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# **Domestic Violence Prosecution Handbook**

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*Supporting understanding and best practice in the  
prosecution of domestic violence.*





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The Office of the Public Prosecutor of the Republic of Vanuatu acknowledges specific materials that were sourced and used to develop this handbook, in particular:

- PILON General Principles for obtaining the best evidence from vulnerable witnesses to Sexual and Gender Based Violence offences, PILON SGBV Working Group , November 2017 : Annexure K
- The UK Crown Prosecution Service Domestic Abuse Guidelines for Prosecutors  
<https://www.cps.gov.uk/publication/domestic-abuse>
- The 2017 Prosecutors Handbook developed by the Office of Overseas Prosecutorial Development Assistance and Training Program (OPDAT) of the United States Department of Justice, the Geneva Centre for Democratic Control of Armed Forces (DCAF) and the Atlantic Initiative prosecutorial working group;
- ACT Family Violence Intervention Program review, Tracy Cussen Mathew Lyneham, AIC Reports Technical and Background Paper 52, <https://aic.gov.au/publications/tbp/tbp052>



## **1. PURPOSE**

The purpose of this handbook is to provide guidance to prosecutors and other staff within the Office of the Public Prosecutor (OPP) and the State Prosecutions Department (SPD) in dealing with domestic violence matters as defined under the *Family Protection Act*. The Public Prosecutor recognises that best practice requires a coordinated criminal justice and community response to violence within intimate and family relationships that is aimed at improving victim safety and increased perpetrator accountability.

The OPP is committed to reducing the incidence of domestic violence by providing a high level prosecution service that makes offenders accountable for their actions and ensures victims of domestic violence receive access to court orders that can offer assistance and protection. This manual draws on various materials reflecting best practice and defines the parameters of the OPP role as part of a co-coordinated justice and community response against the background of the role of the OPP as an independent prosecuting agency. The handbook provides prosecutors with guidance and processes aimed at increasing just outcomes.

## **2. UNDERSTANDING DOMESTIC VIOLENCE TO INFORM PROSECUTORIAL ACTION**

### **2.1 THE POWER AND CONTROL WHEEL**

The Power and Control Wheel is a useful visual tool that illustrates the cycle of violence experienced by men and women in violent domestic relationships. It was initially developed as a model of gender-based violence against women however, the wheel concept is also applicable to domestic violence perpetrated against men. While most domestic violence is perpetrated by men against women who they live with or have lived with, it is important to remember that domestic violence occurs among and between other family members, this fact has been acknowledged by introduction of the Family Protection Act <sup>1</sup>.

In any domestic violence case, police reports and witness evidence are likely to focus on instances of physical violence, which are most easily understood as a crime. The Power and Control Wheel can help prosecutors and other professionals establish whether a wider pattern of abuse exists. In such cases, the psychological effects of physical violence on the victim are often greater or longer lasting than any physical injury.

**Prosecutors with this knowledge can make submissions on the risk related to continued violence in bail applications and in sentencing submissions.**

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<sup>1</sup> See section 4 Family Protection Act

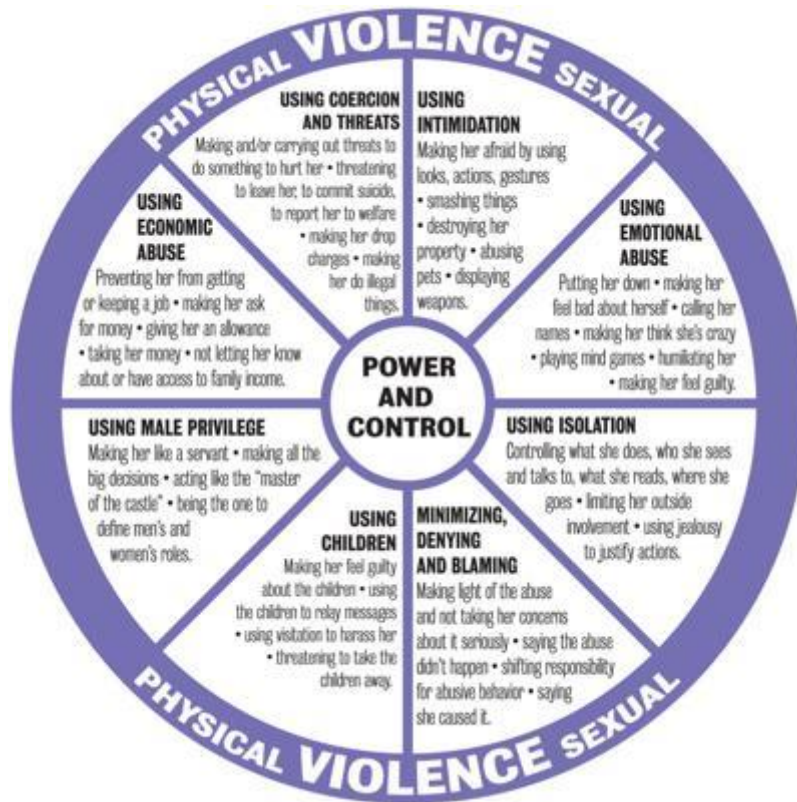


Figure 1 The power and control wheel concept

## 2.2 CYCLE OF DOMESTIC VIOLENCE

Perpetrators of domestic violence are not necessarily persistently violent; and in some cases, violence is cyclical – tension in a relationship builds slowly, resulting in a brief period of severe violence, followed by a “honeymoon phase” during which the abuser is says they are sorry. Yet, the tension builds again and the cycle repeats.

It is important for prosecutors to be aware of this cycle, for victims who are in the honeymoon phase at the time their case reaches trial may be convinced that their abuser’s bad behaviour is confined to the past and may not want to give evidence. Nonetheless, these victims are still at risk. Some perpetrators may even use court cases as justification for resuming their controlling behaviour. **When prosecutors are aware of the cycle they can**

**explain it to victims.** In many cases when this is explained to a victim they recognise the cycle in their own life.

Interventions of the criminal justice system and protective measures for victims, issued in accordance with the law, interrupt the cycle of violence. For this reason, it is in the interest of victims for prosecutors to pursue domestic violence cases and put maximum effort into the collection of evidence even when those victims are uncooperative or request that charges be dropped. The Diagram below, shows the cycle of violence that characterises some abusive relationships, and clarifies why a period of good behaviour on the part of an accused perpetrator of domestic violence should not be considered a mitigating factor and does not indicate that the cycle of violence has been broken.

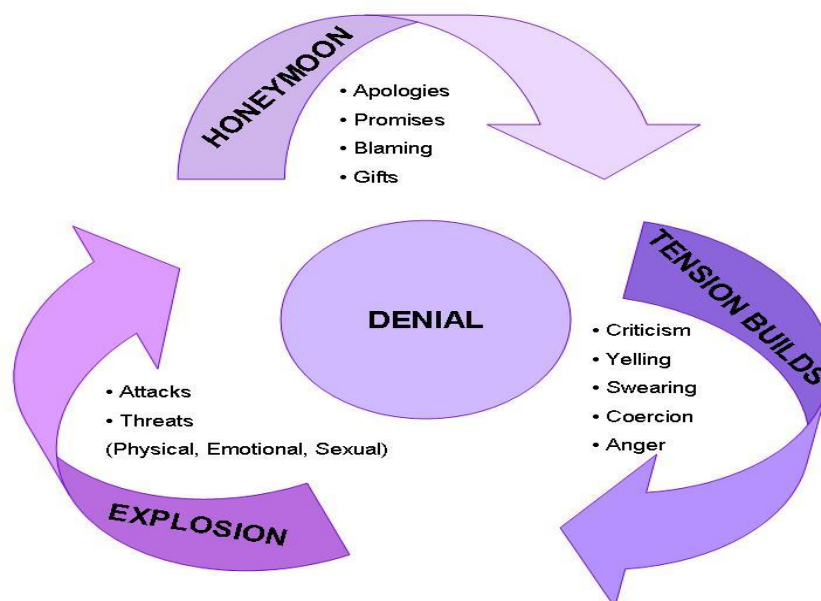


Figure 2 The cycle of violence

## 2.3 GENDER BIAS AND THE PROSECUTION OF DOMESTIC VIOLENCE CASES

Gender stereotype can be defined as a “generalised view or preconception about attributes, or characteristics that are or ought to be possessed by women and men or the roles that are or should be performed by men and women . Gender stereotypes can be both positive and negative for example, “women are nurturing” is positive or “women are weak” is negative <sup>2</sup>. These general views can form part of a “gender bias” that is sometimes described as an “unconscious or implicit bias”. Implicit or unconscious bias refers to the unconsciously held assumptions or stereotypes about specific social groups (gender, race, ethnicity, religion, etc.) that develop at a young age and become more ingrained over time. They result in subconscious attitudes, assumptions, and stereotypes that affect decision-making in all areas of our lives <sup>3</sup>. Even when judicial professionals strive to treat women and men equally and fairly, it is inevitable that their implicit biases, including about gender, play some role in their practice. Otherwise, judicial decisions would follow one simple, universal pattern: Facts + Law = Decision. However, we know this is not how it works; firstly because no two prosecutors will see a case in exactly the same way and always issue the same charges, and secondly because judges don’t make identical decisions. (If they did, there would be little need for courts of appeal.) Subjective decision making is thus a factor, to some degree, throughout the chain of justice.

The important question **prosecutors need to ask themselves** is not whether they have gender biases but what gender biases they have. Indeed, the same goes for the witnesses, experts, judges, and lawyers they work with as well. It is only by starting from the assumption that everyone harbours biases that we can begin to actively identify, challenge, and mitigate these

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<sup>2</sup> [https://www.ohchr.org/documents/issues/women/wrgs/onepaggers/gender\\_stereotyping.pdf](https://www.ohchr.org/documents/issues/women/wrgs/onepaggers/gender_stereotyping.pdf)

<sup>3</sup> See: Levinson, Justin & Young, Danielle. (2010). Implicit Gender Bias in the Legal Profession: An Empirical Study

[https://www.researchgate.net/publication/228145784\\_Implicit\\_Gender\\_Bias\\_in\\_the\\_Legal\\_Profession\\_An\\_Empirical\\_Study](https://www.researchgate.net/publication/228145784_Implicit_Gender_Bias_in_the_Legal_Profession_An_Empirical_Study)

biases in order to ensure that the law is applied in a fair and objective manner, to the greatest extent possible.

### 2.3.1 How gender bias and gender stereotypes impact domestic violence cases

Many people have strong opinions about the roles women and men ought to play in families, based on varying combinations of culture and personal beliefs. It is therefore unsurprising that gender bias often influences cases of domestic violence in a number of ways.

Gender stereotypes can impact the provision of justice in domestic violence cases when, for instance, inappropriate gender based mitigating factors are submitted by defence counsel. These may rest on the notion that men are naturally aggressive and hence excuse the violence that occurred as due to temporary insanity. Defence counsel may also make note of the fact that a defendant adheres to widely-admired male stereotypes related to his position of social power, status as a father, socio-economic success as a breadwinner, or “good behaviour” before the court. Yet, some of these should actually be treated as aggravating factors given that the perpetrator has abused his position of power by committing violence, especially against his family.

Gender bias can also undermine the evidence of female witnesses, who are disadvantaged from the outset by prevailing stereotypes that women are manipulative and thus likely to fabricate accusations. This calls into question the credibility of female witnesses generally and can be particularly challenging when layered upon the trauma of domestic violence. The trauma can prevent people from recalling events in a clear and ordered fashion, if you combine this with an unconscious gender bias that women are manipulative it could sometimes wrongly lead judicial professionals to believe that the evidence of victims is untrue.

In addition, many people hold an image of a stereotypical victim of domestic violence, and victims who do not fit this image can be subject to greater scrutiny when giving evidence. This can make it particularly difficult for male victims of domestic violence to be taken

seriously. For these reasons, it is critical that prosecutors recognise that they harbour implicit biases, just as everybody does. **At each stage of the criminal justice process, they must take active steps to ensure that their perspective on a case is rooted in objective analysis of the facts and not implicit biases.** Further, prosecutors must question whether and how the evidence presented to them by witnesses, experts, and the police has been influenced by biased assumptions and gender stereotypes. Below, **Table 1 offers examples of how gender bias can hinder the provision of justice in domestic violence cases, at different stages in the criminal justice process.**

Stage	Example of Adverse Impact Gender Bias on the Chain of Justice
Reporting	Victims do not report domestic violence because they do not know it is a crime or they fear no one will believe them
Response	Police decide to not interfere on the basis that it is a ‘family matter’ or that they do not consider it serious
Investigation	Police do not comply with their obligations under the FPA. Victim evidence is doubted without actual basis or investigators do not prioritise domestic violence cases, and police fail to fully implement investigative action
Prosecution	Prosecutors do not comply with the Prosecution Guidelines during prosecution due to previous experiences with victims in domestic violence cases who refused to give evidence or have asked prosecution to withdraw the case
Trial	Witnesses present evidence influenced by gender bias, which puts the credibility of the victim into question, such as, “he was jealous because of her affairs”
Sentencing	Inadequate criminal sanction are imposed because gender based assumptions are used to reduce sentence such as offender being the “breadwinner” or (for example, due to an inadequate evaluation of the aggravating and mitigating factors that affect sentencing)

*Table 1 Examples of the potential effects of gender bias on criminal proceedings*

## 2.4 THE MOST COMMON MYTHS AROUND DOMESTIC VIOLENCE <sup>4</sup>

*Myth: Domestic violence is only perpetrated by a strong man against a weak woman.*

Fact: Relative physical strength or weakness is not the issue; power and control are. Far from being a powerless victim, a woman involved in a violent relationship often displays enormous resources of strength in the way she learns to live with fear, navigate unpredictability and predict her partner's moods in order to protect herself and her children.

*Myth: It can't be that bad or she'd leave.*

Fact: There are many practical reasons why women stay: they may be afraid of the repercussions if they attempt to leave; they may be afraid of becoming homeless; they may worry about losing their children; they may fear being blamed by their family or they may fear poverty and isolation. Additionally, women stay in violent relationships for emotional reasons ranging from love to terror. Some women return to their partners because they believe that their partner will change and the abuse will end. Often, before the first physical assault, the abuser uses control tactics, such as isolation of the victim from social and family connections, threats, financial dependency, and by doing this the abuser has degraded the victim to the point that she lacks the self-confidence necessary to leave or appropriately respond to the violence. Another explanation is that fear and uncertainty activate the 'attachment behavioural system'. In traumatic situations, the victim turns to a person she is closest to, which is often the abuser.

*Myth: Domestic violence is due to poverty or lack of education.*

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<sup>4</sup> These myths were summarized from Dempsey, M. M., Use of Expert Witness Testimony in the Prosecution of Domestic Violence, England and Wales Crown Prosecution Service Publication, March 2004 (London, United Kingdom). <https://www.cps.gov.uk/legal-guidance/violence-against-women-guidance>



Fact: Domestic violence is common throughout all levels of society, whether rich/poor, educated/uneducated or rural/urban. Studies consistently find that violence occurs among all types of families regardless of income, profession, religion, ethnicity or educational level. Violence is not caused by poverty or lack of education; rather it is rooted in the historically unequal power relationship between men and women.

*Myth: Domestic violence is a private issue for families.*

Fact: Violence against women and girls violates the law in Vanuatu and most other countries. This means that domestic violence is behaviour that the community does not accept. It is important for abusers to receive this message from the community.

*Myth: Men who abuse are violent because they cannot control their anger and frustration.*

Fact: Domestic violence is intentional conduct, and abusers are not out of control. Their violence is carefully targeted at certain people at certain times and places. They generally do not attack their bosses or people on the street, no matter how angry they may be. Abusers also follow their own internal rules about abusive behaviours. They often choose to abuse their partner only in private, or may take steps to ensure that they do not leave visible evidence of the abuse. They use acts of violence and a series of behaviours, including intimidation, threats, psychological abuse, isolation, etc. to coerce and to control the other person. They choose their tactics carefully: some destroy property, some rely on threats of abuse, and some threaten children.

*Myth: Husbands cannot rape their wives.*

Fact: Rape or sexual intercourse without consent occurs whenever sexual contact is not mutual or when there is no clear consent or when choice is taken away. Any man who disregards a women's "no" or has sexual intercourse without clear consent is having sexual intercourse without their consent (rape).

*Myth: Men have a right to discipline their partners for misbehaving.*

Fact: While some men may believe they have a right to physically chastise their wives and children, this is not the legal system in Vanuatu. The law in Vanuatu protects the right of women and children to live in a safe and secure environment and any physical violence is an offence.

*Myth: If it was really serious she would come to court to provide evidence.*

Fact: A woman may wish to withdraw her complaint or participation in the criminal justice system for a number of reasons such as:

- Withdrawing support for the prosecution of her abuser may appear to be her safest short-term choice in a context of many difficult choices.
- She may perceive it as the only way to keep herself and her children safe.
- The victim might be in the honeymoon phase of the cycle of domestic violence.

A comprehensive understanding of the cycle of violence helps prosecutors who are assisting the victims assist the victim to understand and commit to giving evidence in court.

## **2.5 THE 'RED FLAG' OFFENCES**

A red flag offence is an offence that is predictor of future serious abuse and the possible death of the victim. **Red Flag offences should always be taken seriously by prosecutors.**

### **2.5.1 Strangulation**

In the context of domestic violence, strangulation is an extreme physical form of violence as well as the ultimate exertion of a perpetrator's power and control over a victim<sup>5</sup>. By choosing

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<sup>5</sup> <https://www.rnz.co.nz/news/on-the-inside/377583/strangulation-a-red-flag-for-future-serious-abuse>

strangulation, perpetrators literally control their victims' breath – and life or death – in their hands. Strangulation can thus have a devastating psychological effect on victims, and a potentially fatal outcome<sup>6</sup>.

Police and prosecutors need to recognise strangulation has occurred when it does. As this may be complicated by the tendency of victims to downplay the violence they have experienced, it is particularly important that police and prosecutors' offices understand how to recognize the presence of strangulation in a domestic violence case, in order to enable proper documentation, investigation, and prosecution of these cases.

Importantly, strangulation cases must be correctly identified and appropriate charges laid for example, between cases where strangulation constitutes one of the elements of a domestic violence crime and those in which strangulation constitutes an attempted homicide.

While prosecutors do not investigate, it is important that you be able ask the right questions of investigators and this will assist the effectiveness of the investigation of cases involving strangulation (whether prosecuted as a domestic violence offence or under the Penal Code). When you are considering a case either after the brief has been provided or pre charge, you should advise police that the following investigative actions and the following steps should be taken in relation to an allegation of strangulation:

1. Take a statement from the victim:
  - a. Ask them to describe all details of the case, to the extent they can remember them:
    - i. What is the perceived duration of strangulation?
    - ii. What was the method of strangulation?

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<sup>6</sup> See, The National Domestic Violence Prosecution Best Practice Guide, National Districts Attorneys Association (USA), White Paper, 17 July 2017 at page 21 <https://ndaa.org/wp-content/uploads/NDAA-domestic-violence-White-Paper-FINAL-revised-July-17-2017-1.pdf>

- iii. Ask for a description of the mechanism and intensity of force or pressure applied, whether they lost consciousness, what they did to defend them self, and document all external injuries.
    - iv. Note that if there has been a loss of consciousness the victim might not know that she has lost consciousness or suffer significant memory loss.
  2. Look for witnesses;
  3. Police should seek a detailed medical examination (including an external and internal examination of the neck and throat) of the victim:
    - a. Check for any breathing and swallowing difficulties; changes in voice, hoarseness, or complete loss of voice; visible injuries on the neck (bruises may appear the next day and change colour); this can be evidence given by the attending police or other witnesses.
    - b. Identify any injuries in the mouth.
  4. Collect physical evidence (seize objects that may have been used for strangulation – rope, electrical cords, vines etc);
  5. Collect good-quality photographs:
    - a. Take full-body photographs of the victim, and close-ups of the face and neck, including the front, back, and sides of the neck and chest;
    - b. If possible, take follow-up photographs 24-48 hours later (or as long as visible injuries are present). Note some bruising doesn't become obvious until after 24 hours.

In addition to these actions, in attacks involving strangulation, it is useful in the investigation stage for police to arrange for a physical examination of the suspect. As a rule, strangulation victims will attempt to resist, often leaving injuries on the perpetrator. Also, an examination of the suspect would include analysis of any trace DNA from the victim's skin or blood that can be found under the suspect's nails.

There are a number of conditions that may result from strangulation that prosecutors and investigators should be aware of. When pressure is applied to the neck during strangulation, blood vessels may become damaged resulting in blood clots which can cause brain swelling, stroke or death in victims a month or so after the incident. Other on-going injuries might include vocal cord dysfunction; post-traumatic stress disorder, and back or neck pain<sup>7</sup>.

Taking these actions will enable quality expert analysis of the victim's injuries later, and establish the consequences of the strangulation.

It is important to note that all of these actions should be taken to the extent possible, in accordance with the circumstances of each case. In situations involving strangulation, the provision of urgent medical assistance to the victim should always be the priority.

### 2.5.2 Stalking

Stalking is a specific act of domestic violence under section 10 of the FPA if it is carried out against a family member. It is as defined under the Act as follows:

(1) *A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:*

.....

(d) *stalks the family member so as to cause him or her apprehension or fear;*

(2) *Without limiting paragraph (1)(d), a person may stalk another person by:*

(a) *following the person; or*

(b) *watching the person; or*

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<sup>7</sup> ABC The Law Report "The last warning shot: family violence and strangulation" 12 March 2019

- (c) *loitering outside premises where the person lives, works or frequents for the purposes of any social or leisure activity; or*
- (d) *making persistent telephone calls to the person or to premises where the person lives or works.*

It is very important that investigators and prosecutors recognise the act of stalking as an element of domestic violence.

It is also possible that actions involving stalking appear as part of a larger domestic violence case as the stalking may be one of several acts of domestic violence perpetration that is repeated over a long period of time and constitutes a part of the factual description of the offence.

**Prosecutors must clearly identify stalking as defined in the FPA and identify the elements in the summary of facts.**

For the purposes of informed and efficient prosecution of domestic violence and other cases involving stalking, the following list gives examples of actions and behaviours that may support a stalking charge:

- Following the victim and/or showing up where the victim is;
- Sending unwanted gifts, letters, cards, or e-mail
- Monitoring the victim's phone calls, computer use, or use of other forms of communication;
- Using technology, such as hidden cameras or GPS, to track the victim;
- Driving by or loitering near the victim's home, school, or workplace;
- Gathering information about the victim from public records or online search services, by going through the victim's garbage, or by contacting friends, family, neighbours, or co-workers;
- Other actions meant to control, track, or frighten the victim

### 2.5.3 Sexual assault: recognizing the act in the context of domestic violence

The criminal offence of sexual intercourse without consent on a marital or intimate partner (marital rape) is not often prosecuted in practice, and sexual assault charges are not often included in domestic violence cases. One reason for this is that victims often do not report it, another may be the fact that collecting conclusive evidence of marital rape is difficult because it requires proving a lack of consent. This brings various challenges to prosecution, which can be divided into four broad themes – credibility, consent, evidence, and stigma.

#### *The challenge of credibility*

Legal professionals and others who provide expert testimony in the courtroom (expert witnesses) may have preconceived and gender-biased notions of how a “real” victim of sexual assault should behave. As a result, victims often find their own behaviour under intense scrutiny (for example, facing questions about whether they were drinking alcohol or why they didn’t physically resist more forcefully) as defence counsel aims to destroy their credibility. This is particularly problematic in cases of domestic violence in which violence was perpetrated systematically and where there is often a lack of evidence to demonstrate lack of consent.

One way **the prosecution can counter the accused contention** that there was consent is to lead evidence of controlling and coercive behaviours on the part of the accused, this could be run as ‘relationship or context evidence’<sup>8</sup>, the accused version of events can be considered in light of the context of the relationship and in many cases it would make consent less likely.

#### *Establishing the absence of consent*

Sexual assault is characterized by a lack of mutual and clear consent and a lack of concern for the victim. It can be less obvious in the context of a spousal or defacto relationship, when a couple has previously engaged in consensual sexual behaviours. While the investigation and

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<sup>8</sup> See chapter ‘Relationship and Context’ evidence

forensic work in cases where the accused is unknown to the victim seeks to establish the identity of the perpetrator and whether the assault took place, sexual assault in the context of domestic violence involves establishing whether sexual relations were consensual at a specific moment in time.

**It can be difficult for prosecutors to prove lack of consent** beyond reasonable doubt, even in the rare cases where there is forensic or medical evidence. However, there are several other kinds of evidence that can be used to support the credibility of the victim and help contextualize any existing medical evidence that suggests non-consensual sexual contact. For example:

- there may be evidence that the defendant threatened the victim if she did not comply to certain acts or if she did not obey her partner; or
- there may be propensity evidence that the accused has a tendency to have non consensual intercourse with his domestic partner.

#### *Forensic and medical evidence*

The collection of forensic evidence of sexual assault has traditionally focused on establishing whether sexual contact took place and, if so, identifying the perpetrator. As noted above, this approach is not usually suitable in cases involving spouses or defacto partners, in which a lack of evidence does not imply a lack of sexual contact; to the contrary, it is often true that sexual abuse leaves no visible traces. As such, **victim of domestic sexual assaults should not be pressured into intimate medical assessments unless there is some reason to believe there may be evidence of injury.**

Ideally, evidence collection in sexual assault cases is undertaken during the provision of medical treatment to the victim, in order to avoid the need for both a medical examination and a separate forensic examination, both of which can be highly intrusive and unpleasant.



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EVIDENCE THAT CAN BE USED TO INDICATE  
VIOLENT SEXUAL CONTACT

Type of evidence	Purpose
Blood (for drug and alcohol analysis)	May indicate inability to consent
Urine (for drug and alcohol analysis)	May indicate inability to consent
Extra-genital injury (bruising, lacerations, abrasions, swelling, bites, or scratches)	May indicate use of force
Fingernail scrapings	May indicate resistance, identify perpetrator
Ano-genital injuries (swelling, redness, tenderness, lacerations, contusions, abrasions, tearing, bruising, or bleeding of the vulva, introitus, hymen, vagina, cervix, or anus)	May indicate use of force, penetration

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*Table 2 Evidence that can be used to indicate violent sexual contact*

It is also important that medical and forensic records contain information about the state of victims, for example are they distressed, crying etc as well as the examiner's opinion regarding the likely cause of injury (e.g., a sharp object, cloth, or rope). If police are in attendance and observe the victims state they should also make a record of that and it should be in their statement.

While many of these tests and examinations may not be possible, **the first responders (ambulance or police) can also provide similar evidence.** For example a first responder may be able to indicate whether in their view whether the victim was intoxicated. Police need to take detailed statements about the observations of those who first come into contact with both the suspect and the victim.

### **3. THE LEGAL FRAMEWORK RELATING TO DOMESTIC VIOLENCE PROSECUTIONS**

Domestic violence is defined under the Family Protection Act it involves a number of behaviours constituting violence by a family member on another family member. Domestic violence takes a number of forms and may result in charges under the Family Protection Act or the Penal Code and in many cases both.

#### **3.1 FAMILY PROTECTION ACT**

The *Family Protection Act* (FPA) 2008 was passed into law in 2009 and provides definitions of both a 'family member' and 'domestic violence'.

#### **3. Meaning of family member**

*Each of the following is a member of a person's family:*

- (a) the spouse of the person;*
- (b) a child of the person and/or the person's spouse;*
- (c) a parent of the person or the person's spouse;*
- (d) a brother or sister of the person or the person's spouse;*
- (e) any other person who is treated by the person as a family member.*

#### **4. The meaning of domestic violence**

(1) A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:

- (a) assaults the family member (whether or not there is evidence of a physical injury);*
- (b) psychologically abuses, harasses or intimidates the family member;*
- (c) sexually abuses the family member;*
- (d) stalks the family member so as to cause him or her apprehension or fear;*
- (e) behaves in an indecent or offensive manner to the family member;*
- (f) damages or causes damage to the family member's property;*
- (g) threatens to do any of the acts in paragraphs (a) to (f).*

The position of the Public Prosecutor is that subsection 3 (e) “*any other person who is treated by the person as a family member*”, includes a defacto spouse, anyone who is living and residing with the defendant and or their family, and in most cases a person who is considered to be the defendants ‘girlfriend’ or ‘boyfriend’. The Public Prosecutor recognises that these relationships exhibit the same power imbalances and risks as more traditional family relationships and that their need for protection is the same.

## **3.2 COMMON OFFENCES RELATING TO DOMESTIC VIOLENCE**

Domestic Violence can constitute a range of behaviours. In **annexure A** there are a range of behaviours and suggested offences.

### **3.2.2 Charging for Breach of a Family Protection Order**

Victims of domestic violence can make an application for a family protection order pursuant to Part 3 of the *Family Protection Act*. An FPO is a civil order, however, the FPA makes it an offence to breach this civil order. This means that if it is alleged that a respondent to the FPO has breached the conditions of the PO , police have the power to arrest them under the CPC as the breach is an offence. Normally police would have no power to arrest a person for the breach of a civil order. Section 21 of the *Family Protection Act* states the offence:

*(1) A person who breaches a family protection order is guilty of an offence punishable on conviction by a term of imprisonment not exceeding 2 years or a fine not exceeding 50,000 Vatu, or both.*

Prosecutors should always remember that ***the breach should be charged in addition*** to any offence committed. For more details see below (choosing a charge).

### **3.3 GUIDING PRINCIPLES**

#### **3.3.1 Constitution of the Republic of Vanuatu**

The Constitution of the Republic of Vanuatu recognises a number of fundamental rights including the security of person, this means that all citizens of Vanuatu have a right to both be safe and feel safe, ensuring that acts of domestic violence are prosecuted is consistent with that right. Article 5 not only sets out those rights, it also notes that women and children are particularly vulnerable members of the community and special allowances can be made for this group to ensure there is no discrimination against them.

#### **Article 5**

*(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –*

*(a) life;*

*(b) liberty;*

*(c) security of the person;*

*(d) protection of the law;*

*(e) freedom from inhuman treatment and forced labour;*

*(f) freedom of conscience and worship;*

*(g) freedom of expression;*

*(h) freedom of assembly and association;*

*(i) freedom of movement;*

*(j) protection for the privacy of the home and other property and from unjust deprivation of property;*

*(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.*

### 3.3.2 The Domestic Violence Memorandum of Understanding

The MOU was developed in 2013 and signed by a number of agencies including the Public Prosecutor and the Chief Justice and Chief Magistrate. The full MOU is at **Annexure B**. The MOU states the following undertakings by the Public Prosecutor relevant to this policy:

- a. Magistrates would be assisted if offenders are charged under Section 4 FPA , with the nature of the alleged violence clearly stated and with the reference to Section 10 FPA being included merely as the punishment section;
- b. It is accepted that a priority for use of counsellors is appropriate training in a specialised area of domestic violence;
- c. Offences for which offenders have been charged and brought to court do not define whether the offence is family / domestic violence or not. By means of the charge sheet or by other classification charges should be defined in this way. Domestic violence offences will be distinguished from other criminal offences by means such as use of a specific colour file.

### 3.4 Victim of Crime Charter

All Prosecutors are bound to prosecute in accordance with the victim of crime charter which is an undertaking to prosecute in a manner that is respectful of the victim and maintains their dignity at all times. The Charter is annexed at **annexure C**.

## **4 GATHERING EVIDENCE AND CASE BUILDING**

Domestic violence often happens in private. Heavy reliance has been placed on the evidence from the victim of the violence without exploring the many other potential sources of evidence. As such prosecutors will review domestic violence matters and seek additional evidence from police if required.

Prosecutors will review the evidence provided by the Vanuatu Police Force bearing this in mind and shall encourage the pursuit by investigators of other sources of evidence including:

- admissions by the accused;
- admission made during custom reconciliation
- witnesses who see the violence;
- friends, family or neighbours who may be aware of the history of the relevant relationship;
- observations of those who see the effect of the violence on the victim (including police);
- medical evidence;
- forensic material, including digital photographs; and
- police attendance request call records.

### **4.1 DOMESTIC VIOLENCE EVIDENCE CHECKLIST**

All prosecutors must complete the evidence checklist when they receive a brief of evidence. The completed checklist should accompany all opinions provided to the public prosecutors. The evidence checklist is found at **annexure D**.

## 5. THE DECISION TO PROSECUTE

In summary, as with most prosecutions there are two steps to decide whether to prosecute a domestic violence matter:

1. Does the evidence offer a reasonable prospect of conviction? and
2. Is it in the public interest to proceed?

A prosecutor's decision to continue with any prosecution, including those classified as domestic violence, is to be guided by the Prosecution Policy and Guidelines as explained by this guideline.

### 5.1 THE TEST

#### 5.1.1 Sufficiency of Evidence

As stated in the prosecution guideline the reasonable prospect test is guided by the sufficiency of the evidence, as such the initial consideration will be the adequacy of the evidence. ***A prosecution should not be instituted or continued unless there is reliable evidence, duly admissible in a court of law that the person accused has committed a criminal offence.*** This consideration is not confined to a technical appraisal of whether the evidence is sufficient to constitute a prima facie case. The evidence must provide reasonable prospects of a conviction.

If a particular case does not pass this evidential test then the case cannot proceed.

#### 5.1.2 Sufficiency of Evidence in Domestic Violence Matters

Domestic violence often happens in private. Concerns have been raised in the past that criminal justice agencies have not treated it as seriously as violence occurring in other contexts. Heavy reliance has been placed on the evidence from the victim of the violence without exploring the many other potential sources of evidence. As such prosecutors will review domestic violence matters and seek additional evidence from police if required.

### 5.1.3 Evidence to be considered in Domestic violence matters

Prosecutors will review the evidence provided by the Vanuatu Police Force bearing this in mind and shall encourage the pursuit by investigators of other sources of evidence including:

- admissions by the accused;
- admission made during custom reconciliation
- witnesses who see the violence;
- friends, family or neighbours who may be aware of the history of the relevant relationship;
- observations of those who see the effect of the violence on the victim (including police);
- medical evidence;
- forensic material, including digital photographs; and
- police attendance request call records.

All the material provided by the police shall be assessed by the relevant prosecutor in determining whether or not there is sufficient admissible evidence to prosecute. If a brief of evidence is submitted where areas of investigation have not apparently been explored the prosecutor will consider the case and, if appropriate to do so, will advise the police of what further action is to be taken.

If the victim has refused to provide a statement to the police and the OPP has received a report from the investigating officer to this effect the matter will be referred to a Principle State Prosecutor who will consider:

- what evidence, other than the victim, is available;
- whether it is necessary to call the victim as a witness in order to prove the case; and / or
- whether or not there is evidentiary benefit in compelling the victim to give evidence.



In these matters the Prosecutor must decide whether, absent the victim or with a possibly hostile witness, there will be sufficient evidence to prove the case. Prosecutors are encouraged to discuss evidentiary issues with their team leaders, colleagues and the OPP .

## **5.2 PUBLIC INTEREST**

If the assessment leads the prosecutor to conclude that there are reasonable prospects of a conviction, then prosecutors must apply the second test and consider whether it is in the interests of the public that the prosecution proceeds. There are many factors that may be relevant to that decision. A detailed list is specified in the Prosecution Guideline. They include:

- a) the seriousness of the offence;
- b) the criminal history (if any) and background of the alleged offender;
- c) the prevalence of the alleged offence and the need for deterrence, both personal and general (noting domestic violence is considered a prevalent offence);
- d) whether the alleged offence is of considerable public concern; and
- e) the attitude of the alleged victim to a prosecution (This factor is dealt with in more detail below).

### **5.2.1 Public Interest in Domestic Violence Matters**

In the *vast majority of domestic violence cases the interests of the public will only be served by the deterrent effect of an appropriate prosecution.*

Common general public interest considerations are:

- It is in the public interest to prosecute prevalent offences, domestic violence is prevalent
- Domestic violence is hidden and take place behind closed door making it more difficult to prosecute it, as such it is in the public interest to prosecute this type of matter
- Domestic violence often takes place in the family home or places where the victim should feel safe, this increases the public interest in prosecuting it

- Domestic violence has a tendency to escalate if unchecked, it is in the public interest to stop the escalation of domestic violence through prosecution
- domestic violence is normally perpetrated against vulnerable people, it is in the public interest to protect this group

## 6. CHOOSING A CHARGE

Annexure A sets out a range of behaviours and the offences that the behaviours may constitute. Prosecutors are encouraged to read the annexure to fully understand the range of offences that occur in a domestic violence context.

### 6.1 THE RIGHT WAY TO CHARGE

If a person commits a domestic violence offence, it is likely that they have also committed other offences. It is often difficult for a prosecutor to choose the correct charges. While section 10 (3) states:

*An offence under subsection (1) is in addition to and not in substitution for any other offence constituted by an act of domestic violence.*

Meaning that even if an offence is duplicitous the prosecution may charge it in addition to the domestic violence offence, however, in practice duplicity should be avoided unless there is a public interest reason to charge. The following general rules may assist a decisions relating to charging:

1. If an offence was committed in a domestic violence context a s10 Domestic Violence offence should be charged;
2. If there is a less serious offence that has the same elements as the domestic violence offence in most cases it should not be charged in addition to the domestic violence offence;
3. If the offender has committed an offence in addition to the domestic violence offence then the offender should be charged with that offence in addition to the domestic violence offence;
4. When an offender commits a domestic violence offence and the circumstances also disclose the breach of a more serious offence, the offender should be

charged with both offences. For example; sexual offence in a domestic violence context should be charged sexual intercourse without consent and the domestic violence offence.

Further examples: if an Accused physically assaults his wife and makes a serious threat to kill her, he should be charged with:

- Threats to Kill – Section 115 of the *Penal Code*, maximum penalty – 15 years imprisonment, and
- Domestic Violence offence – Section 10 (1) of the *Family Protection Act* (the behaviour comes within section 4 (b) of the *Family Protection Act*), maximum penalty – 5 years imprisonment.

**It is very important that you clearly particularise each offence.** This will ensure the defendant knows what the allegations are against him and it will also ensure the prosecutor can clearly set out for a judicial officer which facts relate to which offence.

## **6.2 COMMON OFFENCES RELATING TO DOMESTIC VIOLENCE**

Domestic Violence can constitute a range of behaviours. In annexure A there are a range of behaviours and suggested offences. However, it is worth considering at this point common domestic violence offence and what the courts have said about them.

### **6.2.1 Domestic Violence Offence**

Section 10(1) of the Family Protection Act makes domestic violence, as defined in section 4 of the Act and offence punishable by 5 years imprisonment.

Domestic violence can only be carried out by one family member against another, as defined by section 3. Family members include people who are blood relatives, adopted relatives and boyfriend and girlfriend in an intimate relationship. The definition also includes those who are married and those who live in a defacto relationship.

As has been set out above the offence encompasses a number of behaviours and this is further detailed in annexure A. In all cases of domestic violence the domestic violence charge should be charged.

The Public Prosecutor has the view that this offence can be heard in both the Supreme Court and the Magistrates Court.

### 6.2.2 Charging for Breach of a Family Protection Order

Victims of domestic violence can make an application for a family protection order pursuant to Part 3 of the *Family Protection Act*. Family Protection Orders (FPO's) can be used as a tool to try and prevent further violence occurring in domestic situations. FPO's place conditions on a defendant to act in a certain manner towards the complainant. If these conditions are breached, the defendant can be charged pursuant to section 21 of the *Family Protection Act*.

*(2) A person who breaches a family protection order is guilty of an offence punishable on conviction by a term of imprisonment not exceeding 2 years or a fine not exceeding 50,000 Vatu, or both.*

Prosecutors should always remember that ***the breach should be charged in addition*** to any other offence committed. For example, a person subject to a FPO stating they cannot go within 200m of their home stabs their child in the home. The defendant should be charged with intentional assault causing permanent injury or attempted homicide and breach of the FPO being that they were in the home.

## 7. A REQUEST TO WITHDRAW A PROSECUTION

As was stated earlier, the effects of violence may contribute to a victim of domestic violence wanting to withdraw the complaint originally made to the police. The fact that this request has been made is a factor you will take into account when considering whether it is in the public interest to proceed.

The Public Prosecutors Policy Notice 13 of 2017 outlines the considerations that need to take place when deciding to discontinue a prosecution in family and domestic violence matters.

*Careful consideration should be given to any request by a victim that proceedings be discontinued. In sexual offences, particularly, such requests, properly considered and freely made, should be accorded significant weight. It must be borne in mind; however, that the expressed wishes of victims may not coincide with the public interest and in such cases, particularly where there is other evidence implicating the accused or where the gravity of the alleged offence requires it, the public interest must prevail.<sup>9</sup>*

OPP prosecutors need to consider the gravity of the offending. The more serious the offending, the greater the public interest that the matter proceed, to protect the community from the offender and act as both a specific and general deterrent.

*In domestic violence offences, any request by the victim that proceedings be discontinued should be carefully considered. The needs, welfare and safety of the victim should be considered as relevant factors in determining where the overall public interest lies. It may be necessary to defer any decision on discontinuation until a thorough appraisal of all the circumstances of the case can be made.<sup>10</sup>*

### 7.1 DEALING WITH A REQUEST TO WITHDRAW THE CHARGES

It is acknowledged that requests for discontinuance or withdrawal of domestic violence matters by victims on the basis that they do not wish to give evidence against an alleged offender are more frequent than in any other type of matter.

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<sup>9</sup> Section 6 of the Public Prosecutor's Policy

<sup>10</sup> Section 6 of the Public Prosecutor's Policy

Prosecutors will remind victims throughout the prosecution process that victims do not own prosecutions and that it is not their responsibility – it is the responsibility of the OPP to carry on prosecutions on behalf of the community and all decisions will be made by the prosecutor. Victims cannot “press or drop” charges.

#### 7.1.1 No Drop Policy

The OPP has a ‘no drop policy’ which means that a prosecutor will not withdraw a charge of domestic violence unless it does not meet the evidentiary requirements or in rare cases it is not in the public interest. It is known as a ‘no drop policy’ because it is almost always in the public interest to proceed.

The decision to compel a victim of crime to give evidence is a decision that must not be taken lightly. The decision may involve exposing the victim to the prospect of arrest (if he or she does not answer a summons or undertaking to appear), contempt proceedings (if they refuse to give evidence) or perjury of false swearing proceedings (if they choose to give false evidence).

Requests of this nature are made for numerous reasons. Some of the most common are:

- the victim believes or fears that the alleged offender will go to gaol;
- the victim does not want the alleged offender to get into trouble – just to get help;
- the victim expresses love for the alleged offender and is committed to maintaining the relationship;
- the alleged offender has promised, or the victim believes, that it will never happen again;
- the victim believes or fears that their children to go without a parent;
- the victim believes her/himself to be in some way responsible for the alleged offender’s conduct (i.e. provocation etc);
- the victim fears reprisals by the alleged offender and/or his family;

- the victim is dependent upon the alleged offender in some way e.g. Financial and material support, social/personal supports, cultural / religious allegiance, mutual obligation for childcare; and
- the victim is frightened/daunted by the prosecution process.

In determining whether or not it is in the public interest to compel a victim to give evidence the relevant prosecutor shall have regard to the Prosecution Policy and Guidelines.

Other factors relevant to this determination are:

- whether or not this offence is part of a pattern of violent behaviour by the alleged offender;
- whether the victim has previously been the victim of domestic violence and has chosen previously to withdraw the complaint;
- the history of the relationship between the alleged offender and the victim;
- whether or not in all the circumstance it would be fair to compel the victim of domestic violence to give evidence;
- the reasons provided by the victim for the discontinuance request;
- the nature, severity and frequency of any pattern of violent behaviour by the alleged offender; and
- the criminal history of the alleged offender.

Each request for discontinuance will be considered on its merits and in accordance with the section below on withdrawal requests.

Although it is impossible to generalise, if physical violence is alleged, and the more serious the violence involved is, the more likely it is in the public interest to prosecute, even if a victim has requested that the proceedings be terminated.

Prosecutors will not withdraw a matter because a parent, relative or a community leader has sought a discontinuance.

Where a decision is taken to discontinue proceedings, the victim will be advised of the decision as soon as possible after it has been made.

## 7.2 WITHDRAWAL REQUEST PROCEDURE

The OPP notes that research suggests that that victims of domestic violence are typically less able to co-operate, more susceptible to pressure or intimidation by the offender and less self-assured than victims of many other crimes. Offenders must not be permitted to use victims to protect themselves.

In light of this, if the victim of domestic violence indicates that they are not prepared to give evidence the prosecutor must find out why the victim is maintaining that position.

**ALL PROSECUTORS MUST COMPLETE A WITHDRAWAL REQUEST REPORT FORM**

If the police are told by the victim or is otherwise made aware of that person's reluctance to give evidence the Prosecutor is to be notified as soon as practicable. If the Prosecutor is told directly they will also inform police. The prosecutor will compile a 'Withdrawal Request Report'<sup>11</sup> in order to assist them in making a decision whether to proceed or not. It is noted that this report will be a disclosable document and should be disclosed to defence once completed. With the assistance of a witness assistant (if available) and any other resources such as police and the Vanuatu Womens Centre should try and find out the following:

- the reasons provided by the victim for requesting the charges be withdrawn;
- the results of any further investigation undertaken as a result of those reasons
- whether it appears that the views of the victim have been freely expressed and are not the result of threats, coercion, inducement or intimidation;

The prosecutor is required to ensure that:

- that the victim has been advised of the availability of services to provide victim support and protection;
- that the prosecution process, has been adequately explained to the victim;

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<sup>11</sup> See Annexure E : Withdrawal Request Form



- any concerns the victim has about safety are directly communicated to police by email and phone.

The prosecutor should also obtain the views of police as to whether the matter should be withdrawn and the reasons why they hold those views. The need to gather information as a result of a withdrawal request may involve asking the Court to adjourn the proceedings to allow proper investigation to be undertaken. That adjournment should be sought by a prosecutor.

A decision as to the disposition of the case will be made in light of the information contained in this information recorded in the 'Withdrawal Request Report' and in accordance with fact that it will in almost all situations be in the public interest to proceed (the no drop policy) and the tests and procedures referred to above.

Prosecutors are reminded of their **duty to disclose to the defence any inconsistent statement made by the victim and should always disclose the contents of the withdrawal request form** and attached documents, however it is noted that that any opinion or recommendation made by a prosecutor in relation to a domestic violence matter in the form of a memorandum, opinion or file note is covered by legal professional privilege and should not be disclosed.

OPP prosecutors wishing to enter a "nolle prosequi" must file a memorandum with the 'withdrawal request report' attached to it, with the Public Prosecutor to make the determination whether this course of action is appropriate.<sup>12</sup>

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<sup>12</sup> Section 5 of the Public Prosecutor's Policy

### **7.3 CHARGING PEOPLE WHO INTERFERE WITH WITNESSES**

If during the course of a prosecution process it is discovered that a victim has been interfered with or intimidated or threatened police should be advised immediately. Police should be asked to investigate the allegations and if there is evidence to support the allegation then charges should always be laid. These charges should be heard with the domestic violence offences before the Court. **In most cases charges will be laid under section 82 of the Penal Code.**

## 8. GETTING THE BEST EVIDENCE FROM VICTIMS OF DOMESTIC VIOLENCE

Domestic violence affects all victims differently, however, there are some effects that are common and should be kept in mind when you are dealing with a victim of domestic violence, they are:

- Fear of the offender's violence;
- Denial, detachment, lack of affect;
- Rage;
- Self-blame;
- Isolation from family and friends;
- Substance abuse issues;
- Depression, anxiety, suicidal thoughts;
- Post-traumatic stress disorder (PTSD);
- Use of defensive/responsive violence;
- Difficulty managing daily tasks.

Prosecutors should respect the victims and be empathetic. Victims will be less traumatised by the court experience and give the best evidence that they can if prosecutors:

- comply with the mandatory contact requirements
- conduct meetings and proofing sessions in accordance as set out in this manual
- listen to the victims concerns about safety and act upon them by keeping police informed
- give them the opportunity to be heard through a victim impact statement
- in some circumstances seeking orders to have the defendant screen and the court closed

## **8.1 MANDATORY CONTACT WITH THE VICTIM**

In respect of all domestic violence cases the OPP shall comply with the following procedures that apply to contact with victims.

- a) The Prosecutor with carriage of a remand will contact the victim to obtain their views on bail and any concerns they have. This contact may be done through police or a witness assistance or directly by the prosecutor. At the bail hearing the victims views MUST be communicated to the court no matter what they are. It is noted that a victim is best placed to express to the court concerns about their own safety and fear, however, in some cases a victim who has been subjected to a serious injury will state that they have no safety concerns or fear, in this situation it may be a reflection of the fact the victim is unable to seek safety themselves and the prosecutor would be seeking the courts protection through remand or strict bail conditions.
  
- b) After the bail hearing the prosecutor is responsible to ensure the that victim is told the outcome and any bail conditions the defendant is on if they have been released on bail. The communication can be made by police, a witness assistance or a prosecutor.
  
- c) The prosecutor is responsible to ensure that the victim is updated as to the outcome of each court hearing and is told:
  - i. What happened during the court sitting
  - ii. The outcome of the court sitting
  - iii. Asked whether they have any safety concerns
  
- d) If a matter is going to proceed to sentence the prosecutor is responsible for:
  - i. Advising the victim that they can come to Court if they want to but that they do not have to
  - ii. Ensuring they have completed a victim impact statement

- iii. After court calling the victim and advising them of the outcome
  - iv. Conveying any safety concerns to police (see first meeting with victim below)
- e) If a matter is to proceed to trial the prosecutor is responsible for:
- i. Advising the victim that they will receive a summons and that they will need to attend court
  - ii. Arranging a time to speak to the victim about the evidence they will give and discussing any concerns they may have. This must occur at least 1 week prior to the trial date (see proofing witnesses below)
  - iii. Contacting the victim and advising them of the outcome
- f) If a matter is appealed, the prosecutor who had carriage of the original trial or sentence must contact the victim and explain the appeal process and tell them who will conduct the appeal.
- i. At the conclusion of the appeal the appeal prosecutor must contact the victim and advise of the outcome

### **8.3 PROOFING VICTIMS IN DOMESTIC VIOLENCE CASES**

Proofing a victim is the process of meeting with them and listening to them describe what happened to them and preparing them for court. In order to establish confidence with the victim in a FV case and ensure are able to give their best evidence prosecutors should meet victims in accordance with the prosecution guidelines mandatory contact. Victims, especially those who have experienced physical or sexual abuse may be suffering from trauma and should be treated with particular sensitivity during proofing.

### **Conducting a first meeting with a domestic violence victim**

Be prepared to provide information or referrals to support services by making a directory of local resources; for example, local agencies providing specialised services to women and children who are victims of domestic violence such as the Vanuatu Womens Centre.

Have copies of any bail conditions that they defendant may be on.

- Discuss the bail conditions (if on bail) and ensure that they feel there has been compliance.
- Suggest they may wish to also seek a protection order as it would last longer than the court process.

Start the session by explaining:

- the victims role in the legal process; emphasise that they are important and that OPP will support them and listen to them but that they are not responsible for the prosecution.
- The prosecutors role; explain that you will assess the case and all decisions about the matter proceeding will be made by you after speaking to them.
- The defence lawyers role; explain that a defence lawyer can speak to them, but that they do not have to speak to them and if they feel under pressure they should contact the prosecutor.
- The Judge or Magistrates Role; explain that they will make all final decisions.
- The legal system; explain the basic court process and potential outcomes. If the case is one where the defendant should not be sentenced to gaol, make sure you tell the victim that they are unlikely to go to gaol but that ultimately the judge will decide. Speak to the victim about court ordered FV courses the defendant could be required to do if they are convicted.
- Inform the victim that a considerable period of time may pass before a court appearance and that they do not need to go to court unless the prosecution ask them to and only if they have to give evidence.
- Explain how the statement they made will be used and that the defendant can get a copy of it.

Talk to them about bail or remand; ensure the victim understand the bail conditions if the defendant is on bail; inquire as to whether they feel safe.

Do not talk about the offence in detail unless it is necessary, however, it is recommended you take the opportunity to discuss what happened generally. If any new information arises, write a summary of it for the file and provide that summary to defence via email. Ensure this disclosure is recorded on CMS. If significant or a large amount of further information is provided obtain a further police statement.

Undertake to keep them informed and ensure that you have their contact details

*Table 3 Conducting a first meeting with a domestic violence victim*

### **Preparing and conducting a proofing session for trial**

Be prepared to provide information or referrals to support services by making a directory of local resources; for example, local agencies providing specialized services to women and children who are victims of domestic violence such as the Vanuatu Women's Centre.

Start the proofing session by explaining:

- The victims role in the legal process; emphasise that they are important and that OPP will support them and listen to them but that they are not responsible for the prosecution.
- The prosecutors role; explain that you will assess the case and all decision about the matter proceeding or not will be made by you after speaking to them.
- The defence lawyers role; explain that a defence lawyer can speak to them, but that they do not have to speak to them and if they feel under pressure they should contact the prosecutor.
- The Judge or Magistrates Role; explain that they will make all final decisions. The legal system; explain the basic court process and what will happen on the day they give evidence. Explain where everyone will be sitting in the court room (use the diagrams on the OPP website)

Proof them.

- Confirm that they prepared a statement with police and that you have the statement they signed.
- Confirm that they can read the statement and if they cannot, you must read it to them.

<ul style="list-style-type: none"> <li>• Start at the beginning. Use open questions similar to Court and take them through their evidence. They can refer to their statement at anytime.</li> <li>• At the end of the proofing, discuss any relevant background such as an ongoing violent relationship. Any new information should be provided in summary form to defence via email and also copied to CMS.</li> </ul>
<p>Explain the role of the defence counsel to prepare the victim for cross examination. Take time with the victim in advance to explain that the legal process allows the defendant to present a defence and that, often, this process can be uncomfortable for a victim. Ask them whether there is anything additional they think may be relevant to the prosecution case. If information is disclosed, provide a summary of it to defence via email immediately and record on CMS.</p>
<p>Choose an appropriate place for the interview; ideally, a neutral environment where the victim feels safe and comfortable, and which affords privacy. Give the victim time to tell you what happened. Victims may need to be reminded that the violence they experienced was not their fault. Always ask the victim about safety concerns.</p>

*Table 4 Preparing for and conducting a proofing session for trial*



## 9. BAIL IN DOMESTIC VIOLENCE MATTERS

### 9.1 RISK FACTORS AND VULNERABILITIES ASSOCIATED WITH DOMESTIC VIOLENCE

Bail is a consideration of risk. In Domestic violence matters it is important that prosecutors understand what particular vulnerabilities exist in domestic violence matters before the court both so they can accurately advise the court during a bail hearing and also for the ongoing management of the case.

As stated by Justice Andree Wiltens in making a decision on bail:

1. *While the presumption of innocence is in Mr Kiels favour, that is not conclusive. If it were, all those accused of criminal offending would be on bail.....*
2. *Bail requires an evaluation of risk. The risks relate to an accused appearing at the next court date, interfering with prosecution witnesses, and re-offending.*
3. *The risk that I see is significant in Mr Kiels case is the risk of re-offending.....There is a very real risk of further offending by Mr Kiel if he were granted bail – a risk that conditions allied with a grant of bail cannot simply alleviate<sup>13</sup>.*

Research also suggests that a victim's own assessment of their risk is as accurate, prosecutors should ask victims if they are frightened and what they are afraid of and they should tell the court what the victim thinks. Prosecutors should carefully consider the victim's own assessment of risk alongside all other relevant information, including previous history and their own observations and judgement.

In addition to the above factors, professional expertise suggests that the following factors relating to the suspect and/or victim may also be associated with risk of abuse.

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<sup>13</sup> Public Prosecutor v Anthony Kiel case no. 19/403 SC/CRML (Annexure F )

### Factors associated with the suspect

- Previous physical assault by the suspect
- Escalation and severity of violence, including use of weapons and attempts at strangulation
- Child abuse by the suspect
- Animal abuse by the suspect
- Suspect's possessiveness, jealousy or stalking behaviour
- Threats or attempts at suicide by the suspect
- Threats or fantasies of committing homicide by the suspect
- Previous criminality or breach of protection order or criminal court order or bail conditions by the suspect
- Substance abuse by the suspect
- Suspect's mental ill health

### Factors associated with the victim

- Isolation of the victim (from friends or family)
- Current or imminent separation from the suspect and child disputes
- Pregnancy of the victim
- Disability of the victim
- Mental or physical health of the victim
- Substance abuse

These factors are not the only factors that may be present and each case will have its own set of considerations. Some of these may appear not important if looked at individually but take on significance when the overall picture is examined. It should also be noted that an escalation in frequency of even minor incidents, or 'rapid repeats', may indicate an escalation in the level of violence.

## **9.2 SHOULD BAIL BE OPPOSED?**

As arrest is the preferred charging method in domestic violence matters it is likely that a Court will be required to determine an issue of bail in the majority of domestic violence cases. This is supported by the fact that section 45 FPA requires that in most cases a suspect is arrested and brought immediately before a Court. It is recognised that significant reliance should be placed upon a police case officer's judgment in respect of any decision whether to oppose bail. However, the final decision whether to oppose bail rests with the relevant prosecutor. In all cases and particularly in domestic violence matters, that discretion is exercised with care and only after appropriate steps are taken to ensure all relevant information is at hand.

Annexure G contains a decision making matrix in relation to bail. Prosecutors should use this matrix to decide whether they should ask for the defendant to be remanded or whether they form the view that the defendant can be released into the community on bail. If bail is not opposed prosecutors can use the bail condition form in Annexure H.

The case law states that there are a number of factors that should be considered to assess risk, they are:

1. The seriousness of the offence alleged
2. Is the defendant likely to reoffend
3. Is the defendant likely to attend court on the next court date
4. Is the victim fearful of further violence from the defendant
5. Is the defendant likely to interfere with any witnesses

One or more of these factors may be present, if any are the prosecutor needs to ask her/himself whether that risk can be alleviated by bail conditions. If it cannot then bail should normally be opposed.

### **9.3 BAIL CONDITIONS**

There is a higher risk of homicide in domestic violence cases if a defendant is released on bail. As a result in most cases there should be strict conditions to ensure that the defendant does not have contact with the victim, and in most cases there should be no contact with the children. Prosecutors should only agree to bail if they can be confident that conditions will be complied with. Common bail condition in domestic violence matters are as follows:

1. An undertaking to appear on the next Court date on a specific date
2. To reside at a place of residence that is NOT the family home
3. Not to contact directly or indirectly the complainant and children (note they should be named on bail)
4. Not to approach within 100mtres of the family home
5. To attend the family home in the company of police on one occasion to collect belongings
6. Not to consume intoxicating liquor, kava or illicit drugs (this condition should be imposed if the defendant was intoxicated during the offence to reduce likelihood of reoffending)

### **9.4 INFORMATION ON THE POLICE BRIEF FOR A REMAND HEARING**

In domestic violence matters *where inadequate information concerning bail is provided on the brief*, prosecutors should make every reasonable attempt to make contact with the police case officer or a supervisor within the police to obtain such further information or advice as to enable:

- the prosecutor to make an appropriately informed decision whether to oppose bail; and
- the Court to be appropriately informed as to matters relevant to bail.

If the domestic violence brief indicates that it is the view of the police case officer that bail should not be opposed prosecutors should make every reasonable attempt to make contact

with the police case officer or a supervisor to obtain such further information or advice to determine:

- whether or not to oppose bail;
- the attitude of the victim towards bail;
- whether the victim is or will be applying for a protection order; or
- whether conditional bail is or may be appropriate and if so, whether the officer holds a view as to suitable conditions; and
- whether other Services or Corrective Services have expressed any concerns/views regarding the issue of bail.

In addition when applications for bail or bail variations are received the OPP/SPD will:

- ensure the victim is spoken to by either, police case officer, prosecutor, or the Witness Assistant in an environment free from influence (not at Court) to ascertain their view with respect to the variation; and
- organise for the police case officer to attend Court if the variation / application is to be opposed.

It is acknowledged that victims can be placed under pressure to make decisions regarding bail that is not in their interests. Only in extremely exceptional circumstances will the OPP/SPD call or make arrangements for a victim to be brought to Court for the purposes of giving evidence on a bail application. Prosecutors should be aware that the resumption of cohabitation could increase the risk of re-offending.

## 10. SENTENCING DOMESTIC VIOLENCE

### 10.1 EVIDENCE ON SENTENCING PROCEEDINGS

At common law the strict application of evidence law does not apply in a sentence proceeding. In essence, defence can make assertions from the bar table which if the prosecution does not object to, will be taken as evidence in the proceedings.

This does not mean that no rules apply to the presentation of material to a judicial officer at sentencing. For example, exhibits such as the agreed facts and the pre sentence report must be tendered to be considered as evidence to be relied upon in sentencing.

#### 10.1.2 Objection must be made or evidence is admitted

If the prosecutor does not agree with an assertion made by defence there should be an objection by the prosecution. This was directly addressed by the Court of Appeal in *R v Bourchas* (2002) 133 A Crim R 413 at 428:

*What I have said is not to deny that the sentencing judge should be fully informed, or that desirable practices as they have developed should not continue. In practice sentencing proceedings are conducted with a degree of informality. Unnecessary insistence on the strict rules of evidence is in no one's interests in sentencing proceedings, and the customary co-operation between the Crown and the offender and making of admissions by the offender should so far as possible be insisted upon. But if there is good reason for objection to evidence in sentencing proceedings the objection when taken must be resolved ....*

The Court of Appeal in *Pakoa v Public Prosecutor* [2019] VUCA 51 confirmed this in the context of a trial, and it does apply to sentencing as well. The Chief Justice stated:

*We noted above that the proper time to object to the admissibility of evidence is when the witness is called. If that submission was to suggest the appropriate time is in the closing it is wrong. Whether the trier of fact is a jury, or a judge or magistrate sitting alone, the evidence must be objected to at the time the witness is called. Indeed it would be wise if the grounds of objection are known at the start of the trial for defence counsel to raise it with the judge then. In this case nothing turns on this point as we have found the evidence was properly admissible in any event.*

It follows that when assertions of fact are made “from the bar table”, they become evidence that is admitted unless there is an objection to it. This accords with the general approach that in relation to evidence, not admissible means “not admissible over objection”:

### **10.1.3 If there is an objection, prosecution must prove Beyond Reasonable Doubt**

It is clear now that where there are disputed matters on sentence, the prosecution is obliged to prove such matters beyond reasonable doubt and as to the facts of the offence and circumstances of aggravation, and the defence to prove matters of mitigation on the balance of probabilities: *R v Storey; R v Olbrich* (1999) 199 CLR 270. That only means that matters which are asserted by either party need to be proven by strictly admissible evidence or to that standard of proof in a sentencing proceeding only where they are challenged.

## **10.2 THE SENTENCING APPROACH**

For all matters in Vanuatu the process to follow is clearly set out by the Court of Appeal of the Republic of Vanuatu in *Public Prosecutor v Andy* [2011] VUCA 14 and can be summarised and applied to the current offence as follows:

**First step: The Starting Point** *“sentence of imprisonment that reflects the seriousness of the offence and the culpability of the actual offending”*

- i) What is the maximum penalty? this is a “critical reference point” (See **Andy**)
- ii) What is the nature of the offending? including detail of what actions constituted the offending, the context and type of offence
- iii) What are the aggravating objective factors?

**Second Step: Assessment of factors personal to the offender**

*“Assessment of the aggravating factors and mitigating factors relating to the offender personally”*

**Third step: Deduction for Guilty Plea**

The offender did plead guilty soon after it was made known the Prosecution would agree to accept count 2 as such a discount of 1/3 is available to him or her.

### 10.3 FIRST STEP: THE STARTING POINT

Prosecutors should always set out clearly the **maximum penalty** in relation to each offence on the information. This can be done in writing or verbally.

Prosecutors should then state what the **nature and context** of the offending is. A general description of the offending highlighting what the prosecution says is the reality of the offending. **For example** a prosecutor could state (or write in submissions):

*The offence was a vicious, unprovoked and cowardly attack on his wife that ended in the death of the offender and his wife's child. The offence was in the context of a domestic dispute and occurred when his wife and the Village Chief were trying to sort out the problems between the offender and his wife. The offender did not intend to harm his child but his action of throwing the wood at his wife when she had come to make peace with the Chief, reckless as to consequences and also breaking the law through this act of domestic violence resulted in the small child's death. The act was impulsive.* (Submissions made by prosecution in relation to negligent death of a child caught in the middle of a domestic dispute)

### 10.4 AGGRAVATING OBJECTIVE FACTORS

While a sentence related to a domestic violence charge may not be any different to any other offence procedurally, there are often unique factors present in DV offences that prosecutors should bring to the Courts attention if they are present.

#### 10.4.1 The need for the law to protect vulnerable people

Clause 5(1)(k) of the Constitution which recognises women and children as vulnerable members of the community. This is reflected in ***Public Prosecutor v Iakis [1994] VUSC 14:***

*Women in Vanuatu need all the protection they can get from the courts. Men must at all cost be discouraged from using violence against women. They must learn that under the law of this country, women are their equals and are entitled to the same protection under the law.*



The High Court of Australia in *Munda v Western Australia (2013) 249 CLR 600* at [54]–[55] referred to the role of the criminal law in the context of domestic violence as including:

*the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. ...*

*... A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.*

In Public *Prosevutor v Hapihabat [2015] VUSC 76* Chetwynd J said in relation to a sustained assault with a weapon by a husband on his wife:

*It will also I hope, emphasise the message that domestic violence cannot be excused and will not be tolerated. If domestic violence does occur the victims, usually women it is sad to say, should be able to rely on the courts to bring the full force of the law to bear on the perpetrators.*

#### 10.4.2 Abuse of Trust

In assessing the crime before it, the court in *The Queen v Kilic (2016) 259 CLR 256* treated the fact the respondent's offence involved domestic violence as a distinguishing aggravating circumstance of significance and, at [28], referred to: "... the abuse of a relationship of trust which such an offence necessarily entails and which ... must be deterred". The *Queen v Kilic* was cited with approval by the Vanuatu Court of appeal in *Luen v Public Prosecutor [2019] VUCA 18* at [15].

In the *Alberta Court of Criminal Appeal in R v Brown (1992) 73 CCC (3d) 242* at 249:

*When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.”*

#### 10.4.3 Domestic Violence is a prevalent offence

In *Public Prosecutor v Ambi [2014] VUSC 158* at [10] Justice Harrop said domestic violence was an offence against the community:

*Although of course this is an offence against your wife first and foremost, it is also an offence against community standards where domestic violence is rightly frowned upon by the Courts and by responsible members of the community.*

In *Public Prosecutor v Simeon [1994] VUSC 15* the court stated in relation to domestic violence:

*The offence is one which is prevalent in the community and steps must be taken to eliminate it. Women should not be required to live in fear of being beaten every time they do something their husband or partner finds disagreeable. Men and women are equal and their rights will be protected by the law.*

#### 10.4.4 Need for Detering others (General Deterrence)

Sentences imposed for offences committed in a domestic violence context must reflect the community interest in general deterrence. As the offence is prevalent there is need to deter others. As stated by the then Chief Justice in *PP v Tataki [1994] VUSC 12* :

*The court has also a duty to deter others from behaving in a like way. I would be failing the victim of this very violent, unprovoked assault and the women of Vanuatu generally if I took a different approach. I know that it takes enormous courage for women in Vanuatu to bring charges against a man, even more so when the man is her husband, because usually the whole family will put pressure on her to drop it. She is the one who is made to feel guilty, because she has complained, often of the most horrendous assault upon her. If the Court then fails to treat the matter seriously, the Court fails her and society at large. It must be extremely rare, if ever, that such a serious assault on a woman by a man, even her husband, does not*

*attract an immediate term of imprisonment. Any Court taking a different course, would be acting irresponsibly and would be failing in its duty to protect the public and particularly the women of this country.*

Further it was stated in ***Public Prosecutor v Simeon [1994] VUSC 15***

*The offence is one which is prevalent in the community and steps must be taken to eliminate it. Women should not be required to live in fear of being beaten every time they do something their husband or partner finds disagreeable. Men and women are equal and their rights will be protected by the law.*

#### 10.4.5 Context of power over the victim

The courts have recognised the special dynamics of domestic violence. A victim of a domestic violence offence is personally targeted by the offender and the offence is usually part of a larger picture of physical and mental violence in which the offender exercises power and control over the victim. This was recognised in ***Public Prosecutor v Mael [2018] VUSC 150***:

*The fact that the offence occurred within a domestic relationship where there is inequality of power and control is also an aggravating factor that cannot be ignored.*

In ***R v Hamid (2006) 164 A Crim R 179*** Johnson J (with Hunt JA and Latham J agreeing) at [77]-[78]:

*“... judicial statements are complemented by criminological research concerning domestic violence. An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instill fear and control ...*

*Although domestic violence is a criminal offence in Australia, it has been reported that many young Australians still evince attitudes that essentially condone it, and many people still believe that it is a private and personal matter rather than a crime ...”*

#### 10.4.6 Disparity between victim and offender

In most instances, the conduct typically involves aggression by men who are physically stronger than their victims, and there is no real prospect of physical retaliation because of the disparity between their respective strengths: In *Patsan v R* [2018] NSWCCA 129 at [39]–[40] the Court of Appeal cited with approval *R v Edigarov (2001) 125 A Crim R 551* at [41].

*“[V]iolent attacks in domestic settings must be treated with real seriousness. Regrettably, that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically, or otherwise, to enforce their silence and their acceptance of such conduct. In truth such conduct is brutal, cowardly and inexcusable, and the Courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence.”*

#### 10.4.7 Domestic Violence in the presence of Children

This is a factor to be considered both as an aggravating factor on sentence and also a indicator of risk in a bail application. The reasons for this were clearly set out by Refshauge J of the Supreme Court of the Australian Capital Territory in *Elson v Ayton* [2010] ACTSC 70 (15 July 2010 at [68]-[70],

*“The courts see, time and time again, that those who appear before them as offenders have often been witness to domestic violence committed against their mother. It is unsurprising then that criminological studies show that family conflict is a very relevant risk factor precipitating youth violence...*

*It is clear that the courts have a duty to express the community’s particular interest in denouncing domestic violence especially by appropriately severe sentences where it is aggravated by being committed in the presence of children. Where this occurs, it not only increases the humiliation and sense of powerlessness of the victim, but it is also likely to cause real psychological damage to the children and risks creating offenders of the children themselves. The courts must show that this is unacceptable and to be condemned as such.”*

Higgins CJ in *R v Bell* [2005] ACTSC 123 at 30 a domestic violence matter in which the complainant was dragged out of bed by her hair, hit three times and put his hands around her neck:

*It is true to say that most assaults on women are at the hands of their partners or ex-partners. It is a pernicious and evil phenomenon not only because of the immediate trauma to the victim. Its evil influence spreads to children as well. It is no coincidence that, in my experience, young offenders, more often than not, present with a family history of domestic violence. It used to be regarded as a family matter, to be kept private. Victims would be made to feel humiliated, and ashamed to complain; in truth it is entirely the criminal conduct of the perpetrator which is at fault. It is entirely in the public interest that such conduct be exposed and deterred”*

## **10.5 SECOND STEP: ASSESSMENT OF FACTORS PERSONAL TO THE OFFENDER**

While the first step considers the objective facts relating to the offending, and in doing so considers what has been often referred to as the ‘objective seriousness’. Step 2 considers those facts personal to the offender that relate to the offending, these factors could be mitigating or aggravating.

The reality is that in sentencing the aggravating factors personal to the offender, usually go to a general consideration of the seriousness of the offending.

### **10.5.1 The offender was on bail or parole at time of offending**

The commission of offences while subject to conditional liberty is a matter of major aggravation and goes to a number of considerations. The offender who commits a further offence while on bail or parole:

- If on parole has not taken the opportunity to rehabilitate him or herself in the community
- Has betrayed the trust of the court that the offender would comply with conditions of either bail or parole
- Is an indicator that further attempts to rehabilitate the offender will not be successful, as rehabilitation will require the offender to comply with condition and directions

### 10.5.2 Prospects of Rehabilitation

In all sentences a judge must consider whether an offender should be given the opportunity to rehabilitate in the community. Prosecutors should ensure that submissions to the effect that an offender is “at a turning point in his or her life” are not accepted uncritically or on face value. Prosecutors should draw to the courts attention factors that would indicate that the submission should be questioned. Prosecutors should also be willing to concede that a offender does have good prospects for rehabilitation if the evidence points towards it. In the Australian case of *R v Govinden* (1999) 106 A Crim R 314 Dunford J stated at [35].

*“Sentencing judges must be vigilant to ensure that they do not accept uncritically at face value all submissions to the effect that the person standing for sentence is "at the crossroads", "has seen the error of his ways", "is at a turning point in his life", or "has excellent prospects of rehabilitation". Often such submissions have no justification in fact and are based on no more than wishful thinking, but there are exceptional cases where such submissions do have validity and the court should be astute to recognise them.”*

### 10.5.3 The offender is a ‘breadwinner’ or hardship to the family

In Vanuatu Courts must take into account that there will be hardship to the family. It is well recognised that very often a prison sentence will result in equal hardship to persons other than the offender. In the case of a male, his wife and children may be the ones who suffer because they lose a father and a person who provides financial support. In the case of a female, it may mean the temporary loss of a mother.

It is common that hardship and stress is shared by the family of an offender and in many cases of domestic violence that may be an inevitable consequence if the offender is to be adequately punished. However, there are other positive factors for the family that often arise out of the imprisonment of an offender. They include, allowing the family to spend a period of time where they are not living in fear of violence, allows for the family to pursue employment and education without being stopped by violence or control, allows the victims to make decisions about their future in the context of a safe environment.

In essence, an offender cannot shield himself under the hardship he or she creates for others, and prosecutors must ensure that they make appropriate submissions that courts should not give undue weight to personal or sentimental factors such as potential hardship to the family.

This was confirmed in *Public Prosecutor v Bong* **Public Prosecutor v Bong [2019] VUCA 40** at [18]

*This Court would not ordinarily contemplate a reduction for hardship in the family following criminal conduct*

As Thomas J also said in the case of *R v Le* [1996] 2 Qd R 516 at 522 at [81] said:

*While [the fact that the offender until sentence cared for her eight-year-old daughter and was eight month's pregnant] evoke sympathy, the hardship or stress shared by the family of the offender cannot be allowed to overwhelm factors such as retribution and deterrence (see also Tilley (1991) 53 A Crim R 1, 3-4, 6)*

Prosecutors should approach submissions as follows:

- The effect of a sentence on the family and dependents of the offender should be taken into account,
- the hardship to the family should only result in any significant leniency where the effect is more severe or prejudicial than the inevitable and usual consequence of the imposition of a proper sentence or
- where it will not overwhelm the proper statutory purposes for which the sentence should be imposed.

#### 10.5.4 Mental health

As a general rule where an offender suffers from mental illness the courts have taken the view that it is not appropriate to use them as a vehicle to deter others. In *Cotter v Corvisy* [2008] ACTSC 64 Refshauge J set out the principles that have been adopted in Australia that reflect the common law, at [71].

*The mental illness or dysfunction may be causally or otherwise connected to the offending behaviour, as in Parnis v The Queen (1993) 49 FCR 304 at 306-7. Thus, it may, for example, reduce the moral culpability of the offender: Hurd (1988) 38 A Crim R 454 at 461. This may require a lesser penalty to be imposed proportionate to the culpability of the offender.*

*This is often expressed as recognising that the mentally disordered or intellectually handicapped offender is not considered to be “an appropriate medium for making an example to others”; R v Anderson [1981] VR 155 at 160; Scognamiglio (1991) 56 A Crim R 81 at 85-6. This is a mark of a civilised society. Of course, this relates to general deterrence and not to specific deterrence which would only be an appropriate purpose for punishment were the offender to be able to appreciate and respond to it. Even so, it does not necessarily require a sentencer to ignore general deterrence or give it only minimal weight.*

Prosecutors should always raise any real concerns about a dependents mental health with the court and the defendant’s representatives and seek an assessment while the defendant is on remand, because it is in the interests of justice.

Prosecutors must never, simply accept a claim from the bar table by defence that the offender has a mental illness or impairment. There should normally be a report and if the report is going to have a significant impact on sentence the writer of the report should give evidence and the prosecutor should question them to assist the court in assessing the defendants culpability.

#### 10.5.5 Intoxication

Section 21 *Penal Code* states that voluntary intoxication is not a defence, it follows that it is not a factor of mitigation. However, it must be taken into account not as an excuse, but merely as a contextual matter.

It should be noted that a person who gets intoxicated knowing that intoxication has an effect on them where they are more likely to commit and act of domestic violence it could be an aggravating factor.



### 10.5.6 Breach of Parole

Sections 60(2) and (3) *Corrections Management Act 2006* allows for the cancellation or revocation of parole and this can only be done by the Parole Board after an application of a Probation Officer. There is no legislative power for a Judge to make such an order or make any comments in relation to how it should be addressed<sup>14</sup> The Judge can however, find that the offence was committed during the parole period.

The Judge can, however, consider the fact of the breach and it can be used as a factor of aggravation and increases the culpability of offender.

### 10.5.7 Extra Curial Punishment

Prosecutors should not accept any submission from the bar table of extra curial punishment. It should normally be objected to unless there is some evidence that the prosecution accepts. How extra curial punishment should be considered is described in *Rony v Public Prosecutor [2017] VUCA 23* and *Koilo v Public Prosecutor [2010] VUCA 27*. In those cases the court gave a reduction in sentence to acknowledge the fact that police and corrections officers had ‘taken the law into their own hands’ when they used physical violence against the offenders in those cases. It was noted in *Koilo* at 19:

*The fundamental principle relevant to this issue is that it is for the Judiciary and not for Police to punish those who commit crime*

Later in *Rony* the court said:

*Accepting that it is not the function of the Courts to discipline police or correctional officers, where an accused person has been remanded into custody by a Court order to await his committal, trial or sentence then the treatment and welfare of such a remandee is a matter of concern for the Court that remanded him. In our view the Court is entitled to take cognisance of any ill-treatment that the remandee may have suffered at the hands of*

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<sup>14</sup> *Public Prosecutor v Manap [2018] VUCA 7*

*the correctional officers while in lawful custody, and to mark its disapproval by the grant of bail or by a reduction in any sentence imposed.*

In both of these cases the offenders had clear injuries that were well documented, essentially the injuries occasioned to the offenders was significant and identifiable.

The discounts for this type of punishment can be significant, prosecutors should always make concessions where appropriate, however, should only make concessions based on evidence.

#### **10.5.8 Reconciliation**

Custom reconciliation is dealt with in section 12.

#### **10.5.9 Assistance to police**

Assistance to police is evidence given to police that is given by the offender that police may not have been able to obtain otherwise. It is NOT:

- Admissions in an interview. The admissions to police are accounted for in the plea of guilty deduction and there is no need for further deduction.

Given the small set of circumstances where assistance can act as a mitigation or deduction, it will be rarely given.

#### **10.5.10 Previous Convictions**

The court is not permitted to increase a sentence beyond that which is proportionate where the offender has prior convictions for the same or similar offences. This was made clear in *R v Veen (No. 2)* ((1988) 164 CLR 465) in the joint judgment of Mason CJ, Brennan, Dawson and Toohey JJ.

*“. . . antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence.”*

As noted by the High Court in *Veen v The Queen* (No 2) (1988) 164 CLR 465 (at 477), he is not to be twice punished for those offences, but it does disentitle him to the leniency that might otherwise be extended to him.

## **10.6 OTHER MATTERS THAT MAY NEED TO BE EXPLAINED TO THE COURT**

### **10.6.1 Delay**

Another common feature is that there may be a considerable delay between the offences and the victim making a complaint. However, such delay should not be held against a victim as it is a direct product of the nature of the offending. It would be unfair for the offender to benefit from such delay: In *Hurst v R* [2017] NSWCCA 114 at [132] the Court of Appeal stated:

*It is, of course, not unusual with offences of this kind for there to be a considerable delay between the occurrence of the offence and complaint being made. That is a distinctive feature of domestic violence scenarios. Given the psychological considerations which may well have been in play, delay of this kind should not in any way be held against the victim. It is in fact a direct product of the nature of the offending itself and in that sense, it would be incongruous if an offender could gain a benefit from such delay.*

### **10.6.2 The victim forgives the offender**

While sometimes forgiveness is important, in some cases the victim may forgive the offender against their own interests, for example, the victim may indicate that the offender is now living with her despite an ongoing threat to her or her children's safety. Sentencing courts will normally treat such forgiveness with caution and the sentence would normally attribute weight to general and specific deterrence, denunciation and protection of the community. While the victim can express their views and the impact the offending has had on them through a Victim Impact Statement, the attitude of the victim should not interfere with the exercise of the sentencing discretion either positively or negatively, it should only be taken into account.

Courts in many countries have noted that forgiveness should not have significant impact, in *Shaw v The Queen* [2008] NSWCCA 58 the NSW Court of Criminal Appeal observed:

*“It is a fact known to the courts and to the community that victims of domestic violence frequently, and clearly contrary to their own interests and welfare, forgive their attackers. It is said, and has been said so often and for so long as to be almost notorious, that it was this pattern of post offence forgiveness, accompanied by apparent remorse or contrition on the part of the offender, that prevented the prosecution of such offenders.”*

Prosecutors with knowledge of the cycle of violence should be able to explain to the court that they should be cautious of giving any discount in relation to the victims forgiveness.

## **10.7 STEP 3: PLEA OF GUILTY**

A discount for a plea of guilty recognises the utilitarian value of the plea of guilty. It is also often a reflection of remorse. In many cases in Vanuatu the standard reduction is 1/3 or 33% deduction. A plea of guilty relieves the witnesses of the necessity to give evidence and provides victims and others with a degree of certainty about the outcome of the charge. It is accepted that in most cases, that unless this benefit is recognised there will be less incentive for guilty offenders to plead guilty, to the disadvantage of the community, the criminal justice system, victims and witnesses.

### **10.7.1 Not all offenders should get a full deduction for a plea**

A prosecutor should not accept that in all cases a person should get a 33% deduction. When the prosecution case is a strong prosecution case in most cases the deduction for the plea must be reduced.

This approach was approved by the Court of appeal in *Public Prosecutor v Niala [2004] VUCA 25*. Where in resentencing the court considered the deduction of 33% (one third) as being in error. The Court resentenced the offenders to 7 years imprisonment, however a deduction of 18 months (approximately 22%) was considered appropriate given the strength of the prosecution case.

*Having said that we agree that the sentences must be reduced in the light of the very early pleas of guilty by the respondents to the amended charges. In recognition of an allowance for pleas of guilty we also take into account that the pleas inevitably saved the*

*trouble and expense of a defended hearing. In all the circumstances the credit due to the respondents must be tempered by the fact that they had no real defence even to the amended charge in view of the eyewitnesses and the admissions which they made to the authorities.*

In *Public Prosecutor v Kavila [2017] VUSC 160* the Court was considering a final sentence of 20 years for multiple sexual offences. In that case the plea was late in time and on that basis the discount was 15%.

## **10.8 SENTENCING OPTIONS**

### **10.8.1 Sentence of Supervision and/or Community Work**

If full time imprisonment is not warranted a sentence of supervision and /or community work is often a very suitable sentence for FV matters. The supervision is important as it gives the offender the opportunity to rehabilitate and the community service recognises the harm done to the community and acts as punishment.

### **10.8.2 Fines**

Fines are a very ineffective sentence in an FV matter. The fine is often paid with family money, or money earned by the victim. The effect is that a fine can harm the victim further. Unless the offender has no financial connection to the victim a fine should not be requested by a prosecutor as punishment.

### **10.8.3 Non-Conviction order (s55 Penal Code)**

Once an offence is proved the Court can hear sentence submissions and then decide whether or not a conviction will be imposed. In most cases a non-conviction order will not be appropriate in a FV matter as the importance of deterring others would indicate that a conviction should be imposed. However, In exceptional circumstances a non conviction order may be appropriate, for example a young offender with no history of violence who has committed a low level FV offence. In this type of case rehabilitation may be a primary factor in sentencing.

#### 10.8.4 Call up for sentence (s56 Penal Code)

In some cases where the court is considering whether a sentence should be suspended or not, the court can delay the sentence under section 56 Penal Code. During the delayed period the offender will be placed on bail so that the court can better assess them. In an FV context this should only be agreed to by a prosecutor if the offender can be carefully monitored, and there is no real risk to the victim. This delay could give offender time to take part in courses or show the court that the FV was a 'one off' event.

#### 10.8.5 Suspended Sentence

A suspended term of imprisonment can act to both show the seriousness of the offending behaviour and give the offender the opportunity to rehabilitate themselves. Prosecutor should ask that offender be placed on a supervision order that requires them to attend any counselling or courses as directed to address their violence against family members. If there is a need for direct punishment prosecutors should ask that the offender be required to do community work.

#### 10.8.6 Sentence of Imprisonment

A sentence of full time imprisonment may be appropriate to reflect culpability in a sentence. For example where the offender has committed multiple offences, has been previously convicted, or the offence itself is very serious.

#### 10.8.7 Compensation

Applications for compensation should also be made where appropriate, bearing in mind that in some circumstances, it may not be appropriate for a compensation order to be made. Orders are often met from family money, and may be used as an opportunity to abuse, or control a complainant further. If a compensation order is sought remember to seek a s41 Penal Code Report, when that report is ordered Prosecutors should ask the report writer to inquire as to whether any money will need to come from the victim or not. It is important

that prosecutors discuss compensation with the victim to seek their views in relation to compensation.

### **10.9 VICTIM IMPACT STATEMENTS**

Prosecutors should ensure that victims have the opportunity to complete a victim impact form in all cases. They should be directed towards the OPP website or police should assist them.

A prosecutor should ensure that a victim is provided with a victim impact statement form in language they feel comfortable with and can provide a form to the victim. The victim can be assisted to fill out the form by police, the VWC or a friend, however it is not appropriate for a prosecutor to assist a victim to complete a form.

Victim Impact Statements are available on the OPP Website in Bislama, French and English at [www.opp.gov.vu](http://www.opp.gov.vu) . An English version is at Annexure J.

# 11. CASE MANAGEMENT

## 11.1 BEFORE PRELIMINARY INQUIRY OR MAGISTRATES PLEA DATE

Before the first mention or the preliminary inquiry the prosecutor will review the file in the following manner:

- review the adequacy of the charges;
- review the summary of facts and amend to include information on the full brief
- speak to the police case officer about any evidential matters that may arise if the matter was to be contested.
- File any new documents 2 weeks before court
- Speak to the victim in accordance with the mandatory contact requirements

The prosecutor will participate in active consultation with the defence with respect to appropriate and constructive negotiation as to:

- the charges that will proceed to trial;
- whether pleas of guilty will be entered to some or all of the charges;
- whether all the witnesses named in the brief will be required to give oral evidence;
- whether statements can be tendered with consent;
- the issues actually in contest; and
- whether appropriate concessions can be made as to pleas and evidence.

It is recognised that discussions between the OPP and self-represented defendants may only be of a limited nature. Prosecutors shall carefully consider whether any contact at all is appropriate.

## 11.2 ACCEPTANCE OF PLEA TO LESSER CHARGES OR A PLEA TO DIFFERENT FACTS

The decision as to disposition of the charges that involve acceptance of a plea to lesser charges or involve the acceptance of significantly different facts from that originally alleged



are to be made by prosecutors in consultation with the Principle State Prosecutor in the Serious Crime Team. In this context **prosecutors are to be mindful of the requirement to keep victims informed** of the progress of cases in which they are involved.

### **11.3 ALLOCATION OF DOMESTIC VIOLENCE MATTERS**

The OPP and SPD will ensure, wherever practicable, that domestic violence matters involving indictable only charges, child victims, or those that have been identified as complex matters, will be allocated as soon as practicable after the first mention of the case in the Magistrates Court. Where practicable the matter will remain with that prosecutor through hearing and sentence.

## 12. CUSTOM IN DOMESTIC VIOLENCE MATTERS

### 12.1 DECISION TO PROSECUTE AND SENTENCE

Custom reconciliation plays no role in the decision to prosecute, however it must be taken into account on sentence. The *Family Protection Act* recognises that customary compensation or repatriation may be taken into account in determining the penalty for domestic violence matters <sup>15</sup>

This is consistent with the Penal Code which also allows custom reconciliation to be taken into account on sentence. It is important to note that it is not a factor of mitigation and may only be used for example as an expression of remorse.

#### *10 Domestic Violence Offence*

*(5) If a person is convicted of an offence against this section, a court may, in determining the penalty to be imposed on the person, take into account any compensation or reparation made or due by the person under custom.*

*(6) If under custom such compensation or reparation has not been determined and a court is satisfied that a determination is likely to be made without undue delay, the court may postpone sentencing pending the determination.*

Section 118 of the *Criminal Procedure Code* also allows for customary settlement to be taken into account<sup>16</sup> and then stay or terminate a proceeding. It is restricted matters where the offence carries a penalty not greater than 7 years, as such this cannot be used for the section 10 domestic violence offence which has a maximum penalty of 5 years. There may however, be other more serious offence that are domestic violence and it is very unlikely it would be in the public interest to use this provision, as such ***a prosecutor should always question the use of this provision*** in domestic violence matters as to whether it is in the public interest.

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<sup>15</sup> Sections 10 (5) and (6) of the FPA

<sup>16</sup> Section 118 of the CPC [CAP 136]

OPP prosecutors should be clear about the role of customary settlement in domestic violence matters. If the Accused has been charged with serious offences, **a customary settlement will be taken into account by the courts when determining sentence but this should not influence the decision as to whether a prosecution should commence.** This is emphasised in the Public Prosecutors Policy as outlined below.<sup>17</sup>

*It is to be noted that in the case of serious crimes, including rape, incest and other serious offences including offences against Public Order, a customary settlement is relevant in determining the quantum or length of any sentence, but not relevant in exercising the discretion to prosecute.*

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<sup>17</sup> Section 2, page 12 of the Public Prosecutors Policy

## 13. OTHER MATTERS RELATING TO DOMESTIC VIOLENCE

### 13.1 DUTY OF POLICE TO ACT IN RELATION TO DOMESTIC VIOLENCE

Section 44 of the *Family Protection Act* outlines the responsibilities of police when a domestic violence offence (outlined in section 4 of the Act) or breach of a FPO comes to their attention.

#### *44 Duty of police to act in relation to domestic violence*

*(1) If a police officer suspects on reasonable grounds that a person:*

*(a) has committed a domestic violence offence (see section 10); or*

*(b) has breached a family protection order (see section 21);*

*the officer must investigate the alleged offence.*

*(2) If, after the investigation, the police officer believes on reasonable grounds that the person:*

*(a) has committed a domestic violence offence; or*

*(b) has breached a family protection order;*

*the officer must:*

*(c) charge the person with a domestic violence offence; or*

*(d) if the complainant is in danger of personal injury - arrest the person and take him or her into police custody.*

If a prosecutor is of the view that a police officer is not aware of this provision or is not applying it a prosecutor should remind them of their obligations under law.

## 13.2 HUSBAND OR WIFE ARE COMPELLABLE TO GIVE EVIDENCE

### 13.2.1 Criminal Procedure Code

Section 89 of the Criminal Procedure Code states that charges involving injury to the wife or a child to the marriage, or any offences against morality are an exception to the common law rule that husband or wife cannot be compelled to give evidence against each other. That means that the husband or wife of the defendant can be compelled by the Court to give evidence and if you summons them they must answer the summons.

*89. (1) Subject to the rules contained in subsection (2) every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.*

*(2) The following rules shall apply to the witnesses referred to in subsection (1)-*

.....

*(c) the wife or husband of the person charged with an offence shall not be called as a witness without the consent of such person unless -*

- (i) the wife or husband of a person charged may, under any law in force for the time being, be called as a witness without the consent of such person; or*
- (ii) such person is charged with an offence against morality under section 90 to 101 of the Penal Code Act; or*
- (iii) such person is charged in respect of any act or omission affecting the person or property of the wife or husband of such person or the children of both or either of them.*

**Example :** The Accused has been charged with indecently assaulting his 12 year old daughter, pursuant to section 98 of the *Penal Code*. The mother of the victim is married to the Accused

and she witnessed the offence take place. She made a statement to police about the matter and is on the Prosecution Witness List. The Accused pleads not guilty and the matter goes to trial. The mother of the victim is compelled (must) give evidence in the trial because the Accused has been charged with an offence against morality AND the victim is the child of the suspect (Section 89 (2) (iii) applies).

## 14. CASE MANAGER PROCEDURES FOR DEALING WITH DOMESTIC VIOLENCE CASES

The following procedures applies to domestic violence cases where the OPP or SPD has made a decision to pursue a prosecution.

- The Case Manager will review each file received at the office and establish whether the matters should be classified as a domestic violence case.
- The file on to the case management system (CMS) will be identified as 'domestic violence' by clicking on the relevant tab on the 'file cover'.
- The physical file cover sheet will be stamped with the words "Domestic Violence"
- Domestic violence files will be separated from other pending files and placed in the "Domestic violence" shelf ready for allocation.
- Files on the domestic violence shelf should be allocated at the next allocation session. If possible the prosecutor that dealt with the remand hearing should be allocated the case to provide consistency in prosecution.
- The Case Manager should ensure Domestic Violence files are given priority and charges and summary of facts are drafted for these matters in preference of non-urgent adult files.
  - The Case Manager will keep a list of all domestic violence matters and ensure the information and summary of facts are filed with the court within a week of allocation (it is noted that some cases will already have these documents).
- When prosecutors are drafting charges, they should charge under section 10 of the *Family Protection Act* and include particulars of the offending as outlined in section 4.





