



Crown Counsel Spousal Assault Policy

Discussion Paper

July 2002

Public Input On the Proposal

Input from interested persons or groups is welcomed on any of the issues raised by this proposal. The deadline for feedback is October 5, 2002.

Comments and submission can be mailed to:

Spousal Assault Policy Discussion Paper

Criminal Justice Branch Headquarters

PO Box 9276 Stn. Prov. Govt

Victoria, British Columbia

V8W 9J7

or can be sent electronically through the following Web site:

www.ag.gov.bc.ca/legislation/spousal-assault/feedback.htm

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Crown Counsel Spousal Assault Policy

Discussion Paper

Issue

Revised Crown Counsel Spousal Assault Policy.

Introduction

As part of its Performance Plan, the Criminal Justice Branch is reviewing all its Policies and revising where necessary. Pursuant to the Crown Counsel Act (R.S.B.C.1996) c.87, it is the responsibility of the Criminal Justice Branch to develop policies and procedures in respect to the administration of criminal justice in British Columbia.

Background

In 1983, Solicitor General Robert Kaplan strengthened Canada's response to domestic violence by urging police chiefs across the country to implement aggressive charging policies in spouse assault cases. Before 1983, domestic violence had been considered a social issue. Now, it was considered a serious crime.

This new approach placed control of the prosecution with prosecutors, not the victim, in the hope there would be less pressure on victims to withdraw their charges, given the dynamics of spouse assault cases.

Over the last 20 years, the new vigorous prosecution approach has sent a strong message that domestic violence is a serious crime and will not be tolerated, a vast improvement over the past. Clearly the principle of characterizing spousal assault as a serious crime must be preserved. Yet in practice, some aspects of the new approach have not been effective for victims. When every case is treated the same way, even though their circumstances differ widely, the result is less, not more, safety for victims and greater inefficiency in the justice process.

Another weakness of the current approach is its potential to re-victimize victims. Crown Counsel often have to deal with reluctant and hostile witnesses in spousal assault cases. Victims and witnesses are sometimes being forced into court. This kind of re-victimization can be avoided by taking full advantage of the Crown Counsel's discretion in such cases, with the help of police and community victim serving agencies and a greater range of justice-process options sensitively tailored to the case's unique circumstances.

COMPARISON OF THE CRIMINAL JUSTICE BRANCH'S EXISTING AND PROPOSED SPOUSAL ASSAULT POLICIES

The Criminal Justice Branch remains committed to the core principle of the approach to spouse assault in place since 1983. In both the branch's existing policy and in its proposed revised policy, spouse assault is viewed as a serious crime. In both, the safety of victims is paramount. Both policies recognize that these cases often involve a reluctant victim or witness: complex factors affect their willingness to cooperate with the criminal justice system. Both policies ask Crown Counsel to be mindful of the public interest and sensitive at all times to victims' needs.

Charge Approval Standard

Both policies say the Criminal Justice Branch's charge approval standard must apply. Before charges are laid, Crown Counsel must decide there is a substantial likelihood of conviction and it must be in the public interest to prosecute.

As with the old policy, the proposed policy emphasizes that the "decision to charge or to continue to prosecute should not be determined by the victim's wishes. Conduct of a prosecution must be at the discretion of Crown Counsel, following the principles set out in the charge approval policy."

The proposed policy strengthens prosecutorial discretion: "These principles apply throughout the trial process, and an ongoing assessment of the likelihood of conviction and the public interest will be required. Prosecutorial discretion must be exercised on the particular facts of the case."

The benefits of retaining and strengthening prosecutorial discretion are:

1. Laying charges is not up to the victim. The dynamics of spouse assault - the pressure that others can exert on victims not to press charges - are thereby taken into account.
2. If the evidence in the case is not likely to produce a conviction, Crown Counsel can make other recommendations for the protection of the victim. Crown Counsel can consider the option of a s. 810 recognizance ("peace bond") when there is sufficient evidence for it, even if there is not sufficient evidence for a criminal prosecution. Section 810 of the Criminal Code of Canada provides for a "peace bond" order, with terms and conditions to be imposed by a court, in any case where a person has reasonable grounds to fear for his or her safety, or for a child's safety. The breach of an order is a criminal offence.
3. Trying to proceed to trial without sufficient evidence results in cases collapsing or not proceeding on the first days of trial. By this inefficiency, justice system resources risk being drawn away from the most serious cases of spouse assault so that neither the less serious nor the most serious cases receive appropriate attention.

Alternative Measures

Another important option for spouse assault cases is the use of Alternative Measures in low risk cases. In some cases, Alternative Measures may be more effective than criminal prosecution in addressing the interests of society and the victim, and the needs of the offender. It may provide for greater accountability for the offender and a more meaningful response for the victim. In addition, it enables the criminal justice system to focus more on prosecuting violent and high-risk offenders.

Alternative Measures are part of the criminal justice process, not outside it. Alternative Measures are provided for in the Criminal Code, and any offender who fails to substantially comply with the terms of their Alternative Measures plan can be prosecuted for the original offence. The old spouse assault policy does not recommend the use of Alternative Measures and in the past few years, fewer than 70 cases annually involving domestic assault have been dealt with through Alternative Measures.

The new policy provides for the use of Alternative Measures in low-risk cases. The proposed new policy shifts the emphasis from "exceptional" cases, an expression which is ambiguous enough to include more serious cases, to minor cases that have been assessed for risk factors. This is expected to restrict the use of Alternative Measures to the cases with the lowest identifiable risk.

The proposed new policy states that:

"The risk factors set out below should be carefully considered at this stage. Final approval for Alternative Measures should not be given until Crown Counsel has received a report from a Probation Officer which will address all the circumstances of the offender and victim, including risks to safety. This information is critical to Crown Counsel in making a decision regarding the use of Alternative Measures. A referral to Alternative Measures may be considered by Crown Counsel at any stage of the proceeding, including after conditions of release are in place."

Recognized risk factors for further violence are set out in the proposed new policy. They are:

- A history of violence within or outside the relationship, including sex offences;
- A history of breach of court orders;
- Recent threats of suicide;
- Escalating violence;
- Substance abuse;
- Recent relationship problems (separation, divorce, or conflict);
- Recent employment problems;
- The use or threatened use of weapons, or death threats; and
- Extreme minimization/denial.

This list of risk factors is set out in the policy for Crown Counsel to use as an assessment tool at various points in the process. The use of risk assessment at the Alternative Measures stage is new and is intended to help screen cases.

Victim Information

The new proposed policy emphasizes that Crown Counsel should provide timely information to the victim about all aspects of the case, especially developments that might affect the victim's safety. Crown Counsel and staff will make available to victims information about police and community victim services agencies which can assist victims. Victims must be given the opportunity to provide information about the impact of the offence. Since victim safety is a core principle of the policy, it will inform the carrying out of how information is provided in individual cases.

Victim's issues are covered extensively in a separate policy. Throughout the policy, where issues are covered in separate policies, they are not repeated in this policy. Crown Counsel are to be familiar with all relevant and applicable policies, and the goal of the Criminal Justice Branch is to avoid unnecessary duplication and repetition.

Bail

Much of this part remains the same as in the former policy, and has been updated due to various changes in the law. The proposed new policy includes the same recommendations that Crown Counsel consider requesting a warrant for the arrest of the accused in spouse assault cases, and suggests conditions of release on bail, aimed at protecting the victims' safety in cases where Crown Counsel is not seeking to have the accused remain in jail prior to trial. Crown Counsel are also reminded to review the bail conditions when accused are released by the police pending trial, and to take steps to amend them, if necessary, for victims' safety. This section includes the recognized risk factors enumerated above. The proposed new policy also includes recommendations for Crown Counsel when dealing with victims who seek removal of no contact conditions.

This section of the policy emphasizes the concern for victim safety. It states:

"A court must consider any evidence submitted regarding the need to ensure the safety or security of any victim or witness, and may impose conditions to ensure such safety or security."

Reluctant Witnesses

This topic has been given greater emphasis in a separate section of the new policy, recognizing that this is the most significant obstacle to prosecution faced by Crown Counsel. This section includes a description of the type of influences that may be exerted on the victim and factors that may contribute to a victim's reluctance to testify. This includes the recommendation that:

"Crown Counsel should try to ascertain from the victim the reasons for his or her reluctance."

It is clear that cases of spouse assault often involve dynamics of threats, fear, power, or cyclical violence among other factors. The Criminal Justice Branch will be conducting training on this issue to continually update Crown Counsel on the current research in this area, so they can better understand the context of domestic violence and the challenges which result when prosecuting these cases.

If a witness has been subjected to threats or interference, the policy requires that the matter be referred to the police for investigation, as this may constitute a separate criminal offence. The section recommends that Crown Counsel should consider whether there is independent corroborative evidence available which would allow the Crown to proceed in the absence of the victim as a witness. It also addresses the possibility, in some cases, of proceeding where there is a prior written statement from a reluctant witness. It also reminds Crown Counsel to consider whether a child who may be at risk was involved in the offence as this may be a relevant factor in weighing the public interest in proceeding.

Crown Counsel are also reminded that the charge approval test must be applied at every stage of the prosecution and that if Crown Counsel is unable to confirm that the victim will be able to testify and there is not sufficient other evidence to proceed, the charge should be stayed (not proceeded with) by the time of the Trial Confirmation Hearing. The Trial Confirmation Hearing is usually held approximately thirty days prior to trial. The Provincial Court Rules require that at the Trial Confirmation Hearing, Crown Counsel confirm that all witnesses are available to testify at trial, or the court may cancel the trial date.

The proposed new policy indicates that a section 810 recognizance may be considered as an option to ensure that any necessary safety protections are in place. This means that where charges would previously have been dropped with no protection for the victim's safety, in some cases Crown Counsel may now be able to seek some form of protection.

This section also addresses the personal service of subpoenas on victims, material witness warrants, and how to deal with a reluctant witness who may be in contempt of court. Crown Counsel is again reminded to avoid the possibility of revictimizing the victim. This is important both for victim safety and for understanding the dynamics of domestic violence.

The dominant theme of this section is the victim's safety and avoidance of revictimizing the victim. The Criminal Justice Branch is enhancing the ability of Crown Counsel to reach appropriate outcomes which benefit victims by ensuring a wide range of options are available to respond to the unique circumstances of each case.

Sentencing

This section has been strengthened by the addition of the reference to section 718.2 of the Criminal Code which deals with aggravating factors for sentencing.

"Section 718.2 of the Criminal Code provides that abuse of one's spouse, common-law partner or child is an aggravating factor in sentencing."

Victims must be given the opportunity to provide information about the impact of the offence. In cases where a jail sentence is not likely, the proposed new policy recommends conditions of sen-

tence, including no contact and reporting conditions and where appropriate successful completion of an assaultive behaviour program. It also recommends that charges of breaching court orders and revocation of conditional sentence orders should be considered if such offences are reported. It states:

"Such breaches can have serious consequences to victims, and victim safety should be a paramount concern."

The Ministry continues as well to pursue amendment to the Criminal Code to permit Judges to delay imposing sentences for extended periods of time to ensure the offender does not re-offend.

SUMMARY

The proposed new policy is aimed at enhancing the existing goals of ensuring that spousal assault is treated as a serious criminal offence and that the safety of victims is treated as a priority. The objective is to continue to prosecute vigorously appropriate cases where the charge approval test is met and there is a victim willing to testify, and, in cases where these factors are not met, where possible, to leave victims with some degree of protection where they currently have none. It is intended that this be accomplished by ensuring that Crown Counsel can implement a broader range of tools and options to appropriately and sensitively deal with the unique issues in individual cases while addressing both offender accountability and victim safety.