



**Manitoba
Department of Justice**

Guideline No. 2:DOM:1

Public Prosecutions

Policy Directive

**Subject: Domestic Violence
Date: September, 1999**

Background

During the past decade, there has been a growing awareness within the criminal justice system, and generally among members of the public, of the serious problem of domestic violence. In 1990, the Supreme Court of Canada made the following comments concerning the gravity of the situation:

The gravity, indeed the tragedy, of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it, the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her. One need only recall the centuries-old law that a man is entitled to beat his wife with a stick "no thicker than his thumb."

Laws do not spring out of a social vacuum. The notion that a man has a right to "discipline" his wife is deeply rooted in the history of our society. The woman's duty was to serve her husband and to stay in the marriage at all costs "till death do us part" and to accept as her due any "punishment" that was meted out for failing to please her husband. One consequence of this attitude was that "wife battering" was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse, tolerance of it continued and continues in some circles to this day.

Policy Statement

The Attorney General's policy regarding domestic violence is straightforward: there is zero tolerance. This means the discretion conferred on those responsible for enforcing the criminal law ought, at each stage of the proceedings, to be exercised in favour of sanctions where a lawful basis to proceed exists. In practical terms, this requires that

where there is evidence to support charges, they will be laid. Where there is evidence to support conviction, the case will proceed to trial as soon as possible. If a Judge errs at the trial, or imposes an inappropriate sentence, an appeal will be taken to a higher court. Throughout the proceedings, Crown Attorneys are expected to pursue cases involving domestic violence vigorously. Zero tolerance is aimed at ending violence against women and others who find themselves in an abusive relationship. It has as much to do with denunciation of the serious social problem and crime as it has to do with changing public attitudes.

Scope of this Policy

This policy is intended to confirm instructions to Crown Attorneys and provide direction to others involved in administering criminal justice in Manitoba, particularly the police. The object of the policy is to ensure that those who abuse others in a relationship, including partners, elders and children, will be pursued forcefully in the courts by means of a criminal prosecution.

Domestic assault, for the purposes of this policy, is defined as physical or sexual assault or the threat of physical or sexual assault of a victim by a person with whom they have or have had an intimate relationship, whether or not they are legally married or living together at the time of the assault or threat.

Intervention

Where a victim of domestic abuse seeks help, police agencies throughout the province are expected by the Attorney General to respond appropriately by treating the situation as a crime and not simply as a "family dispute." Primary concerns at this stage are separation of the parties, and steps taken to ensure non-repetition of the offence. Police should therefore intervene, lay charges where the facts warrant it and arrest and detain in custody where appropriate.

Laying Charges: The Role of the Police

Police officers may, and under this policy will be expected to, lay criminal charges where there are reasonable grounds to believe an offence under the Criminal Code or any other law has been committed. That is not to say that charges should be laid automatically, whether or not there is evidence to support criminal proceedings: the Criminal Code requires that, before laying charges, a peace officer must be satisfied that there are reasonable grounds, based on the available evidence, to do so. Where such grounds do exist, however, charges should be laid.

Prosecuting Criminal Charges: Role of the Crown Attorney

Once charges are laid, Crown Attorneys are expected to proceed to trial unless it becomes clear, at some stage of the proceedings, that there is no longer a prima facie case for which there is a reasonable expectation of conviction.

- (1) Every effort should be made to encourage witnesses who are victims of domestic violence to testify, including putting such witnesses on the stand, but where the charge is provable by other evidence, the reluctant spouse should be excused without further sanction.
- (2) Where there is not sufficient evidence without that of the victim regard must be had to the circumstances of each offence. The more serious the offence, the more appropriate it would be to take all reasonable steps to compel testimony.

Three important points arise. First, the charges should proceed unless the evidentiary foundation supporting the case collapses. Second, the evidence will be measured against the "reasonable expectation of conviction" standard common to most jurisdictions throughout Canada and the Commonwealth. Third, proceedings should not be terminated unless it is clear that there is no longer sufficient evidence to support charges.

Any woman who requests that charges be dropped should be directed to contact the Women's Advocacy Program where available. In centres outside the scope of the Program, the Crown Attorney may refer a victim to a similar program. If no such program exists, the Crown Attorney should discuss the matter with the victim, and if necessary, contact the Women's Advocacy Program for advice on safety planning. Contact with the Women's Advocacy Program and the outcome should be noted on the file.

Criteria for Assessing the Strength of the Case and Determining whether to Proceed with a Prosecution

In making this determination the Crown Attorney should consider all of the evidence including but not restricted to the following factors:

- Whether the victim originally gave a statement to police, written or oral, which shows that a crime was committed.
- Whether and under what circumstances the victim has since changed that statement.
- Circumstances, including pressure from the accused or others, that may have prompted the victim to change the statement.

- Whether a statement has been taken from the victim pursuant to the guidelines as set out by the Supreme Court of Canada and further whether proceeding with such prosecution is in the interests of the victim and not contrary to the interests of the community.

Additionally, before deciding to proceed with such a prosecution without a complainant, the Crown Attorney, where practical, should first consult with the Director of Prosecutions.

- Whether there is any evidence that the victim has been directly or indirectly threatened or intimidated by the accused in connection with the charge.
- Whether there is sufficient independent evidence to prosecute without relying upon the testimony of the victim.
- The seriousness of the present assault.
- Whether the accused has previous convictions for violent offences or whether there have been allegations concerning the same complainant or others that tend to show a pattern of violent behaviour on the part of the accused.
- Where the victim has changed his or her statement, is there a reasonable basis to believe that counselling or referral to a support agency will assist the victim or the Crown Attorney in understanding what actually took place at the time of the alleged offence.
- Whether the victim has had independent counselling, from an agency such as the Women's Advocacy Program or the RCMP witness assistance staff.
- Whether the victim, especially disabled victims, are dependent upon the accused.
- The impact that not proceeding may have on future cases of a similar nature, and on the administration of justice generally.
- Whether or not children are witnesses to or potential victims of assaultive behaviour.
- Whether proceeding with a prosecution could place the victim in a higher level of risk.
- Whether the statement of an uncooperative witness can be admitted pursuant to the current case law regarding recanting witnesses.

Guidelines to Prosecutors in Certain Types of Cases

Several scenarios often arise in the prosecution of cases involving domestic violence. They have been described briefly in Appendix A to this policy. Additionally, guidelines to Crown Attorneys on how to handle these type of cases are described. Ultimately, of course, Crown Attorneys must exercise professional judgment based on the specific facts of each case. The Appendix is only intended to assist counsel in reaching a decision that is appropriate.

General Guidelines regarding the prosecution of domestic violence cases are as follows:

- (1) The victim who chooses not to testify, should not, unless special or unusual circumstances exist, be made the subject of further prosecution as a result of her failure to testify (i.e. charges of public mischief). Such authority to prosecute must be given by the Director of Prosecutions.
- (2) A victim who fails to attend Court in answer to a subpoena or who refuses, once sworn, to answer questions is in contempt of Court and may be called upon by the presiding Judge to answer for his/her contempt. Crown Attorneys may only move to cite such witnesses for contempt with the authorization of the Director of Prosecutions.

Sentencing and Appeals

If an accused is convicted, the Crown Attorney shall recommend a sentence that, among other goals, reflects public denunciation of this kind of offence. Counsel should ordinarily oppose recommendations for conditional or absolute discharges and conditional sentences unless extraordinary and compelling circumstances are present. Where an inadequate sentence is imposed, an appeal should be recommended promptly.

Cross-reference to other existing policies: Counter Accusations (Charging Directive May, 1994); Public Mischief Charges, Contempt, etc. (Policy Directive, Guideline 2:SPO:1)

Rationale

The obvious proximity of the complainant to the accused and the myriad of issues surrounding the emotional and psychological aspects of the cycle of violence makes prosecution of domestic violence cases difficult. The policy establishes a consistent approach to the prosecution of these cases.

APPENDIX A

Factual Scenarios Arising in Cases Involving Domestic Violence

The following describes four of the more difficult factual scenarios that arise in cases of domestic violence. Each includes a guide on how the case can be approached. Ultimately, of course, Crown Attorneys must exercise professional judgment based on the particular facts of the case before them. The following is simply intended to assist counsel in reaching an appropriate decision.

Scenario No. 1

Police attend a 911 call relating to a disturbance. On arrival, the female complainant is suffering from a bleeding lip. The accused is present in the apartment. The complainant refuses to provide a statement to police. Police charge the accused. The Police Report to Crown Counsel, however, does not describe evidence of an assault. There is no other evidence demonstrating how the complainant was injured. The Crown Attorney concludes that there is not a prima facie case for which there is a reasonable expectation of conviction. If the police are unable to obtain further inculpatory evidence, the Crown Attorney should, in general, enter a stay of proceedings on the charge.

Scenario No. 2

Police attend at the scene of a complaint. The complainant provides verbal advice to police concerning the circumstances of the assault. However, she refuses to provide a written statement and indicates that she will not attend Court. There is no material corroboration of the complainant's evidence. In general, Crown Attorneys should refer the complainant to a counselling agency that can assist her, such as Women's Advocacy (where available).

Several situations can arise here. If, after meeting with the counsellor, the complainant indicates that she was untruthful in making the initial complaint, the Crown Attorney can be expected, in the absence of further inculpatory evidence, to conclude that there is not a prima facie case for which there is a reasonable expectation of conviction. Where that conclusion is reached, a stay of proceedings should be entered.

If the complainant refuses to attend the counselling agency, Crown Attorneys should make all reasonable efforts to make contact with the complainant and then consider if the matter should proceed to trial.

Scenario No. 3

Police attend at the scene and the complainant provides a statement concerning the assault. Police lay charges as a result. After charges are laid, the complainant confirms the accuracy and truthfulness of her statement, but advises that she does not wish to

testify at trial. In general, the Crown Attorney should refer the complainant to an appropriate counselling agency for support regarding the court process. The Crown Attorney should take all reasonable steps to speak to the complainant if the complainant refuses to attend the counselling agency, and then consider if the matter should proceed to trial.

Scenario No. 4

Police attend the scene, and the complainant gives investigators a statement outlining an assault upon her. There is no material corroboration of the complainant's evidence. Subsequently, the complainant advises that she lied to the police regarding the incident. In general, the complainant should be referred to an appropriate counselling agency such as Women's Advocacy, where available.

Once again, several situations can arise here. If, after meeting with the counsellor (who can assess any elements of coercion and provide safety planning to the complainant), the complainant continues to deny the assault, the Crown Attorney may, unless the police can obtain further inculpatory evidence, conclude that there is not a prima facie case for which there is a reasonable expectation of a conviction. Where that conclusion is reached, a stay of proceedings should be entered on the charge.

If the complainant fails to attend counselling, the Crown Attorney should take all reasonable steps to contact the complainant. Later, a decision will have to be made concerning the strength of the case, based on the facts available at that time.

Exceptional Cases

The following briefly describes less frequent scenarios that can arise in the prosecution of domestic violence cases. They are:

- Despite the existence of a detailed statement given to police by the complainant at the time of the assault, she later on indicates she has little recollection of the incident. In general, the matter should be set down for trial and Crown Attorneys should proceed on the basis of "past memory recollected."
- Where the Crown Attorney has had no pre-trial contact with the complainant and, on the date set for trial, the complainant either says she lied regarding the incident or adamantly contends that she cannot recall the incident (and past memory recollection is not applicable) or minimizes the incident to the point of de minimus, the Crown Attorney may either put the complainant on the witness stand and lead evidence concerning why she changed her story or bring the complainant into the courtroom and explain on the record the complainant's position, and have her confirm that position. Where this occurs, the complainant

should be given an appropriate counselling agency phone number to assist her in the future, should she wish to receive assistance.

- If a Complainant becomes an uncooperative witness, the Crown Attorney should consider the circumstances of the case to determine if an application to tender the complainant's statement in lieu of her testimony is appropriate. This consideration will only be carried out after discussions with the Director of Prosecutions.
- Where there have been allegations concerning the same complainant or others that tend to show a pattern of violent behaviour on the part of the accused, or previous instances of the complainant becoming uncooperative, referral should be made to the appropriate police agency for flagging as "high risk" and future videotaping of complainant statements.

Amended April 1999