

CHAPTER 7

DEPARTMENT OF JUSTICE

GENERAL PRINCIPLES

- 7.1 It will be rare for the public interest not to require a prosecution for an offence of intimate partner violence if :
- (a) there is enough evidence to provide a reasonable prospect of conviction; and
 - (b) the victim is willing to give evidence.
- 7.2 Research has shown that intimate partner violence is likely to increase in frequency and severity over time, and that victims call the Police only when desperate for help. It is wrong to treat the complaint as just a domestic difficulty.
- 7.3 In deciding whether to proceed with a prosecution, the counsel should take the victim's wishes into account, and balance those against the wider public interest in prosecuting those who commit acts of violence against a partner.
- 7.4 The counsel may have difficulty in finding this balance. It is recognised that one aspect of public interest condemns personal violence in any form, yet another aspect recognises, where possible, the benefit of preserving a family unit.
- 7.5 The strength of the public interest in prosecuting those responsible for intimate partner violence does not override the need to be satisfied that the evidence is sufficient to justify proceedings.

SUFFICIENCY OF EVIDENCE

- 7.6 Intimate partner violence usually occurs in private. Often, the victim is the only prosecution witness to the commission of the offence. Unless the accused admits the offence and pleads guilty, it is very likely the victim will have to give evidence in person.

WHEN THE WITNESS WISHES TO WITHDRAW

- 7.7 For various reasons a victim may decide to withdraw the complaint. If this comes to the counsel's attention, the counsel should ask the Police to take a

further statement from the victim setting out in details his / her reasons for the decision, and whether the original statement was true or not. It may at times be necessary for the counsel to ask for an adjournment to enable a proper investigation and evaluation of all the options to be carried out.

- 7.8 If there is suspicion of duress, the case should be adjourned for the Police to investigate.
- 7.9 If the victim's further statement is inconsistent with any earlier statement, the counsel should consider the following :
- (a) if the earlier statement was false and the complainant has acted in bad faith, proceedings for an offence against public justice may be appropriate, for example wasteful employment of the Police under section 91(2) of the Criminal Procedure Ordinance; or
 - (b) if the later statement is thought to be untrue, there is unlikely to be a reasonable prospect of conviction without compelling independent evidence to support the original complaint.
- 7.10 If the victim confirms the complaint was true but still wishes to withdraw, the counsel should consider whether evidence from the victim is vital to prove the case. If not, the case can still be proceeded, provided that it is in the public interest to do so.
- 7.11 If the complaints cannot be proved without the victim's evidence, there are three options :
- (a) compel the victim to attend court to give evidence;
 - (b) consider whether the victim's statement be admitted in evidence under section 65B of the Criminal Procedure Ordinance; or
 - (c) discontinue.
- 7.12 Discontinuation of the proceedings on evidential grounds should only happen when all options have been considered and found inappropriate.
- 7.13 The counsel should ensure that the Police should provide information about family circumstances, the likely effect of proceedings on family members and any relevant background information. If necessary, the counsel may approach the concerned social worker for any relevant information to assist him / her in the decision-making process.
- 7.14 When a victim decides out of his / her own free will to withdraw the complaint, a prosecution may not be needed in the public interest. Relevant considerations are :

- (a) the seriousness of the offence;
- (b) the likelihood of recurrence;
- (c) any continuing relationship with the accused; and
- (d) the effect the prosecution will have on the relationship.

7.15 In other cases, the public interest will require a prosecution whatever the victim's wishes. A relevant factor is the seriousness of the offence. The more serious the offence, the more likely it is that the prosecution is needed.

7.16 In assessing where the public interest lies, the counsel should take into account :

- (a) the nature of any injuries;
- (b) any use of weapons;
- (c) any threats made;
- (d) whether the offence is pre-mediated;
- (e) the history of the relationship;
- (f) any previous convictions of the defendant, particularly those involving violence or threats of violence; and
- (g) whether the parties have underage children and, if so, the likely effect which a prosecution will have on these children.

7.17 If the case is to be discontinued because the victim has withdrawn the complaint, it may be appropriate to have the victim to attend court. The victim can then confirm on oath that the initial complaint was true, but that he / she has voluntarily and without duress, decided to withdraw it. Before taking this course of action, the counsel should exercise care and sensitivity. In an appropriate case, the counsel may accept from the victim a written confirmation to withdraw the complaint instead of insisting on the victim's attendance in court.

COMPELLING A VICTIM TO ATTEND COURT

7.18 The counsel should note that Part I of the Evidence (Miscellaneous Amendments) Ordinance 2003 has come into operation since 4 July 2003. It extends the competence and compellability of a spouse of an accused to give evidence for the prosecution or the defence.

7.19 It is difficult to predict how an unwilling witness will react. He / she may :

- (a) give evidence hostile to the prosecution. Even though the counsel may be allowed to cross examine on the basis of the original statement, that complaint is not evidence if it is denied by the witness. The court

cannot substitute the original complaint for the witness's sworn testimony if the latter is disbelieved, though conclusions may be drawn about the witness's credibility. In such case, the value of the witness's evidence is bound to be negligible;

- (b) persist in his or her refusal to give evidence, forcing the prosecutor to offer no evidence. In such a case, the court may consider holding the victim in contempt of court;
- (c) agree to give evidence. A witness summons may be a relief for a victim who wants to proceed, but who is under pressure not to. It removes his or her personal responsibility of the case proceeding; or
- (d) give false evidence.

7.20 The counsel, with the help of OC case or a social worker, should give every possible support to a victim witness to find the strength to continue with the case. Remember that a victim who has been threatened or is in continuing danger require help and emotional support.

BAIL

7.21 Depending on the circumstances of the case, the counsel may consider seeking a remand in custody or conditional bail to protect the victim from further intimidation or harm. The following information will help :

- (a) likely repetition of acts of violence;
- (b) details of the history of the relationship;
- (c) the existence of any civil court orders; and
- (d) the current domestic arrangements.

7.22 If bail is granted in a case where serious injury resulted or where there is a history of intimate partner violence whilst on bail, the counsel should consider an appeal under section 12C of the Criminal Procedure Ordinance.

CHARGING PRACTICE

7.23 As a rule, the charge(s) should properly reflect the seriousness of the defendant's conduct – normally the most serious revealed by the evidence. A domestic background does not reduce the selection of the charge.

BINDING OVER

- 7.24 A binding over order may be appropriate in some minor cases if :
- (a) the parties are reconciled;
 - (b) there is no history of violence; but
 - (c) there is a concern for a future breach of the peace.
- 7.25 There must be sufficient evidence to justify the complaint and the order, which is intended to restrain the offender from similar conduct in the future.
- 7.26 A binding over order may be sought when the victim withdraws support for the original prosecution and it is decided to discontinue the case. The counsel should only apply for such an order when there is sufficient evidence to justify the complaint.
- 7.27 A defendant may be offered to be bound over on condition that the criminal charges are discontinued. The counsel should not accept such an offer unless such a disposal is in the public interest. It cannot be in the public interest to accept a binding over order in a serious case or in a case where there is a history of violence. The counsel should also consider reminding the court of its power to impose a binding over order in addition to any other penalty.

OFFENCE AGAINST PUBLIC JUSTICE

- 7.28 If the police investigation reveals that the complainant has been intimidated, threatened or assaulted by or on behalf of the defendant, the counsel should consider preferring an additional charge of attempting to pervert the course of public justice where there is sufficient evidence to support such a charge.

AVOIDANCE OF DELAY

- 7.29 The counsel should ensure that the case proceed expeditiously without any unnecessary adjournment(s), because :
- (a) delay is likely to distress the victim; and
 - (b) the longer the delay, the more likely it is the victim may decide not to continue with the proceedings.

IF THE VICTIM WANTS TO WITHDRAW

- 7.30 When the counsel becomes aware that a victim has withdrawn support for the prosecution, he / she should inform the Leader of the Vulnerable Witnesses Team who should then supervise the progress of the case. If the information comes from the Defendant's legal representatives, the counsel should ask that it be confirmed in writing. At the same time, the counsel should instruct the OC case to submit a written report with an assessment of the case and the victim, and any other relevant information.
- 7.31 The counsel should consult the Police in every case in which discontinuation is being considered. Once the decision has been made, the Police should be asked to notify the victim of the decision and in very general terms, the reasons for it.

RELEVANT ORDINANCES ON INTIMATE PARTNER VIOLENCE CASES

- 7.32 Relevant Ordinances on Intimate Partner Violence Cases are provided at **Appendix XXVI**