Manitoba
Department of Justice
Prosecutions

Guideline No: 2:DOM:1

Policy Directive

Subject: Domestic Violence
Date: November, 2015

POLICY STATEMENT:

The twofold test for laying and proceeding with charges of domestic violence is:

1. Whether there is a reasonable likelihood of conviction?

   and

2. Whether it is in the public interest to proceed with the prosecution?

Statistics Canada reports that 60% of all violent crime in Canada occurs between intimate partners and that just under three-quarters of the victims are female (Statistics Canada, July 8, 2015). The criminal justice system plays an important role in deterring and denouncing domestic violence. Manitoba has implemented justice system responses specific to intimate partner violence to better address the unique needs of both victims and offenders. Manitoba has adopted a "zero tolerance policy" meaning that where the legal basis for laying a charge exists, the criminal justice system is engaged with the goal of protecting the victim and seeking to reduce the offender's risk to re-offend. Further, Manitoba has specialized prosecutors, dedicated domestic violence courts, specialized victim services and the availability of civil protection/restraining orders as ways to address domestic violence.

Crimes of domestic violence provide unique challenges for the criminal justice system. Manitoba Prosecution Service's policy concerning domestic violence has two primary objectives; first, to provide protection and support to victims and their families and second, to ensure that offenders face meaningful consequences for their actions. In accordance with Manitoba Justice's Restorative Justice and Diversion Policy (5:COM1.1), meaningful consequences can include participation by the offender in treatment programs with the goal of reducing the risk of re-offending.

Definition of Domestic Violence

Manitoba Prosecution Service defines domestic violence as follows:

(a) A physical and/or sexual assault or the threat of same is committed in any relationship where the individuals (regardless of gender) are or have ever been dating, cohabitating, married, separated or divorced;
(b) Any other offence (for example, criminal harassment, mischief, theft, etc.) is committed between individuals described in paragraph (a);

(c) The offence arises as a result of a relationship described in paragraph (a) even though the offender and victim are not in a relationship (for example, the accused offends against his former wife's new partner).

If there is any uncertainty as to whether a file should be handled by the Domestic Violence (DV) Unit in Winnipeg, there should be consultation with a Supervising Senior Crown Attorney of the DV Unit or a Director.

Applying the Charging Standard

Reasonable Likelihood of Conviction

There are often special considerations that are relevant in applying the charging standard in a domestic violence context.

In assessing whether a reasonable likelihood of conviction exists, the following factors should be considered:

- It is not unusual for a victim to be somewhat reluctant and apprehensive about testifying in court. As well, it is not unusual for a victim to request that the Crown not proceed with the charge(s). Nevertheless, witnesses who are victims of domestic violence should be encouraged to testify. This should involve consultation with Victim Services. If considered necessary to assist the witness in testifying, consideration should be given to an application under s. 486.2(2) of the *Criminal Code* to allow for testimony to be given from behind a screen or by way of closed circuit television.

- Where the victim refuses to testify, recants or claims to have no memory of the incident, the Crown Attorney shall explore all evidentiary options available to proceed with the prosecution. Particular consideration should be given as to whether there is an evidentiary basis to proceed without the necessity of requiring the victim to testify.

- If the victim's statement was taken under circumstances that satisfy the requirements established by the Supreme Court of Canada in cases such as *Khan*, *K.G.B.*, and/or *Khelawon*, consideration should be given to proceeding on the basis of the victim's statement, provided the public interest requirement (discussed below) is satisfied. Prior to proceeding with such an application there should be consultation with either a Supervising Senior Crown Attorney of the Domestic Violence Unit (for cases that are prosecuted by the Winnipeg office) or with the Supervising Senior Crown Attorney of the applicable regional office or any Director.

Given the particular vulnerability of domestic violence victims, their willingness to testify may change over time. If it is determined that there is no reasonable likelihood of conviction, the Crown Attorney should enter a stay of proceedings. This gives the Crown the flexibility to recommence the proceedings if circumstances change.

Prior to instituting contempt of court, public mischief or other charges relating to a victim's refusal to testify, recantation or failure to attend court, the Crown Attorney must seek approval from either a Supervising Senior Crown Attorney of the Domestic Violence Unit (for cases that are prosecuted in the Winnipeg office) or from the Supervising Senior Crown Attorney of the applicable regional office or any Director. Such approval should also be sought prior to authorizing the detention of a victim pursuant to a witness warrant.

Public Interest

The public interest in prosecuting domestic violence charges is to seek to protect the victims and to reduce the risk of further abuse. In seeking to achieve these objectives, Crown Attorneys should consider the following factors:

- In most cases, commencing a criminal prosecution will be appropriate. Reference should still be made to Policy Directive No. 2:INI:1.1 (Laying and Staying of Charges). Domestic violence is not only criminal conduct but also a serious problem within our community. Having the matter dealt with by the criminal justice system serves to denounce this behaviour and assists in changing public attitudes. Further, bringing the offender into the criminal process provides an opportunity to impose meaningful consequences on an offender with the goal of reducing the risk of re-offending.

- There may be cases where requiring a reluctant victim to testify is counter-productive. In certain situations, proceeding with the prosecution could place the victim at a higher level of risk. This can include not only physical risk but emotional/psychological harm. Factors such as the serious potential for retribution or the existence of psychiatric or physical health issues should be taken into consideration when determining whether to proceed. In these situations, it may be preferable to enter a stay of proceedings and explain the options that are available (e.g., counseling, s. 810 order, protection order under *The Domestic Violence and Stalking Act*, prosecution of any future abuse, etc.). Proceeding in this way may offer some protection to the victim. It also lets the victim know that there are options available in the event of further abuse.

  It is impossible to establish clear parameters around when this may be an appropriate course to follow. Clearly, care must be exercised before staying charges or recommending a more lenient sentence. Some considerations are:

  - The safety of the victim must be the paramount consideration.

  - If the offence is very serious, the public interest will usually favour prosecution and incarceration.

  - If the victim's reluctance to testify is as a result of intimidation by the accused or others, the victim should be encouraged to contact police. Victim Services should also become involved to ensure appropriate safety planning.

Restorative Justice

Manitoba has recognized through the *Restorative Justice Act* that there are many appropriate responses to criminal conduct. The Restorative Justice and Diversion Policy (5:COM1.1) (May 2015) states:

> "A restorative justice approach to unlawful conduct may be utilized at any stage of the criminal process. Matters can be diverted out of the criminal justice system altogether before or after charges are laid. Alternatively, restorative approaches can form part of a traditional prosecution resulting ultimately in a stay of proceedings or the mitigation of sentence."

Domestic violence cases will often be appropriate for a restorative resolution that provides treatment to offenders. Depending on the seriousness of the situation, in some instances it may be appropriate to divert the matter out of the criminal system entirely or to stay charges after an offender has completed treatment. In cases where the facts are more serious or the offender has a record for violence, treatment may be considered as part of a probationary sentence. In all cases where the facts support the reasonable likelihood of conviction, an approach should be adopted that results in meaningful consequences to the offender and seeks to reduce the risk of re-offending.

In order to properly assess the risk to the victim and the appropriateness of treatment for an offender, wherever possible, the Crown Attorney should seek input from the victim and Victim Services.

Bail Considerations

Crown Attorneys are reminded that when a new charge of domestic violence appears on the docket, a check should be conducted to determine whether the accused has other outstanding charges. New charges, particularly breaches, should not be disposed of prior to a revocation application on the original matters.

- In assessing whether the Crown Attorney should oppose bail, the considerations set out in the Bail Policy (2:BAI:1) should be reviewed.

- In every domestic violence case, Crown Attorneys should request a no contact order between the accused and victim. Immediately following an incident of domestic violence, no contact orders are needed in order to give the parties time to cool down and also give time to the police, Victim Services and CFS to investigate what measures are necessary for the adequate protection of the victim and any children that may be at risk. In cases where the accused is in custody and has not yet applied for bail, the Crown Attorney should consider making an application for a no contact order pursuant to s. 516(2) of the *Criminal Code*. This is particularly important if information comes to light that the parties have been communicating while the accused is in custody. In that case, it may be necessary for the Crown Attorney to have the charges brought forward for the application to be made. In all cases where the accused has been denied

bail, a no contact order pursuant to s. 515(12) of the *Criminal Code* should be sought.

- Should a victim attend bail court expressing a desire to address the Court, she/he should be encouraged to speak to a Victim Services Worker as it may be very detrimental to the victim to address the Court. As well, the Court should be reminded that the victim has no standing to make representations at this stage of the proceedings.

Sentencing

If an accused is convicted of a domestic violence offence, the Crown Attorney should recommend a sentence that, among other goals, reflects public denunciation of this kind of conduct. Crown Attorneys should refer to s. 718.2(ii) of the *Criminal Code* when making submissions.

Crown Attorneys should ordinarily oppose recommendations for conditional or absolute discharges and conditional sentences unless extraordinary and compelling circumstances are present. In particular, s. 742.1 of the *Criminal Code* does not permit the imposition of conditional sentences for certain offences. Manitoba Prosecution Service policy on Conditional Sentences (4:CON:1) further restricts situations in which a Crown Attorney may recommend the granting of a conditional sentence.

Where an inadequate sentence is imposed, an appeal should be recommended promptly.

Crown Attorneys must be mindful of the orders that should be requested in domestic violence cases. These include: weapons prohibitions, DNA warrants and SOIRA orders where an assault of a sexual nature has occurred. The Crown Attorney should also consider whether an order pursuant to s. 743.21 of the *Criminal Code* is warranted. This allows for protective conditions to be imposed in relation to the victim and/or other witnesses after the accused has been sentenced to a period of incarceration. Any counselling sought should be specific to "domestic violence" as opposed to "anger management" counselling which does not address the abuse that occurs in intimate relationships.

If the victim is under the age of 18, a Child Abuse Registry Form should also be completed in circumstances where there is an age difference between the victim and the accused of two years or more.

RATIONALE

The prosecution of domestic violence cases is made more difficult by many emotional and psychological considerations that are either not present or are only present to a much lesser extent in other cases. These special considerations may call for a more flexible or situation-specific approach to the prosecution of domestic violence cases. The decision as to how best to proceed in a domestic violence case must rely on the judgment of the individual Crown Attorney based on an assessment of the various factors at work in the particular situation. The Attorney General's policy regarding domestic violence is one of

zero tolerance, meaning, that where the legal basis for laying a charge exists, the criminal justice system should be engaged with the goal of protecting the victim and seeking to reduce the offender's risk to re-offend. Deciding how best to deal with a charge requires Crown Attorneys to exercise their professional judgment, first to ensure that the case meets the test for proceeding with a charge, and second to consider how best to resolve the matter.