a subjective assessment from the victim/witness to concrete procedural issues *and* to outcomes on individual cases.

Tyler (1990) and Lind et al (1990) have identified how important the perception and experience of procedural fairness in the criminal justice system is to both victims and offenders. For crime victims, this boils down to notification, participation, information and respectful acknowledgment.

Victim/witnesses seek *notification* on a range of things — dates, decision-making points, decisions (charge, prosecution, bail, court outcome), and identities of key participants. Linked to notification is the need for *information* about the system, how it works, the role of the prosecution and of the victim/witness, and — crucially — knowledge about the range of likely sentences. In the main, victim/witnesses also seek opportunities for *participation*

through making the initial complaint to police, the provision of a full statement, offering (or not) background and relationship history, consultation on their views and opinions, input at bail, input at post conviction through the Victim Impact Statement and (occasionally) the Pre-Sentence Report, and finally — for family violence victims — input into the assessment for the offender's suitability for the court-mandated perpetrator education program and, where applicable, considerations of parole.[30] *Respectful acknowledgement* relates to the inter-personal communication between the victim/witness and justice practitioner. This idea addresses the style of the interaction — for example, the extent to which the communication is empathetic and builds rapport — where others relate to substance. The next section discusses the extent to which these victim interests have been measurable in the FVIP.

Satisfaction Measures

Family violence victims in the first survey expressed a 74% satisfaction rate with the response of ACT police at the time of the incident, and, of those who had contact with the Office of the DPP, over half said they were satisfied (urbis keys young 2001a:78). Satisfaction measures are particularly useful in revealing the tension between the public and private interest. For example, research into the 'full enforcement jurisdiction' of Quincy (Mass), revealed a high level of satisfaction (82%) with police action (Buzawa, Hotaling, Klein & Byrne 1999). However, they identified a direct correlation between victim dissatisfaction and preference *against* arrest.

In the ACT, we identified a further direct correlation between dissatisfaction with prosecution authorities and a victim's preference that the case not proceed. There is a link here too with the issue of 'respectful acknowledgment' for the victim/witness. Those respondents who made comment that their views were not heard or were marginalised by the Office of the DPP, were also those who did not want the matter prosecuted (urbis keys young 2001a:79).

Interestingly, in the follow-up victim survey (on an admittedly small sample size of 15) three respondents were originally unsure whether they wanted the prosecution to proceed but, 12 months later, then expressed satisfaction with the outcome and felt that justice was done. In both the first and second surveys of victims within the FVIP we noted that women changed their views as the case progressed through the system. In one example, a woman was adamant that she did not want the matter prosecuted, was dissatisfied with the Office of the DPP and yet, at the finalisation of the matter (a conviction) expressed satisfaction with the outcome and that justice had been done. These findings suggest that evaluations of satisfaction must acknowledge the context, location (in the system) and the time frame at which the survey is conducted in order to achieve more accurate interpretations.[31]

Returning to measures of satisfaction with procedural points, we identified that victims, in the main but not the majority, received notification and feedback from police or prosecution. For example, 49% received police follow-up, 45% were informed of bail conditions,[32] 29% agreed with the statement that they had received short notice to attend court, and 14% reported being unsure as to court outcome (urbis keys young 2001a:73–81).

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30 S46 of the ACT *Rehabilitation of Offenders (Interim) Act* 2001 requires that a person whose details are entered in the victims register must be contacted to seek his or her views as to the release of a prisoner and the conditions of that release.

31 The full findings of this survey are found in *ACT Family Violence Intervention Program: Combined Annual Report 2000-2001 and 2001-2002*, ACT Department of Justice & Community Safety (forthcoming).

The findings in relation to opportunities for meaningful participation and acknowledgment were again rather mixed. 60% of victim/witnesses reported that they had sufficient contact with police/prosecutor:

- 55% said that they had plenty of opportunity to ask questions; and
- 28% were given the opportunity to submit VIS (although this low figure may relate to the category of offences prosecuted)[33] (urbis keys young 2001a:81).

These two sets of findings on procedure and process revealed what we already suspected. Our systems for *consistently* providing certain key 'deliverables' were just not working effectively. Again, however, we must point out the importance of operational context. Some victim/witnesses do not receive contact from prosecution authorities in part because the matter has resolved by way of an early plea of guilty. For 2000–2001 this occurred in nearly 80% of matters. The victim/witness is thereby saved from the stress of waiting and the distress of giving evidence (although early finalisation without the victim does generate its own concerns — see below).

Another example occurs when a Court is considering bail for a defendant. The ACT has a specific legislative provision (*Bail Act* 1992 (ACT) s23A) that enables the prosecutor to put before the Court any concerns a victim may have expressed, without the need to call direct evidence of this. This negates the requirement for a victim to attend Court and give evidence. Any dissatisfaction expressed of not being given an opportunity to participate in the bail process may be reflective of this.

Finally, although 68% of respondents indicated that their matter had resulted in a conviction, only 47% expressed satisfaction with the outcome and felt that justice had been done (urbis keys young 2001a:81). Why? Respondents expressed dissatisfaction on two main grounds: being 'unable to have had proper say in proceedings' and a perception of 'leniency or ineffectiveness of the sentence'. The first comment harks back to the importance of procedural fairness for victim/witnesses; and the second relates in part, we believe, to that relatively small proportion of family violence perpetrators who, in women's experience, remain either dangerous or harassing irrespective of conviction and even irrespective of the type of sentence imposed.[34] That is, the court's sanction did not increase women's real or perceived safety in these cases. Like the case of Sue and Sam above for example.

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32 This finding may relate to a requirement in s27A of the ACT *Bail Act* 1992. This provision requires an officer to take all reasonable steps to advise a victim of the decision to grant bail and its conditions *if* the officer is aware that a victim has expressed concern about the need for protection from violence or harassment.

33 The provision for Victim Impact Statements (VIS) is contained within s343 *Crimes Act* 1990 (ACT) located at <www.legislation.act.gov.au/>. A VIS may be tendered by the prosecution after conviction and before sentence. They are only available to a crime victim if the offence is one for which the sentence is a maximum of 5 years imprisonment. A VIS is voluntary, in the victim's own words and must contain a *durat* to be tendered in court.

34 Buzawa, Hotaling, Klein & Byrne (1999) arrived at similar conclusions in their evaluation of the Quincy jurisdiction.

Safety Measures

Improving safety for victims is one of the overarching aims for all agencies participating in the FVIP. However, it is one of the hardest aspects to measure. As mentioned earlier, the evaluation captured the victims' subjective assessment at different points of case processing, and the reports of a self-selecting group for the 12 month follow-up. The recidivism rates for men sentenced or directed to participate in the perpetrator education program, and who later come again to police attention, needs an article in itself.[35] We do not address it here.

In the first survey (n=39 or 20% of all victims of finalised cases):

- 71% of respondents felt reasonably safe once police left the scene of the initial incident; and
- at the finalisation of the case 58% indicated that they felt very or fairly safe (urbis keys young 2001a:76 & 83).

We cannot claim — because we do not know — whether these feelings of safety following police intervention and at case finalisation relate to the incidents having resulted in an arrest or, at the end, in a conviction. Nor do we know what other factors influenced the reduced feelings of safety between police intervention and finalisation. Further research is obviously needed.

The second survey revealed that, whilst at the time of the earlier incident 12 (of 16) were residing with the perpetrator, only 5 continued to do so 12 months later. While four had a protection order at the time of the original incident, seven did so 12 months later. These findings may support other studies that show separation as being a time of heightened risk for victims of family violence (Humphreys & Thiara 2002). The findings also suggest there is value in further research into the dynamic between separation and justice intervention. What comes first? Is it the relationship damaged by one person's violence that is nearing its natural end or the justice intervention that stimulates an end?

Whilst the second survey sample size is very small, 12 of 16 respondents said that they felt very safe or fairly safe since the finalisation of the incident. Four of those who felt very or fairly safe linked this to the impact of the court case on the perpetrator — an impact that led to his changed behaviour. These four respondents continued to reside with the offender. Only one person had been physically assaulted since case finalisation although a further three indicated that they had had to call for police assistance again. However, nearly all of the women who were no longer residing with the offender had experienced some form of verbal abuse, harassment and intimidation since case finalisation.[36]

As practitioners, we find the results of the two surveys valuable in providing a guide to more precise targeting of future reform efforts. However, they raise intriguing further questions such as:

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35 For a recent overview of the situation in Australia see Laing (2002), *Responding to Men who Perpetrate Domestic Violence: controversies, interventions and challenges*, Issues Paper No 7, Australian Domestic and Family Violence Clearinghouse, Sydney.

36 Women made comments that the harassment and intimidation occurred through other legal proceedings especially over child contact.

- The need to explore further the correlation between satisfaction and sentence, and the relationship of both to the victim's experience of the offending behaviour, is the sentence effective? Too harsh? Too lenient? Or just right?
- In what circumstances is satisfaction *not* related to sentence outcome and why?
- Why are some victim/witnesses not sure about proceeding then later express satisfaction with the result (conviction)? Can we draw a direct correlation?
- What are the components, for a victim of family violence, of being sure that 'justice was done'?

Conclusion

We cannot answer these questions with the information we currently have. However, the investment in data collection and analysis has nonetheless been worthwhile for the ACT criminal justice and victim agencies participating in the FVIP. We now have some baseline measures from which such questions may be more reliably explored. We now have precise information about the number, nature and processing of criminal family violence matters — more than perhaps any jurisdiction in Australia. We even have some early indications of low recidivism in offenders sentenced to the perpetrator education program. All of this is far more than the system knows about any other type of criminal offending.

For a feminist, non-government organisation such as the Domestic Violence Crisis Service these data are important. The data provide strong evidence for what they have been struggling towards for over 20 years.

We now have clearer ideas about some of the things that matter to women in their encounters with our agencies — consistency in interventions, early information, dialogue, and sustained support. We can also say that intervention is clearly effective for some and that we have been able to achieve consistency in approach by the criminal justice system to the problem of family violence in the ACT. The cases that come into the criminal system are complex. Therefore, a strict adherence to notions of 'victim choice' or to 'no drop prosecution' is unhelpful in most circumstances. Furthermore, such notions have the potential to undermine the policy position that domestic violence is a crime.

But has the FVIP data got us any closer to knowing what women want from the criminal justice system? In the beginning we thought we knew. Then we didn't. Now we think it is what so many women and children have been saying year in year out for decades all over the world. And that is that they want the violence to stop. A sustained criminal justice reform process can go some way to achieving that dream.

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