Prosecuting family violence

This chapter contains these topics:

Summary

Family violence is a Police priority

Family violence is an operational priority for Police and is also identified as a driver of crime and priority area for Prevention First. A situational response to family violence has a people and victim focus along with strong offender accountability principles. Improved use of intelligence and information will assist police in preventing re-victimisation of family violence victims and will assist in targeting repeat offenders.

See general information about family violence on the Police intranet, including a diagram showing the percentage of serious violence that is family violence. (Home> Districts & Groups> Prevention> Pages> Family Violence)

Purpose of this chapter

This Prosecuting Family Violence chapter provides instructions and practical guidance for Police prosecutors on dealing with prosecution cases involving family violence.

The chapter focuses on the **differences** between family violence and other types of prosecution, covering in particular:

- family violence-related factors relating to the evidential and public interest tests for prosecution
- how to determine appropriate charges
- factors to be considered in bail applications in family violence cases
- use of ODARA in family violence prosecutions
- dealing with breaches of court orders particularly protection and parenting orders.

Related information

The chapter must be read in conjunction with the:

- Police Family Violence Policy and Procedures
- PPS Statement of Policy and Practice
- PPS Court Manual.

See the Police Family Violence Policy and Procedures for:

- definitions relating to family violence used in this chapter
- the principles guiding the Police response to family violence incidents
- an outline of the different types of family violence
- the procedures for responding to and investigating family violence occurrences, including the collection and assessment of risk information to support effective decision making about offender management and victim safety planning.

Audience

The chapter is aimed at Police prosecutors dealing with family violence cases. Where tasks are the responsibility of the O/C case rather than the prosecutor, this will be stated.

Family violence courts

Court-based approaches to adjudicating family violence cases

Family Violence Courts are District Courts dedicated to dealing with family violence prosecutions. There may be variations in the purposes of the courts and processes in some localities.

Family Violence Courts were established by the judiciary in response to community concerns about the increase in family (domestic) violence cases. They deal with criminal cases relating to family violence and are held at a regular time and place in the District Court. Two key purposes of the Family Violence Courts are:

- *getting defendants to take responsibility for their actions and to think about how they affect other people*

A key part of the Family Violence Court is to hold defendants accountable for their actions and to encourage them to address their violence in an appropriate way. For example, defendants, who enter a guilty plea, may self-refer to a government-funded domestic violence programme or attend drug and alcohol counselling.

- *promoting victim safety*

Victim advisors are a core part of the Family Violence Court process and can put the victim's views to the court, assist victims with applying for protection orders in the Family Court, advise victims about their rights and help them participate in the court process.

Defendants are encouraged to address their substance and violence issues through programme participation. Victim advisors ensure that victims know they can be advised of the progress of their case through the court. They can assist victims to access support, government or community agencies and the police.

Prosecuting in Family Violence Courts

You must still adhere to the policy of primarily considering the nature and seriousness of the offending when prosecuting family violence cases in a Family Violence Court

All prosecutions must adhere to the Solicitor General's Prosecution Guidelines 2013. Therefore only cases that pass the evidential and public interest tests should be prosecuted.

The PPS do not have "no-drop policies" or mandatory prosecution of family violence cases if there is no evidence to support the charge. The fact that there are specific family violence courts does not change the need for the PPS to follow the Solicitor-General's guidelines.

Police Prosecution Service's role in addressing family violence

Role of operational police and the Police Prosecution Service

Operational police are responsible for investigating family violence allegations, gathering evidence and initially charging the alleged offender. However, responsibility for all post-charge prosecution decisions rests with the PPS not with the victim or operational police.

Prosecutor's role

The prosecutor's role includes:

- reviewing the evidence
- determining whether the charge is appropriate
- deciding whether to continue a prosecution
- prosecuting on behalf of the public in accordance with the PPS Statement of Policy and Practice, which will align with the Solicitor-General's Prosecution Guidelines.

Prosecutors can also provide pre-charge advice to operational police to assist them in determining whether there is evidence of offending and, if so, what charges could be appropriate. This can be important in family violence situations where a diversity of offence types can apply, including those having a psychological or intimidating nature. (An O/C case will ask for this type of advice if required).

When reviewing cases for the O/C, you must examine the evidence to hand and not base your review on 'anecdotal evidence' verbally given by the O/C. There is the potential for tension to occur between the O/C and prosecutor when the filed evidence does not match the initial verbal 'story' given and the prosecutor, when seeing the actual file, has to change their view on prosecuting the charge due to the evidential test not being met.

Family violence prosecutors

Prosecutors operating in any court that deals with family violence matters must be skilled in prosecuting family violence cases. This includes becoming subject-matter experts in the resolution of family violence cases. You must:

- be familiar with and understand the particular dynamics of family violence. This includes being familiar with the information in this chapter and taking part in relevant training (when able)
- be up to date with the latest family violence legislation, precedent and theory
- have a working understanding of the Police Family Violence Policy and Procedures
- be able to balance your role as a prosecutor with the purpose for which your particular Family Violence Court has been established. These are not opposing roles but rather a slightly different way of working within the court environment
- have good working relationships with judges, the O/C case, family violence coordinators (FVCs), court victim advisors (CVAs), and victim advocates from non-government organisations
- be skilled in working with victims of family violence, and supporting them to give the best possible evidence.

Key working relationships

Relationship with officer in charge (O/C) case

Working well with the O/C case is extremely important. They gather the information required for effective prosecution decision-making and maintain a close relationship with victims and witnesses. You must be able to advise and receive advice from the O/C case while maintaining your independent decision-making ability.

Cases built around the victim's evidence are common but can be problematic, because cases are invariably prosecuted:

- during the "honeymoon" phase of the battering cycle, when the defendant is contrite and can convince the victim not to give evidence, or
- in a climate of fear, when the victim is wary of repercussions from providing evidence.

See information on corroboration in File standards for examples of evidence that if collected in a timely manner by operational staff will help to build a case that is independent of the victim's evidence, and may aid in continuing a case without the victim's evidence, if necessary or appropriate.

Role of the O/C case in the prosecution

After completing the investigation, the O/C case:

- prepares a file in accordance with the Prosecution file preparation chapter
- arranges for initial and subsequent forensic photographing of the victim's injuries and any property damage
- follows up on any further tasks identified by the prosecutor in the File Notification Form, which requires further work to be undertaken by the O/C case
- maintains contact with the victim (recording these in the NIA Victim Contacts node), and provides them with information about the progress of the case
- if the offending meets section 29 Victims' Rights Act 2002, advises the victim of the offender's bail conditions or issues surrounding bail (using POL1065)
- ensures the victim appears at court for hearings and the victim's emergency contact details are available for the prosecutor
- ensures victim impact statements are up to date, signed and no older than 28 days at time of sentencing
- discusses any matters with the prosecutor that may require an amendment to charges or not proceeding with a prosecution
- informs the prosecutor and the family violence coordinator if the victim no longer wishes to pursue the charges, allowing necessary steps to be taken to ensure the victim is supported.

Role of the O/C case in relation to victims

When victims are also witnesses, they must be supported so they can give their best evidence. The O/C case is responsible for maintaining a link with the victim and advising them of specialist support that may be available. They are also responsible for the victim from the initial investigation to the resolution of the case.

The O/C case is usually responsible for keeping victims informed as soon as practicable about:

- the progress of the investigation of the offence
- the charges filed or reasons for not filing charges, and all changes to the charges filed, including the withdrawal of charges
- whether the defendant is granted bail and any bail conditions
- the victim's role as a witness in the prosecution of the offence
- the victim giving evidence in an alternative way (s105 Evidence Act 2006) and/or having a support person with them when they give evidence (s79 Evidence Act)

- the date and place of all appearances and hearings
- the final disposition of the case.

If the offence is one of sexual violation or serious assault or has led the victim to have reasonable fears for their safety they may ask police to notify them of various events (s29 and s31 of the Victims' Rights Act 2002). The Victims' Rights Act 2002 obliges police to make all reasonable efforts to notify the victim of this right (s32). This is usually the O/C case's responsibility.

If the victim wishes to be notified, the O/C case must give them a POL1065, so they can request inclusion on the Victim Notification Register. If victims are on the Victim Notification Register, police should advise them, as soon as practicable:
- when a defendant is released on bail (s34 Victims' Rights Act)
- of any terms or conditions of the offender's release that relate to the victim or their family.

Local processes should be in place, outlining who is responsible for this notification.

Relationship with family violence coordinators

Family violence coordinators (FVCs) work closely with community-based inter-agency initiatives aimed at preventing family violence. (This approach is called the Family Violence Inter-Agency Response System (FVIARS). Working with this system (through an FVC) can be helpful to a prosecution. No single agency has all the required information surrounding family violence victims and offenders, and the ability to obtain, or provide, additional information may assist in ensuring effective responses relating to offenders and victims within the court and Police processes.

The Family Violence Inter-Agency Response System can provide support for the victim(s) from the investigation to the disposition of the case. This support enhances the likelihood of the victim telling their story in court, and increases the chance of a successful prosecution.

In some areas, Family Safety Teams, which are also a focused inter-agency approach, bring together child and victim advocacy agencies with the Police to develop improved responses to families.

PPS district prosecution managers must liaise with district FVC to foster effective relationships at the district, area and local levels. The aim of this interaction is to build better networks for prosecuting family violence cases.

Trained and certified ODARA users

Family violence practitioners are trained and certified as ODARA users and are currently the only staff who can validate raw ODARA scores. ODARA scores may be used for a variety of purposes including opposition to bail, sentencing, parole and also victim safety planning. For this reason it is crucial that the information used to score ODARA is accurate and that staff indicate the basis for their decisions when completing ODARA in the check boxes provided. (See Collecting risk information and using ODARA in the Family Violence Policy and Procedures).

Relationship with court victim advisers

Ministry of Justice court victim advisors (CVAs) have an important relationship with victims at the time of the court hearing. They:
- provide information to the victim about the case relating to them
- advise victims about their rights in the court process, and
- help victims to participate in the court system.

However, this role should stop short of advocating for the victim. Victim advocacy is undertaken by other non-government organisations such as Victim Support and Women's Refuge.

District prosecution managers liaise with CVAs to confirm local processes for managing the transfer of efficient and timely notice of a victim's intention to no longer pursue a prosecution against the defendant. This is an early warning service provided by CVAs to both prosecutors and the O/C case.

File standards

General requirements for file content

Family violence prosecution files must be prepared by the O/C case in accordance with the Prosecution File Preparation chapter and should contain information:

- accurately reflecting the seriousness of what occurred
- supporting any element of premeditation or persistence in the defendant's behaviour
- proving the defendant's intent
- reflecting the severity of any injury suffered by the victim.

Specific file content for family violence prosecutions

Each family violence case file prepared by an O/C case -

should contain:	may also contain:
• family violence report (POL1311) • family violence report supplementary sheet POL1312 • child risk factors POL1313 • intimate partner vulnerability factors POL1314 • intimate partner violence risk assessment ODARA POL1315 • a copy of the charging document for each charge • a summary of facts • a copy of signed job sheets and/or notebook statements • NIA printouts, including family violence history and profiles • communications centre tape transcripts • signed statements • corroborating evidence • medical reports • an exhibit sheet • initial and subsequent forensic photographs of the scene and victim's injuries • recommendations about diversion and bail. • if an ODARA is present, the name and QID of who validated the score	• ODARA score and opposition to bail form with ODARA score added • a supplementary sheet outlining further circumstances of the investigation • body maps showing marks and injuries for both parties, if applicable • medical release forms, where appropriate • children's details • corroborating signed statements or reports from the Child, Youth and Family, the local school or neighbours • audio recordings from a Police communications centre or family violence alarm • POL1065 (a victim request to be notified of offender bail, release, escape and absence of the offender or defendant).

All this information should be provided in a correct and complete form with evidence that the file has been reviewed and signed off by a file manager and/or the O/C case's supervisor. The case file should be sufficiently prepared to support the presentation of the case at court.

All items featuring relevant physical evidence (e.g., bloodied clothing or weapons) that are seized and retained to be used in court should be noted on the exhibit sheet attached to the file.

The O/C case should check whether a POL1065 has been submitted and entered onto the system using the online Victim Notification Query facility.

Corroboration

Corroboration is particularly important if any key witness, including the victim, becomes a reluctant witness. Because of the dynamics of family violence and fears for their own and their children's safety, it is not uncommon for victims of family violence to recant or ask for charges to be withdrawn. Frontline staff must collect evidence that will support prosecution should this occur. It is also up to the prosecutor to request further investigation from the O/C case to assist with a successful conviction.

The prosecutor should check for sources of information that may corroborate a victim's allegations, such as:

- medical examinations and doctor's reports (of suspect and victim)
- photographs of injuries
- scene examination evidence, including any photographs and scene diagrams
- clothing
- witness statements (neighbours, friends, colleagues, emergency medical staff) – obtain full details and statements. Exhaust all lines of enquiry.
- 111 call - obtain a copy from the Comms Centre for court
- observations of arresting officer
- old FVIR ratings, previous family violence reports and ODARA scores
- emails, text messages, phone records
- admissions or other corroborating or damaging statements by a suspect.

Corroborating evidence can also be gathered from Child, Youth and Family, schools and neighbours. The prosecutor advises the O/C case of the need to gather further evidence using the File Notification Form/Evidence Act Checklist, when necessary.

Case review

Prosecutors to review case and make final decision on prosecution

Prosecutions are conducted when the test for prosecution as detailed in Solicitor-General's Prosecution Guidelines (mandatory compliance) is met. This means there is both sufficient relevant and reliable evidence (see Is there sufficient evidence to prosecute?) and the prosecution can be sustained in the public interest (see Is prosecution in the public interest?). Case review is where a prosecutor considers these factors against the weight of evidence prepared by the O/C case. See the Criminal Procedure - Review stage chapter for further details.

Three stages of case review

There are three key stages of the case review process:

- identification of family violence cases and liaison with O/C case
- file evaluation
- checking to ensure process has been followed.

Identifying family violence cases

The prosecutor:

- identifies and marks family violence cases (if on first call and when this has not been already done by the O/C case)
- works with the O/C case to ensure:
  - proper evidence is collected (see File standards in this chapter which includes information on corroboration)
  - the victim is safe and appropriately supported, and has the confidence to give evidence, if required. (The victim may be the only witness, especially when the offending occurs in private, and will have to give evidence in court, unless the defendant pleads guilty or there is strong supporting evidence)
- confirms whether the witness wishes to give evidence in an alternative way, which may enhance the victim's willingness to give evidence
- explores what other corroborating evidence there might be (that is admissible, relevant, and satisfies all offence ingredients) to relieve the victim of the need to give evidence. This should, however, be used expeditiously (see Alternative ways of giving evidence).

File evaluation

Case file evaluation, involving prosecutors checking to ensure all the essential information, forms, applications and protocols have been prepared and/or actioned is standard practice for all case files sent to the PPS. It provides an integral independent check within the Police prosecution process, and is an essential reviewing phase before the first court appearance.

These are important factors to consider with prosecuting family violence offending:

Factors to consider	Check or note that:
File quality	The effective prosecution of family violence cases saves lives. The quality of the file reflects the opportunity a prosecutor has to effectively manage a case.
Investigation thoroughness	All efforts have been made to collect independent evidence that can corroborate the victim's evidence.
Charge appropriateness	The charge reflects the evidence and does not default to a lesser or more serious charge out of customary practice.
Bail	Opposition to bail is processed properly and any continuing risk to the victim is clearly articulated, as are the victim's views if justified pursuant to section 29 of the Victims' Rights Act 2002.

Evidential admissibility and relevance	The best evidence capable of supporting the charge(s) together with, but possibly independent of, the victim's evidence has been gathered.
Case resolution options	The best options for bring the offender to account and ensuring the victim's safety have been considered.
Victim safety and support	The cyclical nature of family violence has been taken into account to ensure the victim will be protected and the appropriate support has been provided.
Evidence Act 2006	Alternative ways of giving evidence (under the Evidence Act 2006) have been considered and all the evidence is available to the court.

Checking to ensure process has been followed

In addition to checking the correct type of information is in the case file, check the O/C case has:

- included in the file a summary of relevant family violence information from NIA (Query History All and Family Violence Reports) and/or from inter-agency case management (e.g., living arrangements or whether a protection order is being sought)
- prepared the initial disclosure properly, taking care to ensure the disclosed documents do not contain the victim's address and contact details (see the Criminal disclosure chapter)
- filed the Summary of Facts and Court Services Victim Referral (CSV1) form at court, preferably when the charging document was filed.

Differences of opinion

Fundamental differences of opinion between a prosecutor and an O/C case should be managed professionally and, when appropriate, advice obtained from supervisors (PPS and operational).

If a dispute arises on a matter of law, seek independent legal advice from your district's Legal Service Centre to resolve the conflict.

Note: If the evidential test is not met, the prosecution can not be continued. It is reliant on frontline staff to gain the evidence required. There is no such thing as a 'no-drop policy' or mandatory prosecution for family violence matters.

Is there sufficient evidence to prosecute?

Test for prosecutions

Prosecutions can only be conducted where the test for prosecution is met. This means that:

- there is sufficient admissible evidence to provide a reasonable prospect of conviction (the evidential test), and
- prosecution is required in the public interest.

(See the Solicitor-General's Prosecution Guidelines and the PPS Statement of Policy and Practice).

A case that does not have sufficient admissible, relevant and reliable evidence to support it **must not** proceed, no matter how significant or serious it might be.

Applying the evidential test in family violence cases

To meet the evidential test, there must be in relation to an identifiable individual, sufficient credible evidence which the prosecution can adduce before a court and upon which an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence (i.e. there has to be a reasonable prospect of conviction).

Factors to consider

When determining the admissibility and reliability of evidence, take into account the application of due process when collecting the evidence. This may include deciding whether the evidence will satisfy s30 of the Evidence Act 2006 and still be admissible even if it was "unfairly obtained".

Other considerations related to specific types of evidence include:

Evidence type	Consider...
Witness and offender statements	• how the evidence was collected • the reliability and veracity of witnesses • the likelihood of a victim/witness rescinding support for the prosecution • the importance of the victim's evidence to the case.
Hearsay evidence	• whether this information is admissible, including the manner and timing of its collection, and the fulfilment of admissibility requirements under s18 of the Evidence Act.
Exhibits and photographs	• the value and relevancy of these evidential tools in creating a picture about the offending, independent of the victim's evidence.
Emergency call (111 and family violence alarm) tapes and transcripts	• the various ways this evidence may be required to enter the court, for example: - as real evidence, if it records the offence occurring or the offender's voice (s7 Evidence Act) - through a witness who made or received the call - as a prior inconsistent statement used against a hostile witness - under s130 of the Evidence Act, with appropriate notice and without the need for a witness.
Investigative processes and scene examination	• identify gaps or weaknesses in these processes that can be remedied before the case proceeds to court.

Review of charges

Review the appropriateness of the charges when considering the sufficiency of the evidence. Even the most reliable evidence will be ineffective if the charges do not reflect the facts of the offending. (Reviewing charges is dealt with in more detail in Charging decisions and Accepting pleas and diversion in this chapter).

Responsibility for final decision to prosecute

Prosecutors are responsible for making the final decision as to whether a case should proceed, and if so, what the charges will be and how the case will be managed. Whenever possible, if you decide not to proceed with a case, you must first discuss this with the O/C case and victim (if appropriate).

Is prosecution in the public interest?

The general rule

Once the evidential test is met, you must consider the public interest in prosecuting. As a general rule, the public has a significant interest in ensuring all family violence cases are prosecuted, offenders are made to account for their behaviour, and victims are protected from further violent offending.

You should proceed with a case when the charges are serious and the evidence is strong, even if this is against the victim's wishes. While the victim's views are relevant, they are not binding on the prosecutor's decision. You should aim to balance the victim's views and the public interest.

Public interest factors to be considered

When considering public interest in family violence cases, take these factors into account:

- the seriousness of the offence, including:
  - the extent of the victim's physical injuries
  - any emotional and psychological abuse
- whether the defendant planned the attack, used weapons and/or made any threats before or after the attack
- the prevalence of the alleged offence and the need for deterrence
- the context of the offence, including the:
  - state of the victim's relationship with the defendant
  - history of the victim's relationship with the defendant (e.g. any prior police callouts, charges filed?)
  - defendant's degree of culpability
- presence of any children at the time of the offence and the effect on them
- any protection, parenting or supervised contact orders
- risk of further offending by the defendant
- perceived risk to the victim and children of a prosecution not proceeding
- the defendant's history, including:
  - their criminal history in respect of previous relationships (including breaches of other protection orders)
  - other offences, particularly ones involving violence
  - previous interventions that have occurred (e.g. previous referrals to alcohol and drug programmes, including attendance at and completion of those programmes)
  - previous relevant diversions and cautions
- any other relevant circumstances, including:
  - the affect the prosecution is likely to have on the physical or mental health of the victim and/or witnesses
  - the age of the defendant
  - whether the defendant was at the time of the offence suffering from significant mental or physical ill health
  - whether any proper alternative to prosecution exists e.g. diversion
- other mitigating or aggravating circumstances related to the offence.

None of these factors, or any other that may be relevant to a particular case, is necessarily determinative in itself - all relevant factors need to be balanced.

Considering the victim's views

Given the dynamics of family violence, you should always consider "the attitude of the victim of the alleged offence to the prosecution". You can gain the victim's perspective directly (where possible) or from the O/C case, the court victim advisor or information supplied on the case file such as the victim impact statement.

The interests of victims are crucial, but they are not the final word in family violence prosecution decisions. That rests with the prosecutor who is prosecuting on behalf of the public. In coming to your decision, you must try to balance the victim's interests with wider societal interests and the risks to other people (particularly children).

Charging decisions

Reviewing charges

When reviewing charges relating to family violence, you must consider the general charging principles and the:

- nature of the offending and the impact the charge(s) will have on reducing reoffending
- safety of the victim and any children affected by the offending
- need to hold the offender fully accountable for the violence - not doing so might be construed as condoning violent behaviour
- importance of never minimising violence.

General charging principles

Consider the following general principles when reviewing the appropriateness of charges.

Description	Principle
Seriousness	Take into account the aggravating and mitigating features of the case when considering seriousness.
Sentencing	When the evidence discloses an offence against several different statutes, ensure the charge or charges give the court adequate scope to appropriately sentence.
File charges appropriately	Do not proceed with a more serious charge just to encourage a defendant to plead guilty to a less serious one. Alternatively, never file a less serious charge than is appropriate to ensure a guilty plea.
Never file more charges than are necessary	Never proceed with more charges than are necessary just to encourage a defendant to plead guilty to a lesser number of charges.

Linking family violence behaviour to common offences

Consider the type of offending when charging

Family violence is a unique type of offending. Both the offender and victim are often intimately linked in a cycle of destructive behaviour that fosters the offender's power and control over their victim. In many cases, the offender harnesses the trust, commitment and privacy afforded by a domestic environment to perpetuate the cycle of violence.

The appropriateness of charging for family violence should, therefore, take into account a range of offences capable of properly reflecting the nature of the offending. When considering the appropriate charges for family violence it is essential to locate the behaviour within the family violence battering cycle.

Legislation related to family violence offending

This legislation includes offences covering the broad range of family violence offending.

Legislation	Relevance to family violence
Animal Welfare Act 1999	Interfering with or killing pets to intimidate
Arms Act 1983	Threatening with or unlawfully discharging a firearm
Care of Children Act 2004	Using the children's care arrangements to leverage control
Crimes Act 1961	Theft, burglary, threatening and actual physical and sexual violence
Harassment Act 1997	Using nuisance and passive intimidation tactics
Summary Offences Act 1981	Offending including property damage and lesser physical threats and acts

Telecommunications Act 2001	Using a telephone to deliver threats and intimidation
Trespass Act 1980	Unlawful entry onto property

Other legislation includes offences relating to the processing of, or remedies relating to family violence. These offences may indicate the offender's lack of remorse as well as continued threat to the victim:

- Domestic Violence Act 1995 – breaching a protection order or failing to attend a programme (s49).
- Domestic Violence Act 1995 - power to arrest for breaching a protection order (s50).
- Bail Act 2000 – failing to appear at court to answer Police bail (s24), or District Court, High Court, Court of Appeal or Supreme Court bail (all s38).

See the How and when you charge makes a difference guide (available in custody and work areas) for links between family violence offending with a range of possible charges applicable across the family violence cycle.

Determining the right charge for assault offences

A large number of charges are available for assault offences. It is crucial that the correct charge is chosen in the first instance.

It is not appropriate to simply determine the charge solely from viewing the victim's injuries. Consider and establish the offender's intent before factoring in the victim's injuries. Use the three questions in this table to determine the offender's intent:

Question	Guidance
What was the offender's intent? • What result did the offender want? • What did they want to happen? • When the offender applied force, what was their intention? • Did the offender want to scare, injure, cause grievous bodily harm or kill?	**An intention can be shown by:** • admission— the offender's admission • words— the words witnesses heard from the offender • action— the offender's actions • surrounding circumstances— the general nature of the offence can also show offender's intent (e.g. use of a weapon) • results on the victim.
What was the degree of force used? The degree of force used will also give an indication of intent. Care should be taken not to minimise violence.	• "A mere push or slap"— the degree of force used must be established, as there can be a huge variance of force used. • The size, age and physical characteristics of parties must be taken into consideration when assessing force used • The raised fist – gesture or assault? "Fist actually used" — what was the intent? What parts of the body were targeted? • Strangulation or kicking to the head or body – can indicate quite serious intent.

What was the result or degree of injury received? Did the victim receive any injury or was grievous bodily harm caused, etc?	**To injure** means "to cause actual bodily harm" (s2 of the Crimes Act 1961). Give that phrase its natural and ordinary meaning. An injury need not be permanent, but it must be more than trifling or transitory: R v McArthur [1975] 1 NZLR 486; R v Donovan [1934] 2 KB 498. **With reckless disregard for the safety of others** means conscious and deliberate risk-taking resulting in an injury to another person, e.g., throwing a bottle across a crowded room. Grievous bodily harm (GBH): includes harm that is really serious such as wounding, maiming and disfiguring, requiring hospitalisation and treatment: • "**Maiming**" means to cause serious bodily injury so that a person is deprived of the use of any bodily member or sense. There must be a permanent weakness. Disfigurement is not enough. • "**Wounding**" means that the victim's skin has been broken, or the victim has internal bleeding. A wound is a breaking in the continuity of the skin: (R v Waters [1979] 1 NZLR 375). • **Disfiguring** is an external injury which mars or alters the figure or appearance of a person. Disfigurement, however, does not need to be permanent, repairable injury or damage perpetrated to disfigure is also included: R v Rapana and Murray (1988) 3 CRNZ 256.
Does the presence of past or current ODARA scores influence the type of charge?	The ODARA score can only be used to assess the risk of intimate partner violence. The ODARA does not influence the type of charge laid.

Determining the charge

Make sure offenders are charged and prosecuted in a way that reflects the essential nature of their offending and the continuing risk they pose to their victims. Remember you should select the charge that reflects the provable evidence. Having determined the offender's intent, select the appropriate charge.

For further guidance on selecting the right charge across a variety of offending scenarios:

- see the Example – determining charges for an offence in this chapter
- download: the description for 'How and when you charge makes a difference' (word doc, 134 KB)

Domestic discipline prosecutions – section 59 of the Crimes Act 1961

You must take special care when considering whether to continue prosecuting a parent-assaults-child case that involves domestic discipline. Follow this four-step analysis:

Step	Description	Action
1	The offence	Determine as a matter of law whether an offence has been committed and charges have been filed appropriately.
2	The defence	Ensure the O/C case has properly considered whether a defence is applicable and justified under section 59 (1)(a)–(d) of the Crimes Act.

3	The test	In considering a section 59 defence, apply the evidence in determining what the parent using force thought the circumstances were at the time and whether the force used in those circumstances was reasonable.
4	The decision	After applying the test, decide whether to proceed with the prosecution or withdraw the charges.

Note:
The O/C case should have considered the applicability of a section 59 defence for each parent-assaults-child case before forwarding the case to PPS. This step should be noted in writing and included in the case file.

In considering a section 59 defence, the O/C case should also bear in mind that:
- s59(2) states that force cannot be used for the purpose of correction
- s59(4) provides the discretion not to prosecute for inconsequential offences.

For further guidance:
See the Parental control (section 59 Crimes Act) chapter on the Police policy position related to the s59 defence.

Dual defendants

Dual defendants can occur when it is unclear who the actual aggressor or victim is, there are counter-allegations, and both parties are arrested and charged.

Particular caution must be used in cases with dual defendants because they may involve complicated dynamics and issues. This can present difficulties in prosecuting, so the facts in both cases must be carefully examined. It can be hard (and is not always possible) to determine the aggressor.

Factors to consider
When handling cases involving dual defendants, take into account these key factors:
- the comparative severity and type of any injuries inflicted by the parties
- whether a protection order has been issued
- whether either party has:
  - made threats of harm to the other party, a child or children, or another family or household member
  - a history of violence
  - made previous counter-allegations
  - acted defensively to protect themselves or a third party from injury
- the likelihood of further injury to each person
- the views of the investigating officer.

Example – determining charges for an offence

Offending scenario

A woman is assaulted at home by her ex-partner. When they arrive at the home, police find the woman unconscious on the floor with blood coming from her nose. Police interview the offender, who admits to punching the victim in the head.

When the victim wakes, she claims she was punched in the stomach, fell over and was then kicked in the head by the offender. An examination of the offender's boots shows blood on them.

A subsequent medical examination of the victim reveals that she has a severe bruise on the back of her skull that is consistent with having been kicked. The victim is kept in hospital overnight and treated for severe concussion. No x-ray is taken. Three weeks after the assault and after several headaches, the victim is re-examined. It is discovered that she has a cracked skull.

When police confront the offender at a formal interview with the victim's claim that he kicked her in the head, the offender claims he only kicked her lightly and did not intend any serious damage, because if he had she would be dead now.

Determine the appropriate charge

Answer the three questions to determine the appropriate charge.

What was the offender's intent?

The offender has not admitted that he intended to cause serious harm. Can police prove that his intent was to cause bodily harm, which is what he caused by cracking the victim's skull? The offender's action that caused the serious harm was one kick to the victim's head, which shows a clear intent to injure. However, it cannot be said that it shows a clear intent to cause grievous bodily harm (GBH).

It is possible police could prove the offender was reckless whether or not he caused GBH, because he did kick the victim in the head with his boots on. That amounts to a reckless disregard for safety.

Therefore, the highest level of intent police can prove based on admissions and actions, is an intent to injure.

What was the degree of force used?

A punch to the victim's stomach followed by a kick to the head of a victim who is on the ground by a person wearing boots is a relatively high level of force. However, it does not establish a very high level of intent because only one kick was directed to the victim's head, rather than several kicks or stomps to the head more commonly seen in cases where there is an intent to cause GBH or death.

What was the result or degree of injury received?

Based on the medical reports, the amount of force applied to the victim was sufficient to render the victim unconscious and cause concussion, a bleeding nose and a cracked skull. A cracked skull can fairly be described as serious harm qualifying as GBH within the meaning of s188 of the Crimes Act 1961.

What is the ODARA score and does the offender have previous ODARA scores registered on NIA?

Risk information via the ODARA is collected when there is evidence of an index assault. An index assault is one in which an offender engaged in violence against their intimate partner (physical contact) or a credible threat of death with a weapon in hand in the presence of the victim. The ODARA score will give an indication of the level of potential future risk and calculates the likelihood of assaulting a partner again in the future. That is, offenders who score higher on the ODARA, recidivate sooner than offenders with lower scores.

After balancing the factors, what charge is most appropriate to the provable facts?

A charge of common assault under the Crimes Act is inappropriate because the conduct is too serious, and male assaults female is not suitable because it does not reflect the intent or results of the assault. On an overall assessment of the seriousness of the offending (the amount of force used, provable intent of the offender and effects on the victim), the most appropriate charges appear to be:

- causing grievous bodily harm with intent to injure
- causing grievous bodily harm with reckless disregard for safety.

Both offences are found in the s188(2) of the Crimes Act, and both are punishable by up to seven years' imprisonment, and carry a warning under the '3-strikes' regime.

Accepting pleas and diversion

Arrangements as to charges

In some cases, a defendant may indicate the possibility of their pleading guilty to a different or lesser offence than that with which they are charged. This could arise, for example, if a defendant indicates an intention to plead guilty to some but not all of the charges, or because new evidence comes to light.

Follow these steps if considering acceptance of a plea.

Step	Action
1	Consider any approach defence counsel makes to review a charge. Note that: • evidence must support the charge and the charge must fairly represent the conduct • the accused must admit guilt • the court has the ability to pass a sentence on the charge that reflects the seriousness of the offending • **no arrangements can be made for the breach of protection orders ever**.
2	Whenever possible, consult with the O/C case, the family violence coordinator and the victim when determining whether to accept a plea. This is done so that the Police Prosecution Service's (PPS's) position can be explained to them and their views obtained.
3	Make the determination to accept or reject an arrangement. You may accept a plea to a different or lesser offence than that with which they are charged, if you believe the court can pass a sentence that reflects the seriousness of the offending. (Arrangements can be revoked in the future, if it is in the interests of justice).

Matters to consider when accepting pleas

You are responsible for determining the prosecution position in respect of charge arrangements, consistent with the requirements of the Solicitor-General's Prosecution Guidelines which include these matters:

- a prosecutor:
  - may indicate to counsel a willingness to consult concerning disposition of the charges by plea
  - must not speak to a defendant directly about charge resolution. Where a defendant is self-represented, any question of appropriate charges should be dealt with by way of a request for a sentence indication as part of a case review hearing
- any plea arrangement must be recorded in a form capable of being placed before a court, which would be a case management memorandum for cases scheduled for a case review hearing (see the Criminal procedure – Review stage chapter)
- the victim/complainant must be informed of any plea discussions and given sufficient time to make their position known
- the summary of facts must reflect the charges filed and must not contain or omit any material fact for the purposes of plea arrangement
- to proceed with an arrangement the evidence must support the charge (and there must be no evidence contrary to the charge), the charge must fairly represent the criminal conduct and the accused must admit guilt. No plea arrangement may be concluded where the nature of the offending or alleged offender is such that it is clearly in the public interest that the matter proceeds on the basis of the charges filed
- the prosecutor must not:
  - agree to promote or support any particular length of sentence
  - over-charge to obtain an arrangement.

Withdrawal of charge arrangements
Occasionally, a charge arrangement may be withdrawn after another prosecutor takes over the case or the PPS deems the arrangement to be inappropriate. When this occurs, a defendant usually claims an abuse of process for the PPS reneging on the arrangement. However, it is lawful for the PPS to revoke an arrangement made by an O/C case or prosecutor if it is in the interests of justice to do so (see Fox v A-G [2002] 3 NZLR 62; (2002) 19 CRNZ 378 (CA)). This option, however, should be exercised with discretion and you must have approval of the District Prosecution Manager or higher line authority

Arrangements as to charges in respect of breaches of protection orders

You must always prosecute a breach of a protection order except when the evidence does not support it. Prosecuting in these circumstances assists in building a history of the defendant's family violence offending.

You must not agree to withdraw charges for breaching a protection order as part of a charge arrangement for a guilty plea to other family violence charges. A guilty plea to a family violence offence committed when a protection order was in place potentially adds weight to the prosecution for breaching the protection order itself.

Diversion

Diversion in family violence cases will be considered, but only on charges involving minor offending. Authorisation for diversion must be sought from the district prosecution manager for offences that occur within an intimate partner relationship and have an ODARA registered against the offender in NIA. In coming to a diversion decision, fully consider previous offending and reports and, where possible, consult the district FVC and O/C. The prosecutor must also ensure that the victim is consulted and their views obtained.

Family violence is characterised by repeat victimisation and offending. Offenders and victims often hold deeply entrenched beliefs. Offenders may be manipulative and have offended seriously and repeatedly.

When diversion is considered, diversion officers must ensure they have all the relevant facts by:

- making a full NIA history check
- checking if the event has an ODARA present and what the score says about further risk? Are there historic ODARAs within NIA?
- checking all **POL 1310** information, including investigation and risk assessment findings
- ensuring the courts victim advisor has checked whether the defendant has a Family Court file
- discussing the situation with the district FVC (and getting information from other family violence services or programme providers).

Note: Diversion must not be offered when a protection order is breached. Such orders are made by the Family Court to protect the applicant (and other named people) from the respondent, so are not issued lightly. All breaches must be dealt with seriously.

See the Adult diversion scheme policy and the Adult diversion scheme deskfile for detailed information about diversion.

Bail

Introduction

The Bail Police Manual chapter contains detailed instructions and guidance for:

- the O/C case to:
  - decide whether to grant Police bail
  - determine appropriate bail conditions
  - decide whether to oppose bail when defendants are not bailable as of right
  - prepare effective opposition to bail applications
- prosecutors to:
  - review bail opposition forms to ensure compliance with the legislative requirements of the Bail Act 2000 and relevant case-law
  - see if there are any ODARA scores listed against the offender
  - oppose bail applications in the District Court.

The following information on bail is aimed at prosecutors and identifies areas of the bail process where because of the particular nature of family violence offending, prosecutors particularly need to focus their attention.

Police bail for family violence events (other than breach of protection orders)

In deciding whether to grant police bail in family violence cases, consider the victim's safety and the possible need for the defendant to have a cooling off period to ensure the victim's safety. The defendant in a family violence case should be released on police bail only with the authority of a supervisor of or above Inspector level.

Court bail – factors to be considered by the court

The three primary considerations the court must take into account when deciding whether to grant bail are set out in section 8(1) Bail Act. Additional considerations that may be taken into account under section 8(2) include the:

- seriousness of the offending and/or punishment
- strength of evidence
- probability of conviction
- character and past conduct of the defendant (including information on the family violence database)
- ODARA scores both for this offence and past scores.

Victim's views about bail

The court must take the victim's views about bail into consideration for specific offences referred to in s29 of the Victims' Rights Act 2002. These include an offence:

- of sexual violation or other serious assault
- that resulted in serious injury to a person, the death of a person, or a person being incapable
- that has led to the victim having ongoing fears on reasonable grounds for their physical safety or security, or for the physical safety or security of one or more members of their immediate family.

(These offences often apply in family violence cases)
(s8(4) Bail Act)

Section 30 of the Victims' Rights Act also requires prosecutors to ascertain any views a victim covered by s29 of that Act has about the bailing of a person accused of an offence against them.

Breaches of protection order

The need to protect the victim of the alleged offence is the paramount consideration when deciding whether to grant bail, if the charge is for breach of a protection order. (s8(5) Bail Act)

Deciding whether to oppose court bail

When deciding whether to oppose bail in family violence cases, consider in addition to the section 8 factors:

- the need to ensure the victim and their family's safety, and any safety plan in place
- the victim's views on their safety and their level of fear if the defendant is released on bail
- the recommendations of the O/C case
- the injuries sustained by the victim and the general seriousness of the offending
- damage to property, which has been done to threaten the victim
- any risk-related information, e.g. the ODARA score
- previous history, including family violence–related calls for police assistance and other offences or charges involving violence or threats of violence
- the influence of alcohol or other drugs on the incident and relationship
- whether any of the following exist, which may increase risk for the victim:
  - a recently served protection order
  - the victim is considering separating from the defendant
  - the victim is in a new relationship.

Make your decision on opposing bail based on the Bail Act's primary "real and significant risk" considerations. These include the need to protect victims, children and other witnesses from the risk of danger, threats, pressure or acts by the defendant that might obstruct the course of justice. When there is a charge of breach of protection order, the safety of the victim is the paramount consideration (s8(5) of the Bail Act).

Consult with the O/C case as appropriate, to ensure all assessment factors are properly addressed. The family violence coordinator (FVC) may also be consulted and provide supporting documentation for bail opposition. Only present written opposition to court using the Police Opposition to Bail form.

When court bail is granted

When court bail is granted to a family violence defendant, you must liaise early with the O/C case, FVC or O/C Intel, advising them of the fact of bail and any conditions. This enables safety plans for the victim, children or other affected people to be established or updated. You must also work with the O/C case and court staff to ensure the victim or witness is promptly advised of any change to the defendant's bail conditions or custody status.

You should:

- carefully consider any proposal for a defendant to be bailed back to the victim's address on a case-by-case basis
- take into account the potential risks of further violence and/or intimidation towards the victim by the defendant, when considering this issue.

Seeking bail conditions

When considering what bail conditions to request in family violence prosecutions, consider these factors for example:

Factors relating to a victim or family	Factors relating to the defendant

• any safety plans in place for the victim • the victim's views • where the victim and children live • where the victim works and socialises • where the family doctor or other relevant medical practitioners are based • where the children go to school or go to on a regular basis • school pick-up times and working hours (if considering curfews) • restrictions on child contact from the Family Court • pending Family Court proceedings that relate to the children (e.g. parenting orders, supervised contact and day-to-day care).	• whenever possible, conditions should not prevent the defendant continuing in their usual employment • whether there is a protection order in force • whether conditions would prevent the defendant's attendance at a Family Court–directed stopping violence or other programme or treatment, including a self-referred programme. **Only in exceptional circumstances should the defendant be bailed to the victim's address.** E.g. the defendant and victim may work together and due to economic circumstances this must continue. In such a case, a condition that the defendant is not to offer violence to the victim would be appropriate

Examples of possible bail conditions
See the examples of appropriate and inappropriate bail conditions in the Deciding whether to grant or oppose bail section of the Bail chapter. In the context of family violence cases, note that:

- a non-association condition may still be required when a protection order is in place, as under the conditions of the order, the victim can invite the defendant back to live with them
- the surrender of passport and travel documents is particularly important if there are issues around breaches of parenting orders or concerns that any children may be taken from New Zealand.

Electronic monitoring on bail

If a defendant applies to be released with electronic monitoring (EM bail) the EM bail assessor must pay special attention to the unique dynamics of family violence and its possible impact on any proposed residential arrangements. The assessor must discuss their report with the prosecutor, so that a prosecution position on the appropriateness of EM bail can be formed.

Applications for the defendant to be released on EM bail to the victim's address should generally be opposed. This is because confining the defendant to premises shared with the victim could exacerbate problems in the relationship, leading to further violence towards and/or intimidation of the victim.

Advising victims about bail decisions

The O/C case should inform the victim of any information relevant to the case (s12 of the Victims' Rights Act) including bail decisions and any bail conditions relevant to them. You should check to ensure this information has been passed to the victim.

Victims covered by section 29 of the Victims' Rights Act are given a POL1065 by the O/C case so they can be registered on the Victim Notification Database and be advised of various events relating to the case. The O/C case must advise registered victims as soon as practicable:

- when an offender is released on bail (s34 Victims' Rights Act)
- of any terms or conditions of the release relating to them or their family at that time.

It is the prosecutor's responsibility to pass this information on to the O/C case, so they can tell the victim. You should check to ensure that the O/C case has advised the victim.

Note:
The victim **must** be advised quickly because there are no provisions for the defendant to be held in custody once bail has been granted. This means the defendant must be released as soon as they have been processed (within two hours) and cannot be held until the victim has been contacted.

Variations to bail conditions

When a defendant seeks variations to their bail conditions, you must make every reasonable effort to ensure the victim's views are sought where the victim has ongoing fears on reasonable ground for their own physical safety or that of one or more of their family members. Where possible and appropriate, consult with the FVC before agreeing to a change of bail conditions.

Victims may be pressured to agree to bail conditions being varied. Changes must not compromise the victim's safety and in all cases there must be a very good reason for agreeing to any changes. The reasons for the original conditions being imposed must be carefully considered.

The victim must be advised of any changes to the bail conditions (s34 Victims' Rights Act).

Be aware of these common ploys to obtain variations to bail conditions:

- prosecutors being played off against each other (e.g. finding a prosecutor who has a more favourable view of the defendant's issues)
- the defence:
  - applying for a variation at a court where the case and its history are not known
  - having the victim or the victim's family accompany them when making an application to vary conditions.

Breaches of bail conditions

Breaches of bail must be treated seriously. Depending on the seriousness of the breach and whether it fits one of the criteria in section 8(1)(a) and (3) of the Bail Act, or more significantly, restrictive provisions in the Bail Act that shift the onus, you should generally oppose bail and seek a remand in custody.

The victim is not the subject of the bail conditions, the defendant is. However, take care to ensure that it was not the victim who initiated the contact that breached the bail condition. The defendant is responsible for complying with any conditions imposed by the police or the court until released from those conditions by the court.

When a person has been arrested for breach of a bail condition, seek a certified record of non-performance of a bail condition (s39 of the Bail Act) - this is whether further bail is opposed or not. The court can note the non-performance on the back of the bail notice and instruct the Registrar to enter a record of this event in the criminal records kept under s184 of the Criminal Procedure Act 2011. This information can then be used in subsequent bail applications. It is important to note the court will certify only serious breaches that may lead to a failure to comply with one or more of the three primary considerations in s8(1) of the Bail Act.

Supporting victims and witnesses to give evidence

Initial interactions with the victim or witness

Many victims and witnesses will be experiencing the court process for the first time. This, coupled with the fear of facing the defendant, can make the court appearance a frightening experience. The physical layout of the court can also be intimidating, particularly when victims and witnesses have to sit near the defendant's family, supporters or witnesses.

You should meet with the family violence victim or witness before the Judge-alone trial, because of the inherent tension they may feel in giving evidence against a spouse or partner. Establishing contact before the proceedings will give the victim or witness confidence and a better understanding of the court and prosecution process.

You should be familiar with ways to help vulnerable and intimidated witnesses (including children) give their best evidence. See information on giving evidence in alternative ways in the Storage, transcription and the court process after visually recording section of the Investigative interviewing witness guide.

Victim impact statements

See information on victim impact statements in the Victims (Police service to victims) chapter.

Support for victims in court

Prosecutors work with the O/C case to ensure the victim is safe and the contribution of external service providers (e.g. Women's Refuge and Victim Support) to victims is well directed and appropriate. When specific concerns have been identified, liaise with the O/C case and/or the family violence coordinator to consider the best options for appropriate support.

Protection and safety of victims and witnesses

Victims and witnesses in family violence cases may be coerced, threatened, and intimidated. Just attending court and facing the defendant is traumatic for many victims and witnesses. When the defendant has not been kept in custody, victims and witnesses may fear meeting the defendant (and their family and supporters) before the hearing. The O/C case should brief the prosecutor about any safety procedures that have been put in place for the victim and family, so safety is not inadvertently compromised.

The victim and any support people can be located in secure rooms at the court immediately before and after the hearing if their safety is at risk. The prosecutor and/or O/C case should liaise with the CVA before the hearing date to arrange this facility on the victim's behalf.

Victim's location and/or residential whereabouts

Section 16 Victims' Rights Act restricts the victim's precise address (including postal address, email address, fax number, or phone number) from being given in evidence or in information provided to the court.

In some family violence cases, the victim and any dependants may have to reside somewhere unknown to the defendant. Some serious investigations may necessitate the victim being relocated in another country or re-established elsewhere in New Zealand. District prosecution managers must ensure that no information is divulged by or through PPS staff that could lead to the victim's whereabouts being discovered and their safety compromised.

Alternative ways of giving evidence

For information on the alternative ways of giving evidence see:

- the "Storage, transcription and the court process after visually recording" section of the Investigative interviewing witness guide, and
- "Ways of giving evidence" in the Victims (Police service to victims) chapter.

Limitations on self-represented defendant

If the defendant is representing themselves, they are **prohibited** from directly cross-examining a complainant or child witness in a sexual or domestic violence case (s95 Evidence Act).

Reluctant or hostile witnesses

Dealing with reluctant witnesses

Because of the dynamics of family violence, some witnesses (particularly victims) will be reluctant to give evidence and withdraw their support for the prosecution. You must take a considered approach toward dealing with reluctant witnesses and balance the need not to re-victimise the witness with the need to stop future violence by holding the offender accountable. Generally, you should seek to continue a prosecution where the evidence is available and it is in the public interest to do so.

When the offending is serious (i.e. has significant public interest) and the evidence is strong, the presumption is that the family violence prosecution will proceed despite the witness' wishes. The degree to which a witness will be required or compelled to give evidence will relate to the facts of the case. Download the decision tree for working with reluctant witnesses as a guide.

Adjournment, withdrawal, and dismissal of proceedings

In cases where you cannot proceed with a case, because a witness has refused or failed to appear, you should try the following options:

Option	Action
1	Stand the case down or seek an adjournment of the matter from the court (to locate the missing witness).
2	If the court will not grant an adjournment, seek leave to withdraw the charge under s146 of the Criminal Procedure Act 2011.
3	If the court will not grant an adjournment or withdrawal of the charge, the most likely outcome is that the charge will be dismissed under s147 of the Criminal Procedure Act 2011. There is no scope for such a dismissal to be deemed "without prejudice", and accordingly the charge will not be able to be re-filed in the future.

Indication of reluctance prior to court

When a witness indicates reluctance prior to court you should:

- consider the issues behind their reluctance to make a statement and/or desire to change a statement
- consider having the O/C case investigate the witness' change in position
- assess **options for the prosecution** with the O/C case including:
  - summonsing the witness to appear and give evidence
  - explaining the authority to seek a warrant to arrest before the hearing
  - helping the witness give evidence using an alternative way of giving evidence – (this must be approved by the court)
  - applying to have the witness's statement read in court in absentia if the witness is genuinely unavailable (i.e. admitted as hearsay)
  - prosecuting on the basis of the original statement made to police together with corroborative evidence (i.e. photos) if the witness intends to give "hostile" evidence.

Investigating a witness's change in position

When deciding what prosecution option to take, consider having the O/C case interview the witness to confirm whether they have withdrawn their support and request that a POL 258 report be prepared explaining:

- the reasons for withdrawing support for the prosecution
- whether the complaint (and original statement) was true
- whether the witness has been pressured to withdraw support
- any other relevant factors.

If there proves to be a material difference between the witness' original complaint and subsequent retraction, obtain the views of the O/C case (or the FVC if the O/C case is not available) about the evidence and the possible implications of requiring the witness to give evidence. The O/C case may need to assess the risks to the witness and any child or other affected person, so that a comprehensive picture can be obtained.

If you suspect the witness has been pressured or coerced into withdrawing the complaint, ask the O/C case to investigate. This may reveal further offences, e.g. harassment, witness intimidation, a breach of bail conditions or attempting to pervert the course of justice.

If the witness confirms the original complaint is true but wants to discontinue prosecution, assess whether the prosecution can proceed without their evidence (evidential sufficiency) and, if so, whether it should proceed against the witness' wishes (public interest).

Using hearsay evidence without calling the witness
The law allows the use of the witness's statement in court without calling the witness (s18 of the Evidence Act), but only in limited circumstances, e.g. where the witness is genuinely unavailable (within the meaning of s16(2) of the Evidence Act). The court ultimately decides whether a hearsay statement will be admissible even though the witness will not be available for cross examination. In practice the court is likely to admit such evidence if there is strong corroborative evidence, which supports the truth of the hearsay statement.

Failure to appear in court

When a witness fails to appear in court or avoids service of a summons, you should if possible, have the case stood down to make enquiries and assess the situation to determine in consultation with the O/C case whether the prosecution should proceed as per normal policy and procedure.

Having a victim or witness declared "hostile" when giving evidence
It is not uncommon in family violence cases that the witness changes their evidence while under oath. Consider asking the court to declare the witness hostile in accordance with section 94 of the Evidence Act. This is usually preferable to withdrawing charges.

You can then properly cross examine the witness including introducing a previous inconsistent statement made by them (taken at the time of the offending) to prove the truth of its contents. You should refer the witness to the prior inconsistent statement and get them to confirm that they did make the statement (or confirm their signature on the statement). If they do not adopt the statement as true, seek leave of the court to introduce the prior inconsistent statement into evidence.

If coupled with corroborating evidence (e.g. photos of bruising) the prior inconsistent statement may be considered proof beyond reasonable doubt of the offence before the court. You may invite the court to reject a hostile witness's evidence on oath as not credible, and adopt the initial statement as the true version of events.

Requiring witnesses to give evidence

The legal provisions for dealing with witnesses who refuse to be sworn or give evidence are in section 165 (witnesses refusing to give evidence may be imprisoned) and section 365 (contempt of court) of the Criminal Procedure Act.

In a leading case on the requirement to give evidence, Beckett v Jaffe and Evans (1989) 4 CRNZ 248, Justice Hillyer said (at page 252):

There is an obligation in this country on every citizen to give evidence in our Courts when required to do so. To refuse is an offence.

For a witness not to give evidence they must convince the court they have "just cause or excuse" for not doing so. Therefore, the prosecutor must have considered all the issues of the case and be prepared to argue that the witness does not have a "just cause".

Compelling a spouse or partner

The Evidence Act has removed spousal immunity from the law. This means a victim who is the spouse of the offender can be summonsed to appear as a witness and be compelled to give evidence. It is also likely that section 165 of the Criminal Procedure Act 2011 also ceases to provide the same level of immunity for people in a committed relationship (including a civil union, or a de facto relationship between people of the same or opposite sex), because the Evidence Act gives a clear statement of Parliament's general intention in this area.

Prosecuting for breaches of protection orders

About protection orders

See the Protection and property related orders chapter for information generally about:

- the purpose of protection orders
- when they can be issued
- the standard non-violence and non-contact conditions of protection orders.

See also Defences to breaches of Protection Orders in this chapter.

Note: Diversion for breaches of Protection Orders must not be considered in any circumstances.

Proving the offence

To ascertain a charge for breach of a protection order three ingredients must be established:

- Was there a valid protection order in existence at the time of the offence?
- Had the defendant had the protection order served on them or were they were aware of its existence?
- What is the evidence that a specific condition has been breached?

Proof of service

When service of the protection order can be proved it should be proved.

Proof of service is a common problem, especially if the O/C case has not given it sufficient consideration. In some cases, the defence may consent to proof of service being entered as a fact admitted by consent (s9 Evidence Act 2006).

To get certified copies of proof of service, make an application to the Family Court where the documents originated. Section 130 of the Evidence Act allows documents into evidence without a witness having to be produced, but prior notice to the defence must be given.

The rules for service of protection orders are in Rule 127 of the Family Court Rules 2002.

If the orders and associated documents:	**then...**
are served by a registrar, bailiff, member of Police, or social worker	service can be proved by a certificate or an endorsement on the original or a copy of the documents that were served. The date, mode, and time of service must be stated.
were not served by a registrar, bailiff, member of Police, or social worker	an affidavit of service on form G8 (found in the First Schedule to the Family Courts Rules) can be provided. The affidavit must describe the documents that were served, but does not need to have a copy of the original documents attached. Oral evidence can also be given. Oral evidence may be necessary, if the documentation is in dispute or appears to have some irregularity.

If service has not occurred

If service has not occurred, the prosecution is not necessarily doomed, as it has to prove only that the defendant was aware of the existence of the protection order before breaching it. This does require evidence to be given of that fact. If the defendant claims not to be aware of the order and it has been served, then service should be proved.

Proving knowledge can also be achieved by the defendant admitting they had prior knowledge of the protection order before the breach.

Defences to breaches of Protection Orders

Defence of non-service of protection order

Non-service is not a defence if the prosecution proves that the defendant was aware of the existence of the protection order at the time they allegedly breached it (see De Montalk v Police [1994] NZFLR 149, and Skelton v Police [1998] NZFLR 102, to similar effect).

Defence of not understanding the legal consequences of the protection order

It is not a defence that the defendant did not understand the legal consequences of the protection order (see Alofaki v Police 19/3/07, Baragwanath J, High Court Whangarei CRI-2006-488-43).

Defences relying on exceptions to non-contact

Several exceptions to the non-contact conditions may be relied on as a defence, including:

- communication about contact with children
- emergency contact.

Communication about contact with children

Section 19(2)(e) of the Domestic Violence Act provides exceptions to non-contact conditions. The most commonly encountered exception is the allowance for non-physical contact by an "order or written agreement relating to the role of providing day-to-day care for, or contact with, or custody of any minor" (subclause (ii)).

This exception allows only non-physical contact and that any such agreements must be in writing (or be court orders). The respondent is still in breach of the order if such communications become threatening or abusive.

Emergency contact

Contact is also permissible in an emergency. This is likely to include serious illness, accident, death, or other crises. The High Court has held that an overdue telephone bill is not an emergency (see Porter v Police (2005) 25 FRNZ 913).

"Reasonable excuse"

Section 49 of the Domestic Violence Act provides that it is an offence if the respondent breaches a protection order only "without reasonable excuse". This is interpreted in an objective way – in other words, whether an "ordinary New Zealander" would consider the contact reasonable, not whether the defendant considers they have been reasonable (see A v Police [1999] 2 NZLR 501).

Interestingly, in Porter v Police (2005) 25 FRNZ 913, the court did not find an overdue telephone bill constituted an emergency, but it did constitute a reasonable excuse.

The repeal of section 67(8) of the Summary Proceedings Act 1957 and removal of the reverse evidential onus is not expected to have significant impact on the course of prosecutions.

Meaning of "accosting"

One of the conditions of a protection order is not to "follow the protected person about or stop or accost the protected person in any place" (s19(2)(b) Domestic Violence Act).

The meaning of "accosting" for breach of a protection order was interpreted by the High Court in Campbell v Police (1997) 16 FRNZ 25 to mean, "make up to and address, open

conversation with" and can extend to physical actions such as touching someone or arresting the passage of another person.

In Campbell v Police, the High Court held that the District Court judge had made no specific finding relating to "accosting", but seemed to have decided the case on the basis of "following", which was not the charge. The appeal was upheld. This case illustrates the need for the correct wording for the charge to be used.

Actual "mens rea" or intent is not required

Another defence sometimes used is that the defendant had no intent, or mens rea, to breach the protection order. This defence is invalid because an "intent" to breach the protection order is not required (see A v Police [1999] 2 NZLR 501).

No requirement to prove the behaviour was threatening or intimidating

There is no requirement for the prosecution to prove that the behaviour was threatening or intimidating to the protected person.

Convictions have been upheld for stalking-type behaviour when the intended victim was unaware the actions were being carried out (see McDowell v Police 30/4/99, Gendall J, High Court Wellington AP71/99).

Double jeopardy or "autrefois-convict"

An unusual defence that has been put forward to charges of assault and breach of protection order based on the same assault is "autrefois convict", or as it is sometimes called "double jeopardy". The essence of this defence is that a person cannot be prosecuted twice for the same offence.

No such defence exists because both charges can sit alongside each other, as shown in De Montalk v Police 24/9/98, Cartwright J, HC Auckland AP109/98. Two distinct separate offences were committed, even though they arose out of the one factual situation.

Validity of old orders made under the Domestic Protection Act 1982

Final non-violence and non-molestation orders made under the Domestic Protection Act 1982 that were valid when the Domestic Violence Act came into force (on 1 July 1996) or were made final after that date are deemed to be protection orders under s133 of the Domestic Violence Act.

The old final non-violence orders remain valid until they are discharged by the court. Care needs to be taken with final non-molestation orders, because s17 of the Domestic Protection Act provided that such orders ceased to have effect if the parties lived together with the consent of both parties. The key question is whether the order was still in force as at 1 July 1996. Section 133 of the Domestic Violence Act should be checked to see if it applies.

Non-attendance at a court-ordered programme (Domestic Violence Act 1995)

Introduction

The Family Court usually directs respondents of protection orders to attend a Stopping Violence programme when a protection order is made. Section 49A of the Domestic Violence Act 1995 creates an offence for a respondent who, without reasonable excuse, fails to comply with a direction to attend a programme. Previously a Family Court Registrar would decide whether to recommend a matter for prosecution and, if so, Crown Solicitors were engaged. It has been agreed between the Ministry of Justice and Police that a Family Court Registrar will now refer the matter to Police for determination as to prosecution.

This topic sets out the relevant legislation and the process that Police must follow **when investigating and prosecuting** an offence of non-attendance at a court-ordered programme under the Domestic Violence Act 1995 (DVA).

Legislation - the Programme

The relevant provisions are contained in the following legislation:

- Domestic Violence Act 1995 (DVA)
- Domestic Violence (Programmes) Regulations 1996
- Family Courts Rules 2002

Respondent must attend a programme

On making a protection order the court must direct a respondent to attend a specified programme, unless the court considers there is good reason for not making such a direction. (DVA s32(1) and s32(2)). This is to attend a stopping violence programme.

A respondent means the person against whom an application for a protection order has been made under the DVA.

Court will direct number of sessions to be attended

When making the order the court must state the particulars of the programme in the direction (e.g. programme provider and place of attendance) and the details of the number of sessions per month the respondent is required to attend. (DVA s33).

The number of sessions required to successfully complete the various programmes are approved by the Domestic Violence (Programmes) Regulations Approval Panel.

Programme provider and the programme must be approved

All programmes must be approved by the Domestic Violence (Programmes) Regulations Approval Panel.

> (DVA s2: **Programme provider** means a person who is for the time being approved, in accordance with regulations made under this Act, to provide programmes; and includes a person who, in accordance with the terms of the approval of any approved agency, is for the time being authorised to provide programmes.)
>
> The Secretary of Justice must maintain a register showing details of the approved programmes and providers (Domestic Violence (Programmes) Regulations 1996, regulation 71).

Powers of programme provider

The programme provider can, in special circumstances, excuse the respondent from attendance at any session or sessions (DVA s38(1)).

In cases of illness or injury the programme provider can excuse attendance for a session if they are satisfied with the circumstances, but not from the whole programme (DVA s38(2)).

Missed sessions made up
Where a respondent misses a session they must make up that session by attending a substitute session, unless the programme provider considers the absence has not significantly affected the person's ability to benefit fully from the programme (DVA s38(3)).

Notice of absence from programme
Where the respondent fails to attend the programme without being excused, the programme provider must advise the Family Court Registrar in writing, within 7 days of the failure to attend. (DVA s39(1)).

Non attendance must be referred to a Judge
On receiving the notification the Registrar must, without delay, bring the matter to the attention of a Judge (DVA s39(2)).

Programme provider must report back to the Registrar
On completion of the programme, the programme provider must report back to the Registrar in writing, advising, as the case requires:

- any sessions missed and the reasons for same; and
- whether the respondent fully participated, in particular, by completing any tasks set as part of the programme.

The Registrar is then required to notify those details in writing without delay to the applicant or the applicant's lawyer (DVA s40).

Programme provider can apply to vary direction of the court
The programme provider can during the course of the programme apply to the Registrar to vary the direction of the court. This may include substituting another programme.

The Registrar must bring the matter to the attention of a Judge (DVA s41).

Judge may call respondent before the court
A Judge may call the respondent before the court to confirm, vary or discharge the direction.

Where the court confirms or varies the direction the Judge must warn the person that non-compliance with the direction is an offence punishable by imprisonment (DVA s42).

Legislation - Failing to comply with a direction to attend a programme

Failing to comply with a direction to attend a programme has been removed as a condition of protection orders and has a separate penalty regime under section 49A. Section 49A separates the offence previously enforced as a breach of a protection order pursuant to s49 of the DVA.

Section 49A(1) of the DVA creates the offence of failing to comply with a direction to attend a programme and s49A(2) specifies the penalty:

S49A Offence to fail to comply with direction

(1) Every person commits an offence who, without reasonable excuse, fails on any occasion to comply with a direction made under section 32(1) or (2) to attend a specified programme.

(2) Every person who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding $5,000.]

Ministry of Justice role – the Family Court

The Family Court Registrar will decide whether to refer a matter to Police for determination as to prosecution. Generally, the matter will be referred where:

- The Family Court has received a notice of absence from the programme provider; and
- An effort has been made to bring the respondent before the Family Court under a s42 DVA summons and s/he has been previously warned by a Judge on one or more occasions;

or

- A s42 summons has been issued but is unable to be served.

Information from the Family Court

Once the Family Court Registrar has made the decision to refer the matter to police for prosecution, the Family Court will assemble the following documentation for the file:

- letter requesting police review the file with a view to prosecution
- chronology of relevant details
- copy of 'checklist for prosecutions under s49A DVA'
- certified copies of:
- the temporary and/or final protection order, including the direction to attend a programme
- proof of service of direction to attend, duly certified with times of service included, or, alternatively, an affidavit of service or other evidence to prove personal service
- any notice of objection to attend or request to vary the programme, and outcomes
- notices of absences issued or received from the programme provider
- certified copy of the summons to the respondent to appear before the Family Court to explain absence/s, with proof of service
- Judge's Minute regarding any warnings by the Court (if applicable)
- copy of any relevant letters, records of telephone conversations and file notes sent, received, or recorded by the Court.

Police role: Investigation

File sent to nearest Family Violence Coordinator

Family Court staff will send the above information to the local Family Violence Coordinator (FVC). These will be designated in a Memorandum of Understanding between Police and Ministry of Justice. Family Court staff should first ensure the FVC is not on leave and if the FVC is away for more than one week, the file should be sent directly to the Officer in Charge (O/C) of the relevant station.

The FVC will add any relevant Police information (such as NIA printouts) and a file cover sheet (see appendix 2) before passing the file to the O/C station for actioning.

Enter an occurrence in NIA

The file is entered into NIA, and allocated to an enquiry group/ staff member. The usual procedure is followed when entering the relevant information into NIA.

- For 'start date' the date of the last non-attendance is to be recorded
- For 'location of the incident or event' the street address where the programme was held is to be entered.

- The 'family violence-related offence' box should say 'yes', but no POL 400 is to be completed.
- The offence code is 3855.

Liaise with Family Violence Coordinator
It is important the investigating officer continues to liaise with the Family Violence Coordinator (FVC) to ensure the FVC is kept informed about progress of the case.

Interview the respondent
Normally it will be expected that Police will need to interview the respondent. This is for two main reasons:

- If the respondent was summonsed before a Family Court Judge and admitted their non-attendance and gave reasons for it, which was recorded in a Judge's Minute, this document is not admissible as evidence in a criminal court. It is therefore necessary to try to get the admission and reasons directly from the respondent.
- The offence is not committed if the respondent had a "reasonable excuse" for failing to attend and therefore it is important to ask the respondent the reasons for their non-attendance.

Use of Family Court records in criminal cases: As part of the investigation
Rule 427 of the Family Court Rules allows certain Family Court records to be searched and copied by parties or persons having a proper interest in the proceedings. This would include Police who seek to bring proceedings under s49A. Police are therefore entitled to have copies of the documents noted in Rule 426. Such documents include records of reasons noted by a Judge but not a Judge's personal notes. Police may put to the respondent the material sanctioned by Rule 426 including the Judge's reasons for confirming or varying an Order and that the warning as to attendance was given. However, Police may not use any personal notes made by the Judge for this purpose.

Arrest without warrant
Since the Domestic Violence Act was amended in 2009, and s50 was amended to remove the bar to arrest without warrant, arrest is an option by virtue of s315 of the Crimes Act 1961. This is different to the offences contained in sections 49(1)(a) and 49(1)(b), for which the Act specifically points to a power of arrest in s50.

Police warnings
Given the seriousness of breaching a court order, if there is sufficient evidence, it is expected that in most cases there will be a prosecution.

However, all relevant factors should be considered, such as the family violence history of the respondent, including number of previous breaches of protection orders; whether the respondent appeared to have a reasonable excuse for non-attendance, and whether it is within the time frame for prosecution (see below). If the officer considers prosecution is not warranted they should consult with the Family Violence Coordinator. In the event of a decision not to charge, the respondent should be warned that failure to attend in future will result in prosecution.

Reporting back to the Family Court
The investigating officer needs to keep Family Court staff informed of any decision not to charge and the reasons for this (contact the person referred to in the covering letter sent from the court).

Decision to charge
Once a decision has been made to charge, the charge is entered in NIA (use the occurrence ID from the one that has already been entered). This will create the Information.

Specimen charge and precedent code

See Charge Precedents / 3855 on the Police intranet.

Act:	Domestic Violence Act 1995
Section Title:	Offence to contravene protection order
Section:	32(3)and 49A
Charge Text:	(1) while a protection order was in force against him/her and having been directed to attend a specified programme as part of that order, failed to attend that programme (2) without reasonable excuse (3) being an offence punishable by 6 months imprisonment or a $5,000 fine.
Penalty:	s49A(2) 6 months imprisonment, $5000 fine
Category:	2
Minimum Chargeable Age:	14 years
Time Limit:	12 months
Act Information:	Fails to Comply with a Condition of a Protection Order (No Firearm Involved)
Justice Code Text:	FAIL COMPLY CONDITION OF ORDER - NO F'ARM
Justice Code:	3855

Time limit for bringing a prosecution

The charging document must be filed within 12 months of the date of the last non-attendance at the programme. If there is more than one occasion when the respondent has been absent, then only the incidents within the last 12 months can be charged.

A case on point, dating from prior to implementation of the Criminal Procedure Act when the time limit was 6 months and Informations were the charging medium:
The 6 month time limit commences at the first minute of the next day after the event giving rise to the right to lay the Information: MAF v Whiting 25/3/93, Robertson J, HC Auckland AP11/93.

Summons or Warrant to Arrest

It is expected that a summons would first be sought and served. If it cannot be served, or the person fails to attend, a warrant to arrest can be sought under section 34 of the Criminal Procedure Act 2011.

Victim Impact Statement

A victim impact statement is not required as there is no direct victim.

Case review by Police Prosecution Service

On receiving a prosecution file a prosecutor will endeavour to evaluate the file using the directed file evaluation process prior to the defendant's first appearance in Court. This will focus on file quality, investigation thoroughness, evidential admissibility and relevance, and case resolution options.

If the prosecutor decides the prosecution should not proceed but the respondent should be warned, the prosecutor will inform the investigator of this, with their reasons.

Admissibility of Family Court records as evidence

The determination as to admissibility must be instructed by the Evidence Act 2006 ("EA"). In particular, s50(1) of the EA states:

> **50 Civil judgment as evidence in civil or criminal proceedings**

> (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.
> ...

Section 50(1), thus, limits the admissibility of the evidence of a judgment or a finding of fact to prove the existence of a fact in a criminal proceeding that was at issue at a civil hearing.

Much of the material provided by the Family Court would be admissible as it would be relevant and not unfairly prejudicial to the defendant. However, Judge's Minutes or other material offered as evidence that the defendant admitted the charge, where this was not taken directly from the defendant, for example through a transcript of proceedings, would not be admissible.

Judgments and findings of fact from the Family Court are not admissible in the District Court to prove the existence of a fact that was at issue before the Family Court. Thus, where the Family Court has given a decision or finding of fact on whether a respondent failed to comply with an order to attend a programme, this finding would be inadmissible.

This means a Judge's Minute or other material that includes such a finding would, in that form, be inadmissible. However, this only relates to judgments and "findings of fact" not to documents on which a Judge may have based that finding. Accordingly, documents such as "certified copies of temporary and/or final protection orders" would be admissible.

Ingredients of the offence

The prosecutor must prove the following ingredients:

	Ingredients to prove	Evidence (not exhaustive)
1	That a protection order has been issued naming the defendant as the respondent.	Usual identity issues to be covered
2	That the Family Court properly made a direction for the respondent to attend a specified programme under the DVA (s32).	Certified copy of protection order (including the direction to attend) and notice of programme details will be required). Provided by Family Court.
3	That the respondent was served with the direction to attend a specified programme.	As per Family Court rules of service - see below for summary. Documentation provided by Family Court.
4	That the respondent failed to attend the programme	Certified copies of notices of absences from programme. Provided by Family Court.

"Reasonable excuse"

The offence is only committed if there was not a 'reasonable excuse'. Therefore, the defendant can try to establish that he/she had a 'reasonable excuse' for failing to attend.

Service of protection orders

The rules for service of protection orders are contained in Rule 127 of the Family Courts Rules 2002.

In summary, if the orders and associated documents are served by a Registrar, bailiff, member of Police or social worker, then service can be proved by a certificate, or an endorsement on the original or a copy of the documents that were served. The date, mode, and time of service must be stated (Rule 127(4) and 127(5)).

If the orders and associated documents were not served by a Registrar, bailiff, member of Police or social worker, then an affidavit of service on form G8 (found in the First Schedule of the Family Courts Rules 2002) can be provided. The affidavit must contain a description of the documents that were served, but does not need to have a copy of the original documents attached. Oral evidence can also be given. This may be necessary if the documentation is in dispute or appears to have some irregularity.

Makepeace judgment
Although service of documents was not the critical issue in this case, it nevertheless raised useful points:

- The signature of the document server was illegible and there was no statement identifying who the person was, or whether he/she was an officer of the court, police officer, etc. The document also did not state (as required) the mode of service.
- Of relevance if the defendant had chosen to raise a "reasonable excuse" defence was that the document was only served one day prior to the programme commencement. The Judge stated "a far more reasonable time than 24 hours would, in my view, have been required to establish a criminal charge". (p11)

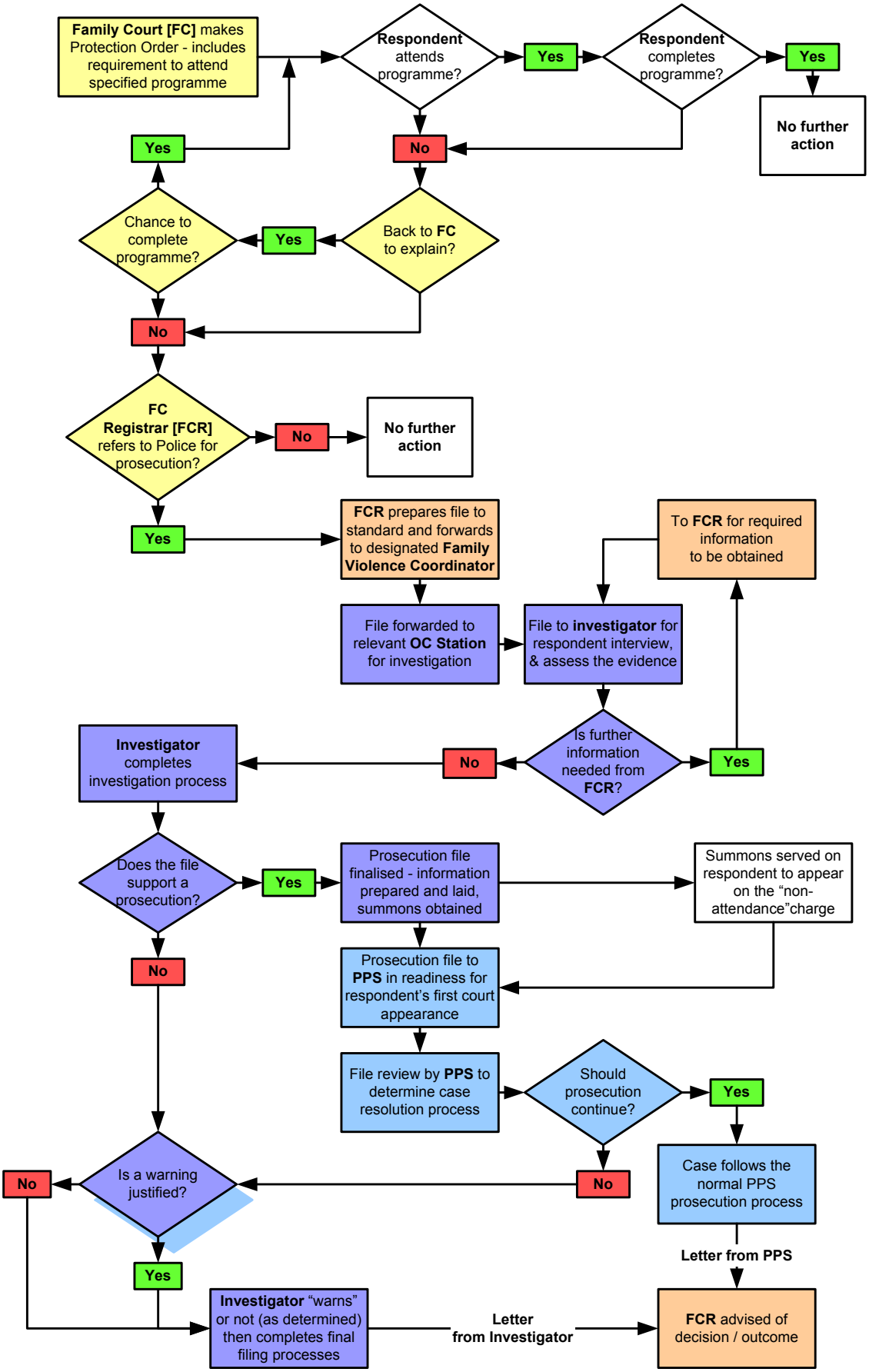
(Ministry of Justice v Mark Hugh Tweedle, aka Makepeace, DCJ P Callinicos, District Court Wellington, 27 May 2005; CRI-2004-085-6832; there is also an addendum but it is not relevant to the service issue.)

Closing the file
Once a case is finalised it should be filed following usual local processes.

Reporting back to the Family Court
The prosecutor should advise Family Court staff of the outcome of the case. (Contact the person referred to in the covering letter sent from the court).

Prosecuting family violence, Continued...

Version : 5.0



Warrants or orders made under the Care of Children Act 2004

This section describes:

- the essential elements of warrants and orders under the Care of Children Act 2004
- the types and characteristics of offences relating to parenting orders.

Relevance of the Act to family violence

The Care of Children Act 2004 replaced the Guardianship Act 1968. It modernised the law about the care of children, recognising that many families are not traditional nuclear families, and the responsibility for children is sometimes borne by people other than the child's biological or adoptive parents.

Several provisions in the Care of Children Act relate to situations that might involve family violence. This is where the care or contact arrangements for a child or children have become part of the family violence dynamic.

The prosecutor:

- locates the offence within the context of other family violence offending – is this offence part of a pattern of family violence offending?
- considers the safety of the child or children when deciding whether to prosecute.

Warrants

The Care of Children Act provides the court with the power to issue warrants for police or other specified people (including social workers) to undertake several activities on behalf of a child or children, including warrants to:

- enforce the day-to-day care or contact arrangements for a child
- prevent the removal of a child from New Zealand
- prevent the concealment of the whereabouts of a child (by uplifting the child to a safe and secure environment)
- enforce the return of a child to the appropriate parent or caregiver.

Parenting orders

Under the Care of Children Act parenting orders replace custody and access orders. "Custody" has become "day-to-day care", and "access" has become "contact".

A parenting order is an order made by the Family Court that says who is responsible for the day-to-day care of a child, and when and how someone who is important in the child's life (usually the other parent) can have contact with them. Both parties are given a copy of the parenting order, which clearly and simply explains the requirements of the order.

Courts prefer parents or caregivers to make care arrangements for children themselves and will grant orders only if the parents or caregivers have made a serious effort to reach agreement but have failed to agree on care arrangements.

Parenting orders are a clear indication that the court considers this type of order absolutely necessary.

While only some breaches of parenting orders involve family violence, it is essential that when they do, the safety of the child is a key consideration in any deliberations regarding prosecution.

Key areas of Care of Children Act

Orders and warrants

This table outlines orders and warrants made pursuant to orders that may be relevant to prosecutors in the context of family violence.

Provisions	Explanation
Section 48	Granting of parenting orders Order determines care arrangements for a child that include day-to-day care and contact arrangements.
Section 72	Warrants for enforcing day-to-day care Pursuant to a parenting order.
Section 73	Warrants for enforcing contact Pursuant to a parenting order.
Section 77	Warrants issued for the purpose of preventing the removal of a child from New Zealand Issued where it is feared a child may be removed from New Zealand by a person (usually one of the parents).
Section 117	Warrants to prevent the concealment of the whereabouts of a child In situations where a child has been abducted to New Zealand (and it is feared that a person will attempt to conceal the child) the court can issue a warrant empowering police to take and deliver a child to a suitable person pending an order being made to return a child to their home country.
Section 119	Warrants enforcing an order for the return of a child Empowers police to take and deliver a child to any person named in the warrant, where an order has been made to return an abducted child to their home country.

Offences

This table outlines key offences relevant to prosecutors in the context of family violence.

Provisions	Explanation
Section 78	Contravening a parenting order **Test**: Any person who, without reasonable excuse, intentionally contravenes, or prevents compliance with, the parenting order. **Penalty**: Maximum three months' imprisonment or a fine not exceeding $2,500.
Section 79	Resisting execution of a warrant **Test**: Any person commits an offence if they knowingly resist or obstruct any person executing a warrant under ss 72, 73, or 77. (Note that ss 117(4) and 119(4) extend the application of s 79 to resisting the execution of a warrant granted under ss 117 and 119.) **Penalty**: Maximum three months' imprisonment or a fine not exceeding $2,500.

Section 80	Taking a child from New Zealand **Test**: Any person commits an offence who, without leave of the Court, takes or attempts to take a child out of New Zealand: • knowing that proceedings are pending or about to be commenced under the Act in respect of the child; or • knowing there is an order giving any other person the role of providing day-to-day care for, or contact with, the child; or • with intent to prevent an order about the provision of day-to-day care, or contact, being complied with. **Penalty**: Maximum three months' imprisonment and/or a fine not exceeding $2,500.

Further information

Contact Prevention staff in your district or at PNHQ if you require any further information about responding to incidents involving warrants or orders made under the Care of Children Act 2004.

Sentencing

Prosecutor's responsibility at sentencing

The prosecutor must ensure that the court has all the information it needs to sentence appropriately including:

- a list of the offender's previous convictions
- ODARA scores and current score and the risk assessment
- an up-to-date victim impact statement, (if available)
- a sentencing submission (where appropriate).

Sentencing submissions

The Police Prosecution Service Written Submissions Practice Note 2011 sets out when a written sentencing submission is required.

The Chief District Court Judge's Sentencing Practice Note 2003 details the factors that should be included in a sentencing submission. In family violence cases, any ODARA scores and the corresponding risk assessment should also be included.

In all cases where defendants are convicted of family violence offences, you should consider preparing a written submission taking into account the nature and/or seriousness of the offending. Provide the court with an up to date victim impact statement and draw the court's attention to any aggravating or mitigating factors particular to the case and consistent with the characteristics of family violence offending.

You should challenge any assertion by the defence that is inaccurate, misleading, or derogatory.

Use the submissions database as a resource when preparing legal submissions. (Refer: Home > Districts & Groups > Police Prosecution Service > Submissions Templates).

Submission deadlines

Whenever practicable, all written submissions should be completed and forwarded to the district prosecution manager two working days before needing to be filed with the court. Submissions must be filed with the court three working days before the court date.

Mechanics of sentencing

The prosecutor:

- considers non-custodial options first
- determines the starting point for the offence(s)
- factors in the mitigating and aggravating factors.

Non-custodial sentencing options

Submissions on offences that involve a term of imprisonment must include consideration of the non-custodial sentencing options included in the Sentencing Act 2002:

- home detention (s80A) – for a period not less than 14 days and or in excess of 12 months.
- community detention (s69B) – an electronically monitored curfew available for a maximum of 12 hours per day over a maximum period of six months.
- intensive supervision (s54B) – monitoring by the Probation Service for a minimum of six months up to a maximum of two years.

You must examine all the circumstances relating to the offence and the offender in determining whether a non-custodial option is appropriate. Any factors affecting the suitability of these options should be brought to the court's attention. In family violence

cases, factors include the likelihood of the offender re-offending if the offender was located at the victim's residence. Given the nature of family violence, this factor may be relevant even if the victim has consented to the offender residing at their address.

Considering factors relating to the offending and the offender

If you have considered and excluded non-custodial sentencing options, your next step is to prepare the sentencing submission to aid the judge's determination at sentencing.

Begin by providing a position on the "starting point" for the sentence. Only factors relating specifically to the offending should be considered at this point. This gives the court guidance on what would be appropriate for the level of seriousness and culpability related to the type of offending. The Court of Appeal in R v Taueki (2005) 21 CRNZ 769, at page 773, summarised this step.

The modern approach to sentencing uses as a reference point a starting point taking into account aggravating and mitigating features of the offending, but excluding mitigating and aggravating features relating to the offender. Put another way, a starting point "is the sentence considered appropriate for the particular offending (the combination of features) for an adult offender after a defended trial": R v Mako [2000] 2 NZLR 170 and [2000] 17 NZLR 272 (CA) at para 24.

The second step looks to contextualise the "starting point" by focusing on aggravating and mitigating factors related to the offender. While prosecutors should not offer a position on an appropriate final sentence, they should give an indication of the significance of any aggravating or mitigating factors relating to the offender at this stage. The Chief District Court Judge's Sentencing Practice Note 2003 provides guidance on the content requirements for a submission.

Section 9 of the Sentencing Act 2002 provides an inclusive list of aggravating and mitigating factors but does not give guidance as to their use. Take care to apply these factors appropriately.

Guides to setting a starting point

Tariffs or guiding precedents are aids to determine the appropriate starting point for sentencing. Precedents for some family violence offences are provided below. Note that most of the offences detailed below feature on the schedule in the Crown Prosecution Regulations, so the district Crown Solicitor will handle sentencing requirements.

Offence	Starting point
s128B Crimes Act – sexual violation (rape or unlawful sexual connection)	The sentencing starting point in a contested rape case is eight years: R v Accused [1994] 2 NZLR 129; (1994) 11 CRNZ 222. Good guidance for an unlawful sexual connection starting point is three to six years imprisonment: R v Tranter 14/6/04, CA486/03 and CA36/04.
ss131, 131B, 132, and 134 Crimes Act – sexual offending (other than rape) against children and young persons	The ordinary principle is that imprisonment should be imposed for sexual offending against children unless exceptional circumstances apply: R v Frost 27/10/89, CA242/89.

<table>
<tr>
<td>ss188(1) and 191(1) Crimes Act – wounding with intent to cause grievous bodily harm and other serious violent offences by analogy</td>
<td>This table applies to all serious violent offending (including ss188(2) and 189 of the Crimes Act 1961): R v Taueki [2005] 3 NZLR 372; (2005) 21 CRNZ 769 (CA) and R v Highley 13/9/06, CA164/06.
<table>
<tr><th>Band</th><th>Type of offending</th><th>Starting point</th></tr>
<tr><td>One</td><td>Grievous bodily harm (with no aggravating factors)</td><td>Three to six years' imprisonment</td></tr>
<tr><td>Two</td><td>Grievous bodily harm (with two or three aggravating factors)</td><td>Five to 10 years' imprisonment</td></tr>
<tr><td>Three</td><td>Grievous bodily harm (with three or more aggravating factors, where the combination of aggravating factors is particularly grave)</td><td>Nine to 14 years' imprisonment</td></tr>
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Aggravating and mitigating factors

Section 9 of the Sentencing Act 2002 lists aggravating factors that must be taken into account when sentencing to the extent that they are applicable in the case.

In determining the seriousness of an offence you must consider any **aggravating and mitigating facts**. These are defined by s24(3) of the Sentencing Act as follows:

Term	Meaning
Aggravating fact	Any fact that: • the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence, and • the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.
Mitigating fact	Any fact that: • the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence, and • the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.

Seriousness

Family violence offences should be regarded as no less serious than other violence offences. The history of the relationship is particularly relevant when assessing the gravity of the offence. Evaluation of the file should take into account the relationship as a whole; this may reveal relevant aggravating and mitigating factors.

Key aggravating factors in family violence offences

These are the key aggravating factors in sentencing family violence offences. The list is not exhaustive and other relevant factors may arise depending on the facts of the case.

Factor	Comment

Offence involves violence	The use or threat of violence is an aggravating factor whether the violence is an element of the offence or accompanies the commission of a non-violent offence (such as a breach of protection order). In determining how significant an aggravating factor this is, the court considers the degree or level of violence, the characteristics of the victim's injuries, and whether the offending was provoked, spontaneous, premeditated, prolonged, and/or gratuitous.
Use of a weapon	Using a weapon in the commission of an offence is an aggravating factor. This is whether it is merely present or is used and causes injury. What is considered to be a weapon is usually determined on the facts of the case and how an object was used or threatened to be used. The existence of a firearm during the offence is generally considered to be a significant aggravating factor, and is compounded by the firearm's manner of use as described by the Court of Appeal in R v W 19/11/97, CA352/97, at page 4. Presenting a firearm in any circumstances is serious. Leading people to believe that it is loaded is more serious. Having a firearm which is actually loaded is more serious still because of the potential for injury and death.
Resulting loss, damage, or harm	Loss, damage, and/or harm resulting from an offence are aggravating factors. Physical and emotional harm as well as property damage are common components of family violence offending. The more severe the damage and harm the greater significance the court will place on this factor.
Cruelty	Cruelty is an aggravating factor, both when it is an element of a particular offence or reflected in the way an offence was conducted. The status of the victim is relevant to the weighting a court gives this factor, e.g. cruelty against a child is considered to be worse than cruelty against an adult. The use of a weapon in the act also raises the significance of this factor.

Abuse of position of trust or authority	Domestic relationships generally have a level of trust that implies mutual consideration, honesty, care, and responsibility. There may also be a power imbalance where one party can exert control over the other (e.g., physical strength or earning capacity). Abuse that capitalises on a trust and power imbalance aggravates the seriousness of the offence. Such abuse can be emotional and/or psychological and/or physical. Baragwanath, J noted in R v Gurnick (2002) 19 CRNZ 627 (CA) at page 631: The fact that the complainant is the mother of the appellant's children does not justify characterising this offending as somehow of lesser significance. On the contrary, the facts that the appellant was already subject to a protection order and in terms of section 9(1)(f) Sentencing Act 2002 was abusing a position of trust in relation to the complainant aggravate his offending.
Vulnerability of victim	A victim's vulnerability is an aggravating factor, particularly when the vulnerability relates to age. The elderly and children are two groups commonly covered by this factor, which can be further aggravated by serious and repeated offending, the use of a weapon, and the lack of proper care or treatment being sought for the victim and children of the relationship. In the context of family violence, vulnerability may be linked to cultural, religious, linguistic or financial factors, or other associated dynamics. Similarly, conditions such as a mental or physical disability or a medical condition such as pregnancy or having recently given birth at the time of the offence may make the victim particularly vulnerable.
Previous convictions	When considering previous convictions as an aggravating factor, the court must be careful not to be perceived as punishing an offender for a previous conviction. In general, the main relevance of previous convictions is in relation to contesting the offender's arguments of mitigating good character and establishing the risk of re-offending. As family violence is typically a recidivist form of offending, this factor may be of particular importance. In addition to previous convictions, a sentencing judge may also consider contemporaneous convictions. This is more relevant when the offending has taken place over a longer period, giving the court a better indication of the offender's character and risk of re-offending.

Key mitigating factors in family violence offences

The Sentencing Act 2002 recognises mitigating factors to be taken into account during sentencing. Importantly, being married or in a de facto or civil union relationship (with a person of the same or opposite sex) are not mitigating factors in sexual or physical abuse cases: Proctor v Police (1993) 10 CRNZ 169; R v N (1987) 2 CRNZ 513; R v Miers (1994) 11 CRNZ 307 (CA).

These mitigating factors are most relevant to family violence. This is not an exhaustive list and other relevant factors may arise, depending on the facts of the case.

Factor	Comment

Guilty plea	A guilty plea is a mitigating factor, particularly when it has been made promptly. See R v Hessell 2/10/09, CA170/09 which provides 'tariffs' for reduction in sentences based on when guilty pleas are entered. Key aspects of this factor that need to be taken into account include the promptness of the plea and the strength of the prosecution case. Pleas made at the earliest available opportunity are likely to receive the greatest level of recognition. However, if the case is overwhelming the recognition may be reduced. Similarly, limited recognition is likely to be given to a late plea. Even if a guilty plea is entered to a lesser charge, the plea may still result in a reduction in sentence.
Positive good character of the offender	The court must take into account any evidence of the offender's previous good character. However, it must be recognised that one of the factors that can allow domestic violence to continue unnoticed for lengthy periods is the ability of the offender to have two personae, i.e. the person's behaviour within a domestic relationship may be quite contrary to their public persona. A positive good character is of greater relevance when the court is satisfied that the offence was an isolated incident. Therefore, evidence indicating that the offender is a recidivist should be submitted to the court if it is available. Evidence indicating they have breached a public expectation of integrity or trust created by their good standing may also rebut this factor.
Conduct of the victim	In certain circumstances, the victim's conduct can be taken into account as a mitigating factor for the offender. Most of the family violence precedent in this area reflects female offenders harming male partners who have betrayed or abused them over a period. Given the cyclical and manipulative dynamics of family violence, take care to ensure the court: • understands the context of the offending incident. Family violence victims can, at times, act in ways that indicate they are the primary offender • has a balanced view of the incident including the history of family violence between the offender and victim, where appropriate. Note that the victim's efforts in resisting the offender and preventing a more serious offence are not a mitigating factor for the offender.

Victim impact statements

See information on victim impact statements in the Victims (Police service to victims) chapter.

Practical application of ODARA in court

About ODARA

Since 1 July 2012, responses to family violence are based on relationship type and the nature of the violence. Police now differentiate between intimate partner violence (IPV) and non-intimate partner violence (e.g. child abuse, violence between family members e.g. uncle and cousin fighting). The family violence form set (POL 1310) captures child risk factors (for children present when police attend), intimate partner vulnerability factors (no ODARA) and the ODARA is completed where the threshold of physical/sexual violence or threat with a weapon has been identified. See the Family violence policy and procedures for more information about ODARA and the completion of risk assessments.

Any ODARA completed by frontline staff must be validated by a Police employee who holds a certificate and is registered by NZ Police to undertake such validation before the prosecutor can use any ODARA score within the court environment.

Oppositions to bail - Section 8 of the Bail Act 2000

ODARA is used to predict a defendant's future risk of using intimate partner violence against a specific person. The ODARA can be used to strengthen an argument for continued detention. However, it should be limited in its emphasis and application.

Bail opposition submissions remain essentially the same when using ODARA. The focus of the opposition is still to draw the court's attention to risks identified that are consistent with the Act. Identified risks should be evidenced in the same way that they always have been:

- previous history
- previous offending while on bail
- previous breaches of bail
- any threats made to the victim
- proximity/access to the victim
- previous breaches of court orders, etc

The ODARA score will re-affirm **some** of the concerns outlined in an opposition to bail.

Section 8(1)(a) of the Bail Act 2000 states:

> *The Court must take into account whether there is a... risk that -*
> *(i) the defendant may fail to appear in court on the date to which the defendant has been remanded; or*
> *(ii) the defendant may interfere with witnesses or evidence; or*
> *(iii) the defendant may offend while on bail.*

The ODARA score may be used **after** a prosecutor has outlined the risks that apply to the above sections. ODARA:

- will have no bearing on 8(1)(a)(i) concerns
- may have a bearing on 8(1)(a)(ii) concerns if the witness is an intimate partner, and the interference is likely to include violence
- may have a bearing on 8(1)(a)(iii) if the risk identified in the opposition to bail is the defendant is likely to re-offend against their intimate partner using violence if granted bail.

The above demonstrates ODARA's limited application when addressing section 8(1). The ODARA should not be used as the main focal point of a submission for continued detention.

After the strength of the opposition to bail has been put before the court, a submission such as the following may be appropriate:

> *"The prosecution further submit the validated ODARA risk score of 4 gives added weight to the submission that there is a risk that the defendant may re-offend against the victim in this matter if granted bail"*

When making bail submissions to the court, it is important to recognise the difference between a risk that the defendant will re-offend while on bail, and a risk the defendant will re-offend using violence against an intimate partner. An ODARA score may assist your opposition only in relation to likely re-offending using violence.

Section 12 and the reverse onus

Section 12(5) of the Bail Act states –

> *In particular (but without limiting any other matters in respect of which the defendant must satisfy the Judge under subsection (4)), the defendant must satisfy the Judge on the balance of probabilities that the defendant will not, while on bail or at large, commit—*
> *a) any offence involving violence against, or danger to the safety of, any other person; or*
> *b) burglary or any other serious property offence.*

With strict interpretation of the ODARA scoring system, it would be easy to tell the court the defendant has an ODARA of 6, therefore he/she has a 59% chance of re-offending, and therefore on the balance of probabilities will re-offend against the victim while on bail. This submission obviously implies that the defendant cannot possibly satisfy the court on the balance of probabilities they will not commit further violent offences while on bail.

The ODARA score **should not** be used in this way. The concerns about re-offending consistent with section 12(5) of the Act should be outlined to the court based on the same evidential foundations prosecutors have always used.

If section 12 does apply, and there is a risk the defendant will re-offend using violence against their intimate partner, informing the court of the ODARA score will give added weight to the argument, and therefore make it harder for the defendant to satisfy the Judge to the required standard.

If a defendant has an ODARA score of 7-13, and therefore a corresponding risk of re-assaulting their intimate partner of 70%, this does not mean the courts will interpret this as *'the defendant, on the balance of probabilities will re-offend while on bail.*' Appropriate bail conditions could mitigate the risk. Note also, that if a defendant has an ODARA of 1, or even 0, this does not mean you are unable to oppose bail on either a section 8 or section 12 basis. All risk factors, including those outside the scope of ODARA, should be considered and submitted to the court when opposing bail.

ODARA and appropriate bail conditions

An ODARA score will be linked to an offender and the victim in the matter. Use of this score to assess risk of re-offending while on bail is obvious when the charge before the court is one of intimate partner violence. However, take note of an ODARA score when assessing appropriate bail conditions for other offending.

For example, if an offender has been arrested for burglary or any other non ODARA offence and has put forward an address for bail with a curfew, take care to consider the risks associated with that address, or persons living at the address. If the defendant has

an ODARA they should not be bailed to an address with the other associated person. Bail conditions of this sort create a situation for re-offending - this risk is heightened by any further restrictive bail condition such as a curfew, essentially forcing people at risk to spend time together.

Sentencing

The ODARA score can be used as a tool for the purpose of supporting a sentencing submission. However, it should not be used as a stand alone submission or an aggravating/mitigating factor. The ODARA score predicts the defendant's risk of re-assaulting their intimate partner. This test is narrower and therefore distinguishable from the test used by the Probation Service in a pre-sentence report.

Sentencing submissions should continue in content and in structure as they always have. The ODARA score can be used to support a submission for a certain sentence that is consistent with the purposes and principles of the Sentencing Act 2002, e.g. a sentence that satisfies the interests of the victims, meets the concerns of the community, and reduces the likelihood of re-offending.

The interests of the victim can include the safety of the victim. In order to determine an appropriate sentence that will reduce the likelihood of re-offending it is helpful to know what the potential risk of re-offending is.

A paragraph such as the one below may be appropriate in a prosecutors sentencing submissions.

> *"In addition to the submissions outlined, the defendant has an ODARA score of 7. This score further identifies an extremely high risk of re-assaulting his intimate partner. The only sentence that will have the desired effect consistent with the purposes and principles of the Sentencing Act 2002 outlined is a term of imprisonment, with post release conditions, including a special condition of non-association with his partner, and a protection order under section 123B"*