Prosecuting family violence

Table of Contents

Policy statement and principles

What

Family violence is a subset of activity within the broader category of 'family harm'. Family violence encapsulates physical, sexual, and/or psychological abuse within domestic relationships. As defined in the Family Violence Act 2018, family violence includes any behaviour that is coercive and/or controlling, and/or that causes cumulative harm.

'Safe homes that are free from crime and victimisation' is a key strategic priority of New Zealand Police and reducing the incidence and impact of family violence is therefore of high importance. Specifically, Police is committed to a prompt, effective, and nationally consistent approach to dealing with family violence, and to working in a collaborative manner with other agencies and community partners in doing so.

Why

Family violence is a significant issue within New Zealand society. For instance, cycle 4 of the 2020/21 Ministry of Justice New Zealand Crime and Victims Survey, estimated that 2% of New Zealand adults (equating to one in 50, or approximately 87,000 people) had experienced one or more offences by family members in the previous 12 months. Moreover, approximately one quarter of adult sexual assaults (45,000 of 176,000) were reported to have been perpetrated by and against family members.

Over the longer-term, the survey noted that 23% of females, and 10% of males, who had ever had a partner, reported experiencing intimate partner violence in their lifetime.

How

The Police response to family violence is in alignment with the principles set out in s4 of the Family Violence Act 2018. In particular, Police efforts are intended to be protective and preventive in nature.

Given the seriousness of family violence, prosecution is often the most appropriate resolution response to such incidents. Furthermore, this response enables Police to meet its dual roles of ensuring community and victim safety and preventing re-offending. That is to say, in addition to holding people accountable for their offending, and putting in place responses that protect safety, the formal criminal justice system provides access to a variety of tertiary prevention opportunities - e.g. through therapeutic courts, specialist expertise, support services, and restorative practices - that can be used in response to family violence. Prosecution is therefore an important mechanism through which Police manages its role in reducing the occurrence and impacts of family violence in New Zealand.

The success of a Police family violence prosecution relies heavily on:

- operational Police and Prosecutors working collegially to advance the necessary investigations, evidence gathering requirements, and prosecution processes
- Police staff working effectively in collaboration with our partners
- Police staff working with victim/s, to keep them appropriately informed - noting that:
    - victim safety is the primary consideration in bail decisions (s8 and s21 Bail Act 2000), and the need to protect protected persons is the paramount consideration when charged with a breach of protection order (s112 Family Violence Act 2018)
- and ensuring that:
    - victim views have been obtained by the Officer in Charge of the case (OC case) for first appearance (s8 Bail Act 2000, and s30 Victims Rights Act 2000, where applicable)
    - victims of 'specified offences' (under s29 Victims' Rights Act 2002) are contacted as per s34 of the Act, after every court appearance
    - the court has all the information that it needs to sentence appropriately (including key victim information, such as a current Victim Impact Statement)
    - when dealing with family violence matters, Prosecutors are cognisant of the complex dynamics involved in this type of offending, and remain open minded and non-judgmental, aiming to achieve the best outcome for the victim.

Overview

Purpose of this chapter

The purpose of this chapter is to outline the steps that Police staff may, should, or must take when prosecuting an adult family violence matter in the New Zealand courts.

Audience

This chapter is primarily written for Police Prosecutors who are dealing with family violence cases. However, it is of value to all Police staff who are involved in the prosecution of such matters, particularly the OC case.

Related information

The chapter should be read in conjunction with the following information:

- Police Family Harm Policy and Procedures
- PPS Statement of Policy and Practice
- Police Prosecution Service (PPS) Court Manual
- See also the Police Family Harm Policy and Procedures for:
    - definitions relating to family violence used in this chapter
    - principles guiding the Police response to family harm occurrences
    - an outline of the characteristics and different types of family harm
    - procedures for responding to and investigating family harm occurrences.

Family violence Prosecutors

All Police Prosecutors must be skilled in prosecuting family violence cases. In particular, Prosecutors must:

- understand, the particular characteristics and dynamics of family violence. This includes being familiar with the information in this chapter, and taking part in relevant training (contact Professional Development Manager: PPS for further details of relevant Prosecutor courses/training)
- be up to date with the latest family violence legislation, precedent, and theory
- have a working understanding of the Police Family Harm Policy and Procedures
- be able to balance the role of Prosecutor with the purpose for which Family Violence Courts have been established. Note: these are not opposing roles, but rather a different way of working within the court environment
- have good working relationships with judges, the OC case, Family Violence Coordinators/Family Harm Specialists, Court Victim Advisors (CVAs), and victim advocates from non-government organisations, and
- be skilled in working with victims of family violence, and in supporting them to give the best possible evidence.

General Information

What is family violence?

Family Violence is defined in s9 Family Violence Act 2018. It incorporates physical, sexual, and/or psychological abuse perpetrated against a person, by any other person with whom that person is, or has been, in a family relationship (see ss12-14, Family Violence Act, 2018).

Family Violence Courts

In most places, family violence is managed within the mainstream court environment. However, in some locations adult family violence cases are heard within specialist Family Violence Courts. Family Violence Courts were established as a judicial pilot, in 2001, in response to the often complex and specialist needs of family violence cases.

They deliver accountability and victim/public safety, while having a significant focus on offender rehabilitation; for instance, they provide access to various support programmes in such areas as violence prevention, anger management, and alcohol and drug dependency. Furthermore, these courts are victim-focused in nature, providing communication and support through MOJ Court Victim Advisors (e.g. by advising victims of their rights, linking victims to support services, helping them participate in the court process, and assisting with processes such as protection orders).

In 2022, specialist Family Violence Courts operate in eight district courts across New Zealand:

- Whangarei
- Auckland
- Manukau
- Waitakere
- Palmerston North
- Masterton
- Porirua
- Hutt Valley.

In 2021, the Chief District Court Judge introduced his Te Ao Mārama vision, for the future of the District Court of New Zealand. This vision seeks to transport specialist court practice into the mainstream environment, to ensure procedural consistency and enable all individuals to benefit from the learnings of these specialist therapeutic environments. It remains to be determined - by the Ministry of Justice - how Te Ao Mārama will impact the future of these specialist Family Violence Courts.

Key partnerships in the prosecution of family violence

Officer in Charge of the Case (OC case)

The OC case plays a vital role in the prosecution of family violence offending and is a key partner to the Police Prosecution Service (PPS) in this resolution response. For example, they respond to the initial occurrence, make resolution decisions - including whether to initiate a prosecution - gather the information and evidence required to support a prosecution, and maintain a relationship with the victim/s and witness/es.

The nature of family violence (e.g., the close association between a complainant and defendant, and the implications of that relationship either on the victim's desire to support/continue to support a prosecution, or feeling able to do so), together with an often-strong reliance on victim evidence, can make such prosecutions challenging. Therefore, the OC's role in gathering all available evidence to support the case, and remaining in contact with the victim, is extremely important.

The 'File Standards' section within this document provides guidance (through examples) of evidence, that if collected in a timely manner and as part of a quality investigation by operational staff, will help to build a case that is independent of the victim's evidence, and (if necessary and/or appropriate) may support the continuation of a case without having to rely solely on the victim's evidence.

Family Violence Coordinators/Family Harm Specialists

Family Violence Coordinators/Family Harm Specialists work closely with community-based groups and providers and represent Police at multi-agency forums that have a focus on responding to, and preventing, further family violence.

Working in conjunction with a Family Violence Coordinator/Family Harm Specialist is extremely important and valuable, since they have the knowledge and expertise to provide general and/or specific advice and guidance. Furthermore, since no single agency has all of the required information pertaining to family violence victims and offenders, family violence specialists are a key link to a deeper understanding of issues that can support the most appropriate response to, and advancement of, a prosecution.

Family violence specialists and groups are also able to provide links to victim support services, throughout the investigation and prosecution. This support can make it easier for the victim to engage in the process, thereby increasing the chances of a successful prosecution.

PPS District Prosecution Managers (DPMs) must liaise with District Family Violence Coordinators/Family Harm Specialists to foster effective working relationships at district, area, and local levels. The aim of this interaction is to build better networks to support the successful prosecution of family violence cases.

Court Victim Advisers (CVAs)

The Ministry of Justice employs Court Victim Advisors (CVAs) to support victims throughout the court process. Their role includes:

- providing information to the victim about their case
- advising victims about their rights, and
- helping victims to participate in the court process, within proscribed legal parameters, and to the extent to which they wish to do so.

While CVAs support victims, they do not/should not advocate for victims. Victim advocacy is undertaken by other non-government organisations, such as Victim Support and Women's Refuge.

Police liaise and correspond with CVAs in various ways. For example, the OC case provides certain victim information (via the CSV1 form) to the CVA, to enable them to undertake their victim contact role.

Decision making responsibilities for prosecuting family violence

Operational police staff

Operational police staff are critically important to the effective prosecution of family violence within New Zealand's courts. They are responsible for investigating family violence allegations, gathering and providing evidence, charging the alleged offender (and therefore initiating a prosecution), and communicating with the victim - including obtaining their views about bail, and collecting and maintaining their Victim Impact Statement.
Prosecutor responsibilities: early advice

Prosecutors are able (and are actively encouraged) to provide pre-charge advice to operational police staff - e.g. to assist the OC case in determining whether there is evidence of offending and, if so, what charges are most appropriate given the circumstances of the incident. This can be particularly important in family violence situations, where there is often complexity, and where a range of offence types can apply - including those of a psychological nature.

Prosecutor note: When initially reviewing a case to provide guidance, a Prosecutor should examine only the available evidence, and not base their review on any anecdote provided by an OC case. It should not be assumed that file details will precisely match the representation/s made by an OC case, and making this assumption may lead to incorrect decisions relating to the progression of the case. Furthermore, an informal initial review by a Prosecutor is not binding. These files will be formally reviewed - utilising the Solicitor General's Prosecution Guidelines - prior to Case Review Hearing, where the Prosecutor may change their view about the file, charges, evidence, or other matter.

Prosecutor decision making responsibilities: advancement of the prosecution

While noting the importance of the role of operational police staff in decision-making about the initiation of a prosecution, once that decision has been made, all further decisions relating to the advancement of a prosecution rest with PPS, through the Police Prosecutor. The Prosecutor's role includes:

- determining whether the charge/s are appropriate
- determining whether the evidential sufficiency and public interest tests (see Solicitor-General's Prosecution Guidelines) have been met, and therefore whether the prosecution should continue
- reviewing the evidence, and
- initiating the s29 bail decision victim notification process, via the Inform app (s29 application), unless alternative arrangements have been made with the OC case or other.

Review of charges by the Prosecutor

Prosecutors should 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 the 'Charging decisions' and 'Accepting pleas and diversion' sections of chapter).

Withdrawing charges

Police/PPS does not have a mandatory 'prosecution of family violence' policy; nor does it have a 'non-withdrawal of family violence prosecutions' approach. Any case that is prosecuted by Police must be supported by the necessary evidence (and be in the public interest). Where the necessary evidence does not eventuate (or where a Prosecutor determines that the public interest test is not met), a prosecution cannot justifiably continue, and the Prosecutor will seek leave to withdraw the charge/s. However, given the risks posed to victim safety (and potentially that of other family members) associated with family violence, where a Prosecutor deems it appropriate to withdraw (or, alternatively, significantly amend) a family violence charge/s, they must first consult with:

- their DPM, seeking authority to do so, and
- notify/discuss with the local Family Violence Coordinator, and/or other Family Harm Specialist/team (e.g. for the purposes of ongoing victim awareness, support, and safety planning).

The basis for decision making

The Test for Prosecution

In order to determine whether prosecution is an appropriate and necessary resolution approach in any situation, Police staff must act in accordance with the two-part test for prosecution. Prosecutions can only be conducted where both facets of the prosecution test are met (see the Solicitor-General's Prosecution Guidelines). The test is as follows:

- The Evidential Test: stipulates that the evidence that can be adduced in Court is sufficient to provide a reasonable prospect of conviction. If this test is met, an assessment of the second component - the public interest test - can then be conducted.
- The Public Interest Test: stipulates that a prosecution is required in the public interest.

Part A: The evidential test

To meet the requirements of the Evidential Test, there has to be a reasonable prospect of conviction, given the available evidence. This means that there is:

- sufficient credible evidence (in relation to an identifiable individual)
- which the prosecution can adduce before a court
- and upon which an impartial judge or jury, properly directed, in accordance with the law
- can reasonably be expected to be satisfied, beyond reasonable doubt, that the individual has committed the alleged criminal offence/s.

Part B: The public interest test

Any Police prosecution must first meet the evidential test: without sufficient evidence, Police has no basis on which to prosecute. However, it is not the case that any alleged offence that meets the evidential test must therefore be prosecuted. For those alleged offences that meet the evidential test, Police must then determine how to proceed, including whether a prosecution is in the public interest. Generally speaking, the more serious the alleged offence and/or its aggravating factors, the higher the public interest in prosecution will be. In considering public interest, the OC case (and subsequently the Prosecutor) should consider the following factors:

A. The seriousness of the offence type, including:

- the maximum penalty
- the anticipated penalty/sentence.

B. The seriousness of the offending, including:

- the extent of the victim's physical injuries
- any psychological abuse
- whether the defendant planned the attack, used weapons, and/or made threats before or after the attack
- the prevalence of the alleged offence, and the need for deterrence.

C. The context of the offence, including:

- the nature of the victim's relationship with the defendant
- the history of the victim's relationship with the defendant (e.g. any prior police callouts, or charges filed)
- the defendant's degree of culpability
- the presence of any children at the time of the offence, and the effect on them
- any protection, parenting, or supervised contact orders
- the risk of further offending by the defendant
- the perceived risk to the victim and children of a prosecution not proceeding.

D. The defendant's history, including:

- their criminal history in respect of previous relationships (including breaches of protection orders)
- other offences, particularly ones involving violence

- previous interventions that have occurred (e.g. referrals to non-violence or alcohol and drug programmes, including attendance at, and the completion of, those programmes)
- previous relevant diversions and/or cautions.

E. Any other relevant circumstances, including:

- the effect a prosecution may have on the physical or mental health of the victim/s and/or witness/es
- 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.

F. Other mitigating or aggravating circumstances that are related to the offence.

Note: None of the above-mentioned individual factors (or any other that may be relevant to the case), is necessarily determinative in and of itself. Rather, all relevant factors need to be considered and collectively balanced, in order to reach a determination of whether public interest factors are met.

Applying the public interest test in family violence cases

Family violence is a serious category of offending, meaning that in many instances there will be a public interest in pursuing a prosecution resolution. Recognising this, family violence - as a category of offending - is excluded from pre-charge resolutions, such as Te Pae Oranga, unless it is found to fall within its 'exclusion criteria' (see TPO Policy). However, family violence is not mandatorily excluded from some alternatives to prosecution, such as post-charge diversion (see PPS Diversion Policy). The Police Adult Diversion Scheme is managed by the PPS, and in considering whether offending (including family violence offending) may be eligible for diversion, Prosecutors undertake a thorough review of the case, based on the details of the alleged offence and offending, and its various aggravating and mitigating factors. Where the alleged offending relates to family violence, and diversion is being considered, Prosecutors are required to consult with their DPM, and with local experts - e.g. the District Family Violence Coordinator - to ensure agreement as to its appropriateness.

Note: 'Public' interest is not the same thing as 'victim' interest. While Police has a responsibility to work with, and communicate to, the relevant victim/s in respect of any prosecution, and while victim views are a component of police thinking/actions in regard to prosecution, the public interest and prosecutorial considerations are not simply, solely, or even primarily determined by the victim's view. As a general rule, there is a strong public interest in the prosecution of family violence. Therefore, where charges are serious, and the evidence is strong, but a victim is not supportive of the prosecution, the Police decision-maker must carefully balance victim perspectives, with public interest considerations, and the safety risks to others (e.g. children within the immediate environment).

Considering the victim's views

While noting that the views of a victim are not solely determinative of whether or not a prosecution is advanced, Police should always consider them carefully. There are several sources from which victim views can be gleaned. For example, a Prosecutor can gain the victim's perspective directly (where possible) or indirectly from the OC case, from a Police family harm specialist, or from a CVA. They can also consult the various pieces of information supplied on the case file - including a Victim Impact Statement.

Notifying the victim about the Victim Notification Register (VNR) at point of charge

Police (typically through the OC case) should undertake ongoing communication with the victim/s, to ensure they are informed about the advancement of their case. As detailed in the Police Victims chapter, victims of specified offences (s29 Victims' Rights Act 2002) can apply to be listed (or have their representative listed) on the Victims Notification Register (VNR). This confers specific and additional

communication responsibilities on Police and Corrections. The OC case should inform the eligible victim/s (or their support person) about the VNR at the time of the defendant's arrest. The OC case should also provide the victim/s with a copy of the VNR application form (POL 1065) - for them to complete and return should they wish or seek the victim's consent to complete the form on their behalf (and may help a victim complete the form, as needed) - and update the NIA victim contact node about this discussion with the victim/s.

Charging decisions

Reviewing charges

In general terms, when reviewing charges relating to family violence, a Prosecutor should consider the following:

- the nature of the offending, and the impact the charge/s will have on reducing the incidence of reoffending
- the safety of the victim/s, and of any children impacted by the offending
- the need to hold an offender fully accountable for the violence (e.g. when not doing so might be construed as condoning violent behaviour)
- the importance of never minimising/appearing to minimise violence.

Key questions/guidance regarding family violence charges

Prosecutors should also consider the following questions, regarding the appropriateness of the proposed charges in a family violence prosecution:

- do the charges reflect the essential nature of the offending?
- do the charges appropriately reflect the nature of the violence that has occurred (without minimisation)?
- do the charges take into account any aggravating and/or mitigating features of the case, which impact an assessment of its seriousness?
- is there sufficient evidence, that can be adduced in court, that will provide a reasonable prospect of conviction for the charge/s?

Prosecutor note: Any charges must be justified by the available evidence, and the number or seriousness of charges should not be inflated to increase the likelihood of an offer by the defendant to plead guilty to fewer or lesser charges.

For further guidance on selecting the correct charge/s see: [a.] the below 'Linking family violence to common offences' section, including the 'How and when you charge makes a difference' attachment, and [b.] the 'hypothetical offending scenario' example in the subsequent section.

Linking family violence to common offences

Family violence is a unique type of offending, in the respect that both parties 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 family environment to perpetuate the cycle of violence. Therefore, a review of the appropriateness of what charges to file should take into account the range of broader (and potentially related) offences that may be linked to the family violence charges.

For further guidance on linking family violence to common offences see 'How and when you charge makes a difference' attachment below:

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How and when you charge makes a difference - Dec 2022 **165.27 KB**

Hypothetical offending scenario

Circumstances

A woman is assaulted at home by her ex-partner. Police are called, and when they arrive at the home, they find the woman unconscious on the floor with blood pouring from her nose. Police officers interview the offender, who admits to punching the victim in the head. When the victim wakes, she claims that she was punched in the stomach, fell over, and was then kicked in the head by the offender. On examination, one of the offender's boots is discovered to have some of the victim's hair attached to it.

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 a serious concussion. No x-ray is taken. Three weeks after the assault, after complaining of on-going headaches, the victim is re-examined. It is discovered that she has a fractured skull.
When Police officers 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.

Answer the following questions to determine the appropriate charge in this case

What was the offender's intent?

Answer: The offender has not admitted that he intended to cause serious harm. His action was a single kick to the victim's head. This shows clear intent to injure; but it cannot be said to show clear intent to cause grievous bodily harm. However, it is possible that Police could prove the offender was reckless - whether or not he caused grievous bodily harm - because he kicked the victim in the head with his boots on, and this amounts to a reckless disregard for safety. Therefore, the highest level of intent Police can prove, based on admissions and actions, is intent to injure.

What was the degree of force used?

Answer: A punch to the victim's stomach, followed by a kick to the head when they were on the ground, by a person wearing boots, is a relatively high level of force. However, these circumstances do not establish a very high level of intent, because only one kick was directed to the victim's head (as opposed to several kicks or stomps to the head, more commonly seen in cases where there is an intent to cause grievous bodily harm or death).

What was the result or degree of injury received?

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

What charge is most appropriate, given the provable facts?

Answer: A charge of common assault under the Crimes Act 1961 is inappropriate, because the conduct is too serious. A charge of assault on a person in a family relationship is inappropriate, because it does not reflect the intent or results of the assault. Based on the seriousness of the offending (i.e., the amount of force used, the provable intent of the offender, and the 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.

The above offences are found within s188(2) Crimes Act 1961 and are punishable by a term of up to 7 years' imprisonment.

If in doubt, contact Legal Services for advice.

Parental control prosecutions: section 59 Crimes Act 1961

Section 59 of the Crimes Act 1961 refers to parental 'powers of discipline' towards dependent children. See the Parental control (s59 Crimes Act 1961) chapter for the Police policy position relating to the s59 defence.

Dual defendants

The issue of ‘dual defendants’ occurs when the identity of the aggressor and victim is unclear (including when there are counter-allegations). In such cases, both parties may be arrested and charged. Caution is required in cases with dual defendants, since they typically involve complicated dynamics and issues, and present particular difficulties when prosecuting. When handling cases involving dual defendants, Prosecutors should consider the following key factors:

- the type and severity of any injuries sustained by either of 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 member
    - has a history of violence
    - has made previous counter-allegations
    - has 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.

Prosecuting for breaches of protection and related property orders

About protection orders and related property orders

See the NZ Police Protection and related property orders chapter for general information about:

- the purpose of protection orders and related property orders
- when they can be issued
- the standard non-violence and non-contact conditions of protection orders. (**Note:** from 1 July 2019, all protection orders - including ones granted before then - will have additional standard conditions and changes to the meaning of terms used in the order).

Defences to protection order breaches

Refer to the Westlaw Commentary (here), for the mens rea (intent) requirements, and defences to breaches of protection orders.

Prosecutor note: Diversion must not be considered for breaches of protection orders or related property orders under any circumstances.

Not complying with a direction to undertake assessment, and attend a non-violence programme/prescribed service (Family Violence Act 2018)

See the NZ Police Non-violence programmes and prescribed services chapter for further information.

Validity of orders made under the Domestic Protection Act 1982 & Domestic Violence Act 1995

Final non-violence and non-molestation orders made under the Domestic Protection Act 1982, that were valid when the Domestic Violence Act 1995 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 1995.

Older 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 1982, 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 1995 should be checked to determine whether it applies.

Protection orders made under the Domestic Violence Act 1995, remain in force as per the Family Violence Act 2018clause 3 of Schedule 1. Following the replacement of the Domestic Violence Act 1995, with the Family Violence Act 2018, an order or direction made under the 1995 Act before, and in force on 1 July 2019, continues to be in effect (although with the new Family Violence Act 2018 provisions applying).

Under s133 of the Domestic Violence Act 1995, any final non-violence and non-molestation orders made under the Domestic Protection Act 1982 that were valid when the Domestic Violence Act 1995 came into force (on 1 July 1996) were deemed to be protection orders. Therefore, under the new Family Violence Act 2018, these will still be valid protection orders (subject to the Family Violence Act 2018 provisions).

See the NZ Police 'Protection and related property related orders' chapter, for details of the new conditions applying retrospectively to orders in place as at 1 July 2019.

Bail

Introduction

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

A. The OC 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.

B. Prosecutors to:

- review bail opposition forms, to ensure compliance with the legislative requirements of the Bail Act 2000, Victims' Rights Act 2002, and relevant case-law
- check any available family violence history, to identify risk indicators
- oppose bail applications in the District Court (as necessary).

The following sections are intended to provide further guidance regarding bail in family violence cases.

Police bail in family violence cases

In family violence cases, when deciding whether to grant police bail, the primary consideration is the safety of the victim of the alleged offence, and of any persons in a family relationship with the victim (see s21(2A) Bail Act 2000). If the defendant has been charged with breach of a protection order or a related property order, Police's paramount consideration is the need to protect every protected person to which that order relates (see s21(3) Bail Act 2000).

Note: A Police Officer must have the approval of a supervisor at, or above, the level of Sergeant, before granting and releasing a family violence defendant on Police bail.

Note: A person arrested under/charged with breaching a protection order - pursuant to s112 and s113 of the Family Violence Act 2018, must not be released on Police bail within 24-hours of arrest (see s23(1) Bail Act 2000). This does not affect the obligation on Police to bring the person before a court as soon as possible.

Court bail in family violence cases

In deciding whether to grant bail to an individual, the court will comply with the requirements outlined in the Bail Act 2000. As per the Act, in family violence cases, the court's primary consideration is the safety of the victim/s, and of any person or people in a family relationship with the victim (see s8(3A) of the Bail Act 2000). Where a defendant is charged with breaching a protection order, the court's paramount consideration is the need to protect every person who is protected by that order (s8(3C) Bail Act 2000).

If the defendant is charged with an offence under s194 of the Crimes Act 1961 (i.e. assault on a child, or by a male against a female), or section 194A (i.e. assault on person in a family relationship), they are not bailable as of right (see s7 Bail Act 2000).

Victim views about bail

Where the alleged offending relates to a specified offence (set out in s29 Victims' Rights Act 2002) the court must take the victim's views about bail into consideration (s8(4) Bail Act). Furthermore, as outlined in s30, Police is responsible for ascertaining such views from the victim so that they can be utilised by the court.

In broad terms, s29 offences include:

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

Given the dynamics of family violence, s29 offences often apply.

Deciding whether to oppose court bail

A decision on whether to oppose bail should be made based on the primary risk considerations of the Bail Act 2000. These include the need to protect victims, children, and witnesses from the risk of violence, threats, pressure, or other activity by the defendant that might obstruct the course of justice. When there is a charge of breach of protection order or related property order, the safety of the protected person is the paramount consideration (s8(3C) Bail Act 2000).

In addition to the s8 (Bail Act 2000) factors, when deciding whether to oppose bail in family violence cases, a Prosecutor should also consider the following aspects:

- the general seriousness of the offending
- the need to ensure the victim and their family's safety, including a consideration of any safety plan that is in place
- the victim's views about their safety, and their level of fear if the defendant is released on bail
- the proposed bail address - **Note:** carefully consider any proposal for a defendant to be bailed back to the victim's address. Given the nature of family violence offending, this would be a reason for opposition in all but exceptional circumstances
- the views and recommendation of the OC case (to ensure all known factors are incorporated)
- the views of the Family Violence Coordinator/Family Harm Specialist (as relevant)
- any injuries sustained by the victim
- any damage to property (e.g. caused to threaten the victim)
- any risk-related information (e.g. through the SAFVR - Static Assessment of Family Violence Recidivism - tool)
- 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
- whether there is a recently served protection order
- potential family violence triggers/escalators - e.g. whether the victim is considering separating from the defendant, is in a new relationship, and/or is pregnant.

Where bail is opposed, a written opposition to bail should only be presented to the court using the POL128 Police Opposition to Bail form.

Electronic monitoring on bail

Applications for the defendant to be released to the victim's address on EM bail 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.

Seeking bail conditions

When considering what bail conditions to request in family violence prosecutions, where available or accessible, a Prosecutor should consider the following factors:

A. Factors relating to a victim or family:

- any safety plans in place for the victim
- the victim's views
- where the victim/family live
- where the victim works/socialises
- where the family doctor or other relevant medical practitioners are based

- where the children go to school, and/or go on a regular basis
- school drop-off/pick-up times and working hours (if considering curfews)
- restrictions on child contact from the Family Court
- pending Family Court proceedings relating to children (e.g. parenting orders, supervised contact, day-to-day care).

B. Factors relating to a defendant:

- employment factors: whenever possible, conditions should not prevent the defendant continuing in their usual employment
- whether there is a protection order in place
- whether conditions would prevent the defendant's attendance at a court-directed assessment, and non-violence programme, or prescribed service or treatment - including a self-referred programme
- proposed bail address. **Note:** the Police position is that the defendant must only be bailed to the victim's address in exceptional circumstances (e.g. the victim and defendant may work together, and due to economic factors, this must continue). In any such exceptional circumstances, the inclusion of a condition that 'the defendant is not to offer violence to the victim' is likely to be appropriate.

Examples of possible bail conditions

For examples of appropriate and inappropriate bail conditions refer to the 'Deciding whether to grant or oppose bail' section of the NZ Police Bail chapter. In the specific context of family violence cases, police staff should 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
- surrendering of the defendant's passport and travel documents is particularly important if there are issues relating to breaches of parenting orders, or concerns that any children may be removed from New Zealand.

No-contact on remand (family violence offences)

Section 168A of the Criminal Procedure Act 2011, applies to defendants charged with family violence offences who are remanded in custody. This provision allows a judicial officer to impose conditions on a defendant remanded in custody to have no contact with the victim of the offence, and/or any other person specified by the judicial officer.

Where bail is opposed, and the offence is one of family violence, the OC case should ensure (when they complete the bail opposition) that they seek a non-contact condition with the victim of the offence, or any other relevant person. Prosecutors should also ensure that they alert the judicial officer to this provision and seek it, where appropriate.

Police communication with the victim

As outlined in s12 Victims' Rights Act 2002, a victim should be provided with relevant information pertaining to the progression of the case by members of court staff or Police. The Police responsibility for communication is primarily held by the OC case.

When court bail is granted to a family violence defendant, a Prosecutor must liaise - at the earliest opportunity - with the OC case, Family Violence Coordinator/Family Harm Specialist, and/or OC Intel, advising them of the bail decision and any conditions. This enables victim safety planning to be put in place or updated.

When court bail is granted to a defendant charged with a specified offence under s29 Victims' Rights Act 2002 (or when there are any changes to the defendant's bail conditions or custody status), Police is legally obligated to inform the victim of this 'as soon as practicable' (s34 Victims' Rights Act 2002). Police has a process for doing so via the in-court Prosecutor. Through this process the Prosecutor is able to use an app on their Police phone (the s29 Inform app) to send an e-mail notification about the bail decision to a central hub. It is received by a dedicated team of Police Victim Advisors, who are then able to contact the victim with urgency (as required).

Note: In situations where the defendant is remanded at large, 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).

Variations to bail conditions

Changes to bail conditions must not compromise the victim's safety, and there must always be a very good reason for agreeing to any such changes. In considering a request to amend original bail conditions Police should:

- revisit the reasons for the original conditions being imposed, and their rationale
- make every reasonable effort to obtain the victim's views
- consult with the Family Violence Coordinator/Family Harm specialist (where appropriate, and especially where a victim cannot be contacted) since they often have particular knowledge of the family situation, and can provide advice.

In cases where there is any doubt on the part of Police, best practice is to place the matter before the court so that the Judge can consider the request and make a decision. In these circumstances, Police must provide the Judge with the information it sees as important, to enable that judicial decision.

If changes are made to bail conditions affecting the victim/s of a specified offence (s29 Victims' Rights Act 2002), the victim/s must be notified by Police as soon is practicable (s34 Victims' Rights Act 2002).

Prosecutor note: Prosecutors should be alert to the following problem issues, in regard to bail variation practice:

- prosecutor shopping (i.e. defence counsel seeking a Prosecutor with a more favourable view of a defendant's issues)
- applications being made at a court where the case and its history is unknown
- having the victim/victim's family accompany the defendant when making an application to vary conditions (to intimate their agreement).

In response to any such tactics, Prosecutors should ensure that clear notes are recorded on the prosecution coversheet, stipulating the requested variation/s and reasons for refusal.
If a bail variation is applied for in court without notice, the Prosecutor should inform the judge of this, and ask that they either [a.] stand the matter down for further investigation of the issues, [b.] schedule another hearing, or [c.] deal with the matter through bail variation request on the papers (if appropriate).

Breaches of bail conditions

Bail conditions have a primary focus on protecting victim safety, and the defendant is responsible for complying with all conditions imposed by Police, or the court, until released from those conditions by the court. Breaches of bail expose a risk to the safety of the victim/s (even if that risk is not realised through any harm to the victim/s). As such, breaches must always be taken seriously, and considered carefully.

Where bail is breached, it will generally be appropriate for the Prosecutor to oppose bail, and to seek a remand in custody. However, such considerations will be taken in conjunction with an assessment of the Bail Act 2000 (particularly s8(1)(a) and (3)).

Prosecutor note: The victim is not the subject of the bail conditions, the defendant is. However, in examining the issue, take care to ensure that it was not the victim who initiated the contact that resulted in a bail breach.

Prosecutor note: When a person has been arrested for breach of a bail condition, the Prosecutor may seek a certified record of non-performance of a bail condition (s39 of the Bail Act 2000). This applies whether further bail is opposed or not. The court can note non-performance on the back of the bail notice, and instruct the registrar to enter a record of this event in the defendant's criminal record (as per s184 Criminal Procedure Act 2011). This information can then be used in subsequent bail applications and oppositions. 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 2000.

File standards

General requirements for file content

Family violence prosecution files must be prepared by the OC case in accordance with the NZ Police Prosecution file and trial preparation chapter, and must contain information that:

- accurately reflects the facts of what occurred, and provides context
- supports any element of premeditation or persistence in the defendant's behaviour
- proves the defendant's intent
- reflects the severity of any injury suffered by the victim/s
- identifies any known issue/s with the case, and what steps have been taken to remedy those issue/s.

Specific file content for family violence prosecutions

The below table sets out the information that must or may be contained in a family violence prosecution case file.

The file must contain	The file may contain
- All corroborating evidence - A POL258 covering report, containing sufficient detail, and outlining recommendations about bail and diversion (including an updated opposition to bail, if relevant) - A copy of the charging document for each charge - The Summary of Facts (3 copies) - A criminal and bail history (3 copies) - Signed formal statements (including VVS), compliant with s82 CPA 2011 - A copy of notebook statements and signed job sheets - A Communications Centre chronology, and any tape transcripts - Any related medical reports - An exhibit sheet - Any initial and subsequent forensic photographs of the scene, and the victim's injuries - Any family violence or other investigation information - NIA printouts, including family violence history and profiles - A Victim Impact Statement that includes whether the victim consents to a protection order being applied for on their behalf* ***Note**: as per the Police victims chapter [P.28] 'if the victim declines to provide a VIS, a VIS form with the words "victim does not wish to provide a VIS" must be added to the file to inform the Prosecutor - The defendant's statement or DVD interview (with synopsis) - The victim's views on bail - A completed Court Services Victim Referral (CSV1) form - A Family Violence Summary Report (defendant) generated from NIA for first appearance.	- a supplementary sheet, outlining further circumstances of the investigation - body maps, showing marks and injuries for both parties (as applicable) - medical release forms (as appropriate) - the details of any dependent children - any corroborating signed statements or reports - e.g. from Oranga Tamariki, the local school, neighbours, or relevant others - any audio recordings - e.g. from the Police Communications Centre, or from a family violence alarm.

The prosecution file is the collection of evidence that will support Police's case at court. Therefore, when putting together a family violence (or any) prosecution file, the OC case must ensure that:

- all necessary and available evidence is included, and all provided evidence is complete and submitted in the correct format
- all items featuring relevant physical information that is seized and retained to be used in court (e.g. bloodied clothing, or weapons) is noted on the exhibit sheet, and listed on the POL258, that is attached to the file
- the file has been reviewed and signed off by a File Manager and/or the OC case's supervisor (and that this review process is evidenced).

Corroborating evidence

The decision to prosecute is a significant one and must only be taken when the Test for Prosecution in the Solicitor General's

Guidelines is met. The prosecution of family violence poses particular challenges in regard to the provision of evidence, which makes corroboration extremely important.

That is to say, owing to the dynamics of family violence - including the victim's relationship to the defendant and fears they may have for their safety and/or that of their children - it is not uncommon for victims of family violence to become reluctant witnesses and request that charges be withdrawn. As noted above, in seeking to resolve a family violence incident through prosecution, frontline staff/the OC case must be aware of these challenges, and the importance of collecting and providing all available corroborating evidence.

The OC case (and also the Prosecutor when reviewing and analysing/grading the prosecution file) should check for evidence that corroborates the victim's allegations, including (but not limited to) the following:

- Medical examinations and Doctor's reports (of suspect and victim)
- Photographs of injuries
- Scene examination evidence, including any photographs and scene diagrams (note: consider using ESR forensic scientists for serious offences)
- Clothing
- Witness statements (e.g. children, neighbours, friends, colleagues, emergency medical staff). Note: exhaust all lines of inquiry, and obtain full details and statements from identified witnesses
- Signed statements of relevance from parties such as: Oranga Tamariki, the school/s attended by the family's children, neighbours
- The Police Communications Centre 111 (or other) call information
- The on-scene observations of the arresting officer
- SAFVR (Static Assessment for Family Violence Recidivism) tool assessment and outputs
- Previous family violence reports, Family Violence Investigation Report ratings, and ODARA (Ontario Domestic Assault Risk Assessment) scores
- E-mails, text messages, phone records, and/or electronic records
- Admissions or other corroborating statements by a suspect
- Expert witness evidence.

Accepting pleas and diversion

Matters to consider when accepting pleas

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.

The Prosecutor is responsible for determining the PPS position in respect of charge arrangements, and ensuring that any agreements entered into are consistent with the requirements of the Solicitor-General's Prosecution Guidelines.

In undertaking this role, the Prosecutor should consider the steps and issues outlined below.

Step	Action
1	**Things to note** In considering any approach defence counsel makes to review a charge/s: - the evidence must support the charge (and there must be no evidence contrary to the charge), and the charge must fairly represent the conduct - the accused must admit guilt - no plea arrangement should be concluded where the nature of the offending/alleged offender is such that it is clearly in the public interest that the matter proceeds on the basis of the charge/s filed - where a breach of protection order is alleged, it is not appropriate to withdraw an assault charge for a guilty plea to the breach charge. It may however be appropriate to use a representative breach of protection order charge for an ongoing physical assault arising out of one incident. Plea arrangements for breach of protection order charges should be very carefully considered and step 2 should be followed strictly to ensure victim safety - the Prosecutor **must not** speak to the defendant directly about charge resolution issues. Where a defendant is self-represented, any such discussion should be dealt with by way of a request for a sentence indication, as part of a Case Review Hearing - the Prosecutor **must not** agree to promote or support any particular length of sentence, and - the Prosecutor must be satisfied that - on the basis of any agreed-to changes - the court has the ability to impose a sentence which reflects the seriousness of the offending.
2	**Collecting the views of key stakeholders to support a decision** The Prosecutor should consult with, and ascertain, the views of the: - OC case - Victim - Family Violence Coordinator/Family Harm Specialist, and - District Prosecution Manager The purpose of this consultation is to enable a discussion between the Prosecutor and various stakeholder parties and ensure that the Prosecutor understands/can consider those views as a component of their decision-making process.
3	**Making and recording a decision** The Prosecutor will then make a determination about whether to accept or reject the proposed arrangement (noting that arrangements can be revoked in the future if that is in the interests of justice). In doing so they will consider details from steps 1 and 2. The Prosecutor may accept a plea to a different or lesser offence than that with which the defendant is charged, if they believe that (through this charge) the court can impose a sentence that reflects the nature and seriousness of the offending. **Recording the decision** The Prosecutor will record all outcomes (and the basis on which they were made, including discussions entered into) on the Prosecutor notes section of the prosecution coversheet. This will ensure transparency and accountability for the decision. The Summary of Facts must reflect the charges as amended, be agreed between the parties, and must not omit any material fact for the purposes of plea arrangement. If the Summary of Facts is not agreed at the time a defendant pleads guilty, and the dispute is not resolved within 10 working days, the court must be notified and an indication sought under s24(2) Sentencing Act 2002. Any plea arrangement must be recorded in a form capable of being placed before a court - e.g. for cases scheduled for a Case Review Hearing, this would be a Case Management Memorandum (see the NZ Police Criminal procedure - Review stage chapter).

Withdrawal of charge arrangements

A Prosecutor may not depart from an arrangement unless they have been materially misled by any information (from any source) as to the facts relied on in the plea discussions, and the DPM agrees that it is appropriate in the circumstances to repudiate part or all of the arrangement. When this occurs, a defendant may claim abuse of process in relation to PPS reneging on the arrangement. However, it is lawful for PPS to revoke an arrangement made by an OC 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 caution, and the Prosecutor must have the approval of their District Prosecution Manager to do so.

A Prosecutor must not agree to withdraw charges for breaching a protection order, or related property 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 or related property order was in place, potentially adds weight to the prosecution for breaching the protection order or related property order itself.

Diversion

Diversion considerations for family violence charges are outlined in the NZ Police Adult Diversion Scheme Policy.

Case review

Prosecutors to review case and make final decision on prosecution

As noted earlier in this chapter, a prosecution must only be conducted when the Test for Prosecution (as detailed in the Solicitor-General's Prosecution Guidelines) is met. This means there is both sufficient relevant and reliable evidence, and the prosecution can be sustained in the public interest. In undertaking a case review, the Prosecutor considers these factors against the weight of evidence provided by the OC case.

Three stages of case review

There are three key stages to the case review process:

A. Identifying family violence cases and liaison with the OC case
B. File evaluation
C. Checks to ensure required processes have been followed.

A. Identifying family violence cases and liaison with the OC case

In this stage of the case review process, the Prosecutor:

- identifies and marks family violence cases, to ensure they are correctly flagged
- works with the OC case to ensure that:
    - proper evidence is collected (see File standards in this chapter, which includes information about corroboration)
    - the victim is safe, is appropriately supported, and has the confidence to give evidence, if required. (Note: 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)
    - if a witness wishes to give evidence in an alternative manner (such as from behind a screen or via CCTV, which may enhance their willingness to give evidence) this is identified, so that the Prosecutor can take the necessary steps/file the required applications to enable the process **Note:** a family violence complainant is entitled to give their evidence in chief by way of video record. Notice must be given no later than at the point of CMM filing (for a Judge-alone trial) or a trial callover memorandum (for a jury trial). The prosecutor must also inform the Court about how the complainant will give the other parts of their evidence at trial, including any further evidence in chief.
    - any available corroborating evidence (that is admissible, relevant, and satisfies all offence ingredients) is collected and made available, to support the prosecution, and/or relieve the victim of the need to give evidence, if necessary.

B. File evaluation

File evaluation involves Prosecutors checking a file to ensure that all required processes have been followed, the essential information is present, it is provided in the correct format/s, and is of the necessary standard to support the prosecution.

While an informal evaluation of the file may be conducted by a Prosecutor prior to first court appearance, a formal file evaluation is conducted by PPS on all post-second appearance not guilty plea files. This assessment is made at this stage of the court process to ensure careful consideration of those cases that will be tested by the adversarial process, and in preparation for case management discussions between the prosecution and defence.

PPS operates a nationally consistent file analysis and grading process for all post second appearance not guilty plea files. Through this process a Prosecutor reviews the file for quality and completeness, provides an assessment of the file (from A - Excellent, to E - Poor), and (except in A-graded cases) tasks the OC case with undertaking the necessary remedial work. Data pertaining to this process (such as file quality grades, and areas of file deficiency) is recorded in NIA by PPS staff, and is routinely provided to districts - via DPMs - to assist with efforts to further improve prosecution file quality over time.

An effective prosecution can protect safety and prevent harm. The quality of a file reflects the opportunity a Prosecutor has to effectively manage the case to a just conclusion. However, the quality of a file and the prosecution is the product of a variety of practices and decisions made by those responding to incidents of family violence and managing the prosecution resolution. It is therefore a reflection of those processes and practices. The following are important areas of focus, which have a bearing on file quality (and ultimately, therefore, the progression and success of a prosecution).

Factors to consider	Check or note that:
Investigative thoroughness	All efforts have been made to collect independent evidence that can corroborate the victim's evidence.
Charge appropriateness	The charge reflects the facts and the available 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 (remembering that the court's primary consideration under s8 (Bail Act 2000) is the need to protect the victim of the alleged offending). For victims of specified offences (s29 Victims' Rights Act 2002), the OC case has canvased and provided the victim's views on bail.
Evidential admissibility and relevance	The best evidence capable of supporting the charge/s has been gathered.
Case resolution options	The best options for bringing the offender to account and ensuring the victim's views and safety have been considered and advanced.
Victim safety and support	The episodic 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	Alternative ways of giving evidence (under the Evidence Act 2006) have been considered, the processes required to utilise these alternatives have been followed, and all the evidence is available to the court.

Checking to ensure processes have been followed

In addition to checking that the correct type of information is in the case file, a Prosecutor should also check that the OC case has:

- included in the file, a summary of relevant family violence information from NIA (e.g. Query History All, and Family Violence Reports)
- included in the file, a summary of any relevant family violence information via multi-agency case management tables (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/or contact details (see NZ Police 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

Any fundamental differences of opinion between a Prosecutor and an OC case should be managed professionally and, when appropriate, advice is to be obtained from supervisors (PPS and operational). If a dispute arises on a matter of law, independent legal advice should be sought via District Legal Services or the PPS National Legal Counsel.

Prosecutor note: For any differences of opinion relating to evidence, please note the following. If the evidential test is not met, the prosecution cannot continue. It is incumbent on frontline staff to produce the evidence required to support this resolution process. Continuing prosecutions that are not supported by the available evidence (and therefore do not have a reasonable prospect of conviction), is not justified, does not advantage anyone, and places NZ Police at the risk of incurring cost awards.

Supporting victims and witnesses to give evidence

Initial interactions with the victim or witness

Victims and witnesses may be involved in the court process for the first time. Furthermore, the fear of facing a defendant in this setting and circumstance 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 a defendant's family, supporters, or witnesses.

Prosecutors need to be cognisant of these issues and attempt to mitigate them to the greatest degree possible. For example, a Prosecutor should meet with the victim/s and witness/es before a judge-alone trial. Establishing contact before the proceeding will provide an opportunity to discuss relevant issues with the victim/witness and build their confidence and understanding of the court and prosecution process. This initial meeting may also provide the Prosecutor with an indication of whether a witness may become hostile.

To best support victims and witnesses, Prosecutors should be familiar with ways to help vulnerable and intimidated witnesses (including children) give their best evidence. This might also include opportunities to give evidence in alternative ways. See giving evidence in alternative ways in the NZ Police 'Investigative interviewing witness guide' for further information.

Support for victims in court

Prosecutors should work with the OC case to ensure the victim is safe, and that external service provider support (e.g. through Women's Refuge, Victim Support) is utilised where appropriate. When specific concerns have been identified in relation to victim support needs, a Prosecutor should liaise with the OC case and/or the Family Violence Coordinator/Family Harm Specialist to consider the best options for providing the right response.

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 OC case should brief the Prosecutor about any safety procedures that have been put in place for the victim and their family, to ensure that their 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 the OC case should liaise with the CVA before the hearing date to secure this facility on the victim's behalf.

Victim's location and/or residential whereabouts

Section 16 of the Victims' Rights Act 2002 restricts the victim's precise address (including postal address, email address, fax number, or phone number) from being given in evidence, or included in information provided to the court.
In some family violence cases, the victim (and any dependents) may have to reside somewhere unknown to the defendant; and in some serious cases, this may necessitate the victim being relocated to another country or another area of New Zealand. DPMs 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 advice on alternative ways of giving evidence, refer to: 'Alternative ways of giving evidence' in the NZ Police Investigative interviewing witness guide, and 'Ways of giving evidence' in the NZ Police Victims (Police service to victims) chapter.

Note that there is a presumption that a child witness (i.e. a person under the age of 18) will give evidence in an alternative manner (see s107 Evidence Act 2006). This must be notified to the court at Case Review Hearing and can be included in the content of the Case Management Memorandum.

Limitations on self-represented defendant

If the defendant is self-represented, they are prohibited from directly cross-examining a complainant or child witness in a sexual or family violence case (s95 Evidence Act 2006).

Reluctant or hostile witnesses

Dealing with reluctant witnesses

Owing to the dynamics of family violence, some witnesses (particularly victims) may be reluctant to give evidence and may withdraw their support for the prosecution. A Prosecutor must take a considered approach to dealing with reluctant witnesses and balance the need to ensure that those witnesses are not re-victimised, with the need to hold the offender accountable, prevent further violence, and deliver public/victim safety.

When the offending is serious (and there is therefore a high degree of public interest in a prosecution) and when the evidence is strong, the presumption is that the family violence prosecution will proceed despite the victim/witness' wishes.

The degree to which a witness will be required or compelled to give evidence will relate to the facts of the case. In very serious cases, the Prosecutor should consider whether calling an expert witness to provide evidence (e.g. about why family violence witnesses recant or minimise) may be required. The National Family Harm Team can provide contact details for expert witnesses.

Adjournment, withdrawal, and dismissal of proceedings

In cases where Police may not be able to proceed with a prosecution - e.g. because a witness has refused or failed to appear - a Prosecutor should explore the following options:

Option	Action
1	Stand the case down or seek an adjournment of the matter by the court (for the purpose of locating the missing witness).
2	Seek a warrant for the missing witness and set appropriate bail conditions when they are brought before the court, to ensure their attendance at the judge-alone trial. (Note: given the difficulties that this approach may create, a Prosecutor should consider whether it is justified by the charge/s).
3	If the court will not grant an adjournment or issue a warrant, seek leave to withdraw the charge under s146 of the Criminal Procedure Act 2011.
4	If the court will not grant an adjournment, or a withdrawal of the charge, or issue a warrant, 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 any reluctance to appear/testify prior to court, a Prosecutor should:

- consider the issues behind their reluctance to make a statement and/or desire to change a statement
- consider having the OC case investigate the witness’ change in position
- assess options for the prosecution with the OC 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 mechanism (note: 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. have the evidence admitted as hearsay)
    - if the witness intends to give ‘hostile’ evidence, prosecuting on the basis of the original statement made to Police by the witness, together with corroborating evidence (e.g. photographs).

Investigating a witness’s change of position

When investigating a witness’s change of position (so as to determine what next steps to take), a Prosecutor should consider tasking the OC case with speaking to the witness, to confirm whether they have withdrawn their support, and to request that a POL258 report be prepared, explaining:

- the reasons for their withdrawing support for the prosecution

- whether the complaint (and original statement) is accurate and truthful
- whether the witness has likely been pressured to withdraw support
- any other relevant factors.

Police should not take withdrawal statements because:

- they undermine the prosecution/investigation work already undertaken to prove the charge/s filed by Police
- the grounds set out are often highly questionable when viewed alongside the available evidence obtained in the initial investigation
- the emotional grounds often cited (e.g. separation, finance, impacts on family) are not a basis for withdrawal.

If there proves to be a material difference between the witness' original complaint and their subsequent retraction, a Prosecutor should obtain the views of the OC case (or the Family Violence Coordinator/Family Harm Specialist if the OC case is not available) about the evidence, and the possible implications of requiring the witness to give evidence. The OC case may need to assess the risks to the witness and any child or other affected person, so that a comprehensive picture can be provided.

If it is suspected that the witness has been pressured or coerced into withdrawing their complaint, the Prosecutor should ask the OC 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 that the original complaint is true, but wishes to discontinue prosecution, a Prosecutor should assess whether the prosecution can proceed without their evidence (i.e. whether there is still evidential sufficiency) and, if so, whether it should proceed against the witness's wishes (i.e. whether there is still a public interest).

In rare cases, if, after a full investigation of the circumstances, it is clear that a false statement has been made by a victim, the District Prosecution Manager and Family Violence Coordinator/Family Harm Specialist must be consulted prior to any charging documents being filed.

Using hearsay evidence without calling the witness

The law allows for the use of witness statements in court without calling a witness (s18 Evidence Act 2006). However, this ‘hearsay statement’ is only admissible in limited circumstances - e.g. where the witness is genuinely unavailable (within the meaning of s16(2) of the Evidence Act 2006). 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 also strong corroborating evidence, to support the truth of the hearsay statement.

Failure to appear in court

When a witness fails to appear in court or avoids the service of a summons, where possible, the Prosecutor should seek to have the case stood down, so that Police can make inquiries into the situation, and the Prosecutor and OC case can discuss whether the prosecution should continue as per normal policy and procedure. The Prosecutor should also consider whether seeking a warrant is appropriate.

Having a victim or witness declared ‘hostile’ when giving evidence

It is not uncommon, in family violence cases, for the witness to change their evidence while under oath. In such circumstances, a Prosecutor should consider asking the court to declare the witness as ‘hostile’, in accordance with s94 Evidence Act 2006. This is typically preferable to the withdrawal of charges, since, under these circumstances a Prosecutor can then cross examine the witness: including in relation to a previous statement made by them taken at the time of the offending.

In these circumstances, the Prosecutor should refer the witness to their prior (now inconsistent) statement and seek confirmation that they made this statement (or at least their confirmation that the statement contains their signature, or is content they provided in the case of a VVS). If they do not agree that the statement is truthful, the Prosecutor should then seek leave of the court to introduce the prior (now inconsistent) statement into evidence. If the statement, together with other corroborating evidence (e.g. photographs of bruising, witness statements) is considered to be proof beyond reasonable doubt of the offence before the court, the Prosecutor 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.

When the Court does not find a witness to be hostile

It is also not uncommon, in family violence cases, that the witnesses who changes their version of events is not declared hostile by the court. In these circumstances, the Prosecutor should consider applying the Supreme Court decision of Hannigan v R [2013] NZSC 41. This will not allow cross examination but will allow explanatory questions into the material differences between sworn testimony and prior statement. Again, if a witness does not accept their prior statement as accurate, the Prosecutor should seek leave of the court to introduce the prior inconsistent statement into evidence.

Where the witness is declared hostile, or where the Hannigan approach is adopted, the Police Officer who took the statement in question must be available to give evidence. In the decision of R v Toru [2018] NZHC 1144, at paragraph 25, the court stated the following in respect of the complainant's recanting:

[25] Domestic violence is a pervasive scourge affecting New Zealand society. The victims are not only those, mostly women, who suffer physical, psychological and sexual abuse within a relationship, but also the extended families and especially children who are psychologically and emotionally, if not physically, scarred by it as well. A recurring phenomenon in the attempts by Police and the Crown to prevent and deter domestic violence is the recanting complainant. I can readily take judicial notice of the circumstances in which complainants wish to withdraw complaints of domestic violence because, although they want the violence to stop, they would rather continue in a potentially violent relationship than live without their abusive partner. In some cases, complainants recant out of fear of retaliation, and in others out of feelings of guilt (often misguided) that they have contributed to the causes of the abuse.

The Court further stated at paragraph 29:

[29] Section 89 of the Evidence Act contains a general prohibition on the use of leading questions in examination-in-chief or re-examination. Although the Supreme Court decision in Hannigan v R did not arise in the context of domestic violence prosecutions, the potential relaxation of the restriction against asking leading questions in examination-in-chief also increases the options available to a Prosecutor when confronted with a reluctant or recanting complainant.

Requiring witnesses to give evidence

The legal provisions for dealing with witnesses who refuse to be sworn or give evidence can be consulted in s165 Criminal Procedure Act 2011 (witnesses refusing to give evidence may be imprisoned). In a leading case on the requirement to give evidence - Beckett v Jaffe and Evans (1989) 4 CRNZ 248 - Justice Hillyer said (P.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 that they have 'just cause or excuse' for so doing. Therefore, the Prosecutor must be sufficiently versed in the issues pertaining to the case, to assert that the witness does not have 'just cause', where this is a justified position to take.

Compelling a spouse or partner

The Evidence Act 2006 has removed spousal immunity from the law. This means that a victim who is the spouse of the offender can be summonsed to appear as a witness and be compelled to give evidence.

Note: s165 of the Criminal Procedure Act 2011 ceases to provide the same level of immunity (as previously) to people in a committed relationship (including a civil union, or a de facto relationship between people of the same or opposite sex), since the Evidence Act 2006 gives a clear statement of Parliament's general intent in this area.

Warrants or orders made under the Care of Children Act 2004

Relevance of the Care of Children Act 2004 to family violence

The Care of Children Act 2004 replaced the Guardianship Act 1968. It modernised the law in relation to the care of children, recognising that many families are not traditional nuclear families, and that the responsibility for children is sometimes borne by people other than a child's biological or adoptive parents. Several provisions in the Care of Children Act 2004 relate to situations that might involve family violence. These apply where the care or contact arrangements for a child or children have become part of the family violence dynamic.
In considering the relevance of the Care of Children Act 2004 to the case at hand, a Prosecutor should:

- locate the offence within the context of other family violence offending - e.g. is this offence part of a pattern of family violence offending?
- consider the safety of the child or children when deciding whether to prosecute.

Warrants

The Care of Children Act 2004 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 2004, 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 determines 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 its requirements.

Courts prefer parents or caregivers to make care arrangements for children themselves, and will only grant orders if the parents or caregivers have made a serious effort to reach agreement regarding care arrangements, but have failed to do so. 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 2004

Orders and warrants

The following table outlines orders and warrants made pursuant to parenting orders that may be relevant to Prosecutors in the context of family violence.

Provision	Explanation
s48	Granting of parenting orders. Order determines care arrangements for a child, including day-to-day care and contact arrangements.
s72	Warrants for enforcing day-to-day care - Pursuant to a parenting order (incl. a guardian).
s73	Warrants for enforcing contact - Pursuant to a parenting order.
s77	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).
s117	Warrants to prevent 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 the child to a suitable person, pending an order being made to return them to their home country.
s119	Warrants enforcing an order for the return of a child - issued to enable 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

The following table outlines key offences that may be relevant to a family violence prosecution.

Provision	Explanation
s78	**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.
s79	**Resisting execution of a warrant** **Test:** Any person commits an offence if they knowingly resist or obstruct any person executing a warrant under ss72, 73, or 77. (Note: that s117(4) and s119(4) extend the application of s79 to resisting the execution of a warrant granted under s117 and s119) **Penalty:** Maximum three months' imprisonment, or a fine not exceeding $2,500.
s80	**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 - - knowing there is an order giving any other person the role of providing day-to-day care for, or contact with, the child - - 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 Police National Headquarters, 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
- SAFVR and total concern for safety measures
- an up-to-date Victim Impact Statement (if the victim has chosen to engage with this process)
- written sentencing submissions (where appropriate).

Protection Order

Where a protection order is not already in place, the Prosecutor should consider whether one should be sought. Section 123B (Sentencing Act 2002) states that the court may put in place a protection order where:

- it is satisfied that the making of an order is necessary for the protection of the victim of the offence, and
- the victim of the offence does not object to the making of an order.

Sentencing submissions

The Police Prosecution Service Written Submissions Practice Note 2011 sets out when a written sentencing submission is required. The Sentencing Practice Note 2014 (applies in the High and District Courts) details the factors that should be included in a sentencing submission. In family violence cases, any SAFVR and total concern for safety measures should be included (as relevant).

In all cases where defendants are convicted of family violence offences, a Prosecutor 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 (if the victim has chosen to provide one)
- draw the court's attention to any aggravating or mitigating factors particular to the case, and consistent with the characteristics of family violence offending, and
- challenge any assertions by the defence that are inaccurate, misleading, or derogatory.

Victim impact statements

See information on Victim Impact Statements in the NZ Police Victims (Police service to victims) chapter.