BACKGROUNDER

Crown Intimate Partner Violence Policy (IPV 1)

History and Context

On March 1, 2018 the British Columbia Prosecution Service released its new Intimate Partner Violence Policy (IPV 1). This policy replaces the former Crown Counsel policy on Spousal Violence (SPO 1), which was created in 2003. The IPV 1 policy and its translations can be found at:

https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/ipv-1.pdf

The development of the Crown IPV 1 policy took place as part of the BC Prosecution Service's broader policy review project, in which all of the existing policies in the Crown Counsel Policy Manual were reviewed and revised for the purposes of ensuring that all Crown policies were internally consistent, necessary and appropriate, succinct and up to date.

What is the Crown IPV 1 Policy?

The Crown IPV 1 policy outlines the key principles and guidelines to instruct Crown Counsel in the exercise of their duties when prosecuting offences relating to intimate partner violence.

The Crown IPV 1 policy is comprised of the following sections:

1. Principle
2. Application of this Policy
3. Charge Assessment
4. Alternative Measures
5. Bail Considerations
6. Child Protection – *Child, Family and Community Service Act*
7. Providing Information to Victims (including "Highest-Risk" Cases)
8. Reluctant Witnesses
9. Testimonial Accommodations and Publication Bans
10. Preparation for Hearing
11. Resolution Discussions

Please note that this document is for general information only. It is not intended to be and should not be relied upon as legal advice. (March 2019)

12. Sentencing
13. Further Information: Recognized Risk Factors
14. Appendix A: Corrections Branch Relationship Violence Prevention Program

This document starts out by explaining the principle behind the policy and defining the terms “intimate partner” and “intimate partner violence”. It then sets out the guidelines by which Crown Counsel should fulfill their duties in an intimate partner violence case chronologically: from charge assessment through to sentencing.

Overview of Changes

The IPV 1 policy presents a number of changes from its predecessor, the SPO 1 policy, and this information bulletin will provide an overview of both the consistencies and important changes between the policies. Each are listed below in accordance with their section within the document:

1. Principle

The Spousal Violence Policy (SPO 1) cited the following language from the Supreme Court of Canada in *R. v. Lavallee* [1990] 1 SCR 852, in its introduction, stating: “The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life.”

The above quotation has been removed from the IPV 1 policy and has been replaced with the following: “Intimate partner violence constitutes a very serious, prevalent, and complex problem requiring a special response which is pro-active, coordinated, and vigorous.”

The updated policy removes the gendered language found in the SPO 1, where the specific vulnerability women experience in relation to intimate partner violence was noted both in the citation from *R v. Lavallee* and in the Application section of the policy where it was explicitly stated that “…the significant majority of these [IPV] offences are committed by men and against women.”

Research data and anecdotal reports indicate that women continue to overwhelmingly represent the majority of victims of power-based crimes. We are unsure what consultation took place prior to the removal of informing Crown of the gendered nature of IVP. We encourage the BC Prosecution Service to find other ways to ensure that Crown understand this gendered social phenomenon.

The 2016 *BC Coroners Service Death Review Panel on Intimate Partner Deaths, 2010-2015* stated the following about the impacts of intimate partner violence:

"Each year, 30,000 women and children affected by domestic violence are referred to violence against women counselling and outreach programs and more than 40,000 new clients are supported by police-based, community based victim service programs. In addition, more than 18,000 women and children access transition houses and safe houses to escape violence or abuse. As well, an average of 232 women were admitted to hospital for severe injuries sustained during intimate partner violence."

In addition to gender, we believe it is important that policies related to intimate partner violence specify the vulnerabilities and barriers experienced by women who are marginalized by culture, race, gender identity, participation in the sex trade, immigration status, ability, socio-economic status, sexual orientation, or social or geographic isolation. These victims/survivors also may be highly reluctant to engage with the criminal the justice system after violence occurs.

2. Application

Within the IPV 1 policy, the definition of "intimate partner violence" has been updated to include the new offence of publication of intimate images without consent (*Criminal Code* s. 162.1), which was added to the *Criminal Code* since the old policy was created.

We support the expanded definition of intimate partner violence to include any and all specific offences that perpetuate harassment and violence online. These offences are often connected to and an extension of violence, threats and coercive control that occurs in the real lives of victims. Women are increasingly experiencing online abuse and threats as well as technological surveillance in abusive relationships. In a recent poll commissioned by Amnesty International, 23% of women surveyed across countries had experienced online abuse or harassment.[i]

3. Charge Assessment

While the provisions regarding charge assessment are largely the same in the IPV 1 policy, it is important to note that references to the dynamic of spousal violence and its continuous or ongoing nature have been removed from the new policy. Under the SPO 1, Crown Counsel were encouraged to "consider laying charges under sections other than the assault provision of the Criminal Code where appropriate, for example: criminal harassment, threatening, or mischief. Where these offences are part of the dynamic of spousal violence, as they are often continuing offences [and] the victim may be in a continuing state of fear… Laying appropriate substantive and breach charges is crucial in attempting to address the recurrence of violence or intimidation." This language has been removed in The IPV 1 policy as are references to the Criminal Harassment Policy (CR 1).

While the Criminal Harassment Policy notes that the majority of criminal harassment cases "involve victims who have at one time been involved in a

relationship with the accused" and directs Crown Counsel to consult the IPV policy in those cases, there is no corresponding reference in the IPV 1 policy to the important relationship between intimate partner violence and the specific and ongoing behaviours that constitute criminal harassment. Such behaviours may include frequent threatening phone calls, emails and texts, following the victim to her home or place of work and other behaviours that cause the victim to "reasonably fear, in all the circumstances, for their safety or the safety of anyone known to them." It is well documented that these types of acts often increase after a change in relationship status and/or when the victim engages the criminal or legal system.

The Charge Assessment section of the policy also provides direction on cases of alleged mutual violence. While substantially similar to the SPO 1 in stating that "mutual charges should rarely be approved" the new policy removes the language that recommends that Crown Counsel focus on "determining who is the principle excessive aggressor (also referred to the primary or dominant aggressor)". While both policies advise Crown to distinguish assaultive behaviour from defensive or consensual conduct, the removal of the term "principle excessive" or "primary aggressor" may be problematic. The use of the term "primary aggressor" can prompt further analysis of the power dynamics in a relationship and can assist criminal justice system personnel to better recognize when assaultive behaviour is defensive, or when it is part of a pattern of intimidation and abuse. Police use the term "primary aggressor" and have policy outlining the importance of police making this determination.

4. Alternative Measures

The IPV 1 policy regarding the use of alternative measures in intimate partner violence cases is consistent with the SPO 1 in strongly recommending that "alternative measures should not be considered without careful consideration of the concerns of the victim". The IPV 1 policy sets out new criteria stating that such measures should be pursued only if:

- There is no significant physical injury;
- There is no previous history of intimate partner violence;
- Crown Counsel has no reasonable grounds to believe there is a significant risk of further intimate partner violence offences, taking into account any relevant risk factors…and any risk assessment provided by the Corrections Branch; and
- The use of alternative measures is not contrary to the public interest.

The IPV 1 Policy maintains the recommendation of the SPO 1 that Crown Counsel should consider approving a charge and having conditions of release in place before making the alternative measures referral.

The updated policy restricts the use of Alternative Measures in cases of intimate partner violence by prohibiting the application of such measures unless "there are no reasonable grounds to believe there is a significant risk of further intimate partner offences, taking into account any relevant risk factors." This appears to be strengthened language from the SPO 1 which stated that alternative measures should only be pursued where Crown Counsel has "no reason to conclude, based on an objective assessment of the available evidence, that there is a significant risk of further offences which could result in serious harm". The new standard does not rely on existing evidence of risk but allows Crown Counsel to examine risk factors such as the history and characteristics of the accused, the victim's perception of risk and the dynamics of the relationship to assess whether alternative measures are appropriate in the case, even where there is no significant history of violence in the relationship. The new policy language also restricts the use of Alternative Measures where this a significant risk of any further intimate partner offences, whereas the prior policy stated that further offences needed to "result in serious harm".

5. Bail Considerations

Reference to the *Best Practices and Principles for Community Supervision of Domestic Violence* has been deleted from the new IPV 1 policy document, along with the appendix. In place of the standardized bail conditions specific to spousal violence found in the SPO 1, the policy has been updated to reflect that many courts have been using the standardized Bail Picklist, developed by the Office of the Chief Judge in May 2017.[ii] For courts that have not adopted the Bail Picklist, Crown Counsel may still refer to the appendix found in the old policy.

The general guidance given to Crown regarding how they should formulate a position on bail in spousal violence cases has been revised slightly within the new policy to note the following:

> "When formulating a position on bail, Crown Counsel should have particular regard for the safety of **the public, including victims and other family members, especially children**. Crown Counsel must consider all available information regarding the recognized risk factors presented by the accused, as provided by the police or others."

The updated policy continues to instruct that Crown Counsel ensure that any court orders affecting the accused-whether under the former *FRA*, the *Family Law Act*, the *Child, Family and Community Services Act* and the *Divorce Act*-are included in the Report to Crown Counsel. Further Crown Counsel should review each of these orders and provide relevant information to the court to minimize potential conflicts with bail conditions imposed through family court proceedings.

Highest Risk Cases (Substantial Risk of Severe Bodily Harm or Death)

The new policy varies the language setting out when Crown Counsel must seek a detention and "no contact" order as follows:

"Where Crown Counsel has reasonable grounds to believe that there is a substantial likelihood that the accused will cause severe bodily harm or death to another person, Crown Counsel must seek a detention order along with a "no contact" order pursuant to section 515(12) or 516(2) of the *Criminal Code*."

With regard to the identification and treatment of highest risk cases, the new policy has eliminated references to the B-SAFER risk assessment tool, which may be used by police to identify and assess highest risk cases of domestic violence. The IPV 1 now includes a generic list of risk assessment factors, included at the end of the policy with the heading "Further Information: Recognized Risk Factors".

The IPV 1 policy contains substantially similar procedural guidance as the SPO 1 to Crown Counsel in situations where the police have identified a case as "highest risk" but where Crown Counsel has "reasonable grounds to believe detention is not necessary or that any bail conditions recommended by police are not necessary". The policy directs Crown Counsel to consult with police prior to the bail hearing, in order to provide an opportunity to submit any further relevant evidence or information. Where there is still disagreement about detention or bail conditions after such consultation, Crown should consult a Regional Crown Counsel, Director or respective deputy before conducting the bail hearing.

There is new language guiding Crown Counsel where an accused person asks for a review of police-ordered conditions before the first appearance date. In these circumstances Crown Counsel is strongly recommended to review the Report to Crown Counsel from the police and, where necessary, contact the police and victim before formulating a position. Where a victim or the accused requests removal of a bail condition prohibiting contact, the direction is similar to the SPO 1 policy in that Crown is directed to seek further information about the history of the relationship between the accused and the victim and about the background of the accused, from available sources such as the victim, bail supervisor, or the police. The new policy states that where there is a history of intimate partner violence or other recognized risk factors, Crown Counsel should not consent to a review of the bail conditions.

6. Child Protection – *Child, Family and Community Service Act*

There are minor revisions to language in this section. The IPV 1 section on Child Protection now reads:

> "It is generally reasonable to expect that the police will have made a report where required. If there is reason to believe that the police have not made a

report or where Crown Counsel receive additional information not contained in the RCC that provides reason to believe a child needs protection as defined by the Act [CFCSA], Crown Counsel are required by law to make a report."

The SPO 1 policy mandated Crown Counsel to make a report to the Ministry where additional information not contained in the Report to Crown Counsel becomes available, that gives them reason to believe a child needs protection, notwithstanding that the police have made a report.

7. Providing Information to Victims (including "Highest-Risk Cases")

Citing the BC *Victims of Crime Act*, the federal *Canadian Victims Bill of Rights* and the policy on *Victims of Crime – Providing Assistance & Information to* (VIC 1), the new policy affirms previous policy guidance that all victims should be advised of the availability of victims' services.

The new policy is substantially similar in that Crown Counsel or other designated BC Prosecution Service personnel should provide timely information to victims about charges laid, release conditions, and other developments.

In highest risk cases, the practice of instructing Crown Counsel to ensure that both the victim and police are notified of release, conditions of release, and court disposition as soon as possible is affirmed. The new IPV 1 policy, like the old policy, identifies the police as responsible for notifying other justice/child welfare partners of significant changes relating to release, conditions of release, and court disposition as soon as possible, unless the community has an agreed upon practice for Crown Counsel to do this.

8. Reluctant Witnesses

The IPV policy remains consistent with previous policy by providing the following contextual analysis and guidance regarding reluctant victims or other witnesses:

- The prosecution of intimate partner violence cases often involves a reluctant victim or other witnesses.
- The accused and others may exert inappropriate influence at any stage of the court process and victims often minimize the severity, or deny the existence, of violence in the relationship.
- The involvement of victim services may assist victims to continue through the court process.
- Where there are reasonable grounds to believe the victim or a witness has been subjected to threats or interference, Crown Counsel should refer the matter to police for investigation.

The policy provides further guidance on situations where Crown Counsel is unable to confirm that the victim will testify. IPV 1 states that Crown should consider whether other evidence is available in these cases. Examples of such evidence might include police reports, photographs of injuries, audio or video recordings, including 911 calls, statements or threats made on social media, medical records, eyewitness accounts and similar fact evidence.

Importantly, the policy has been updated to strongly recommend that only in limited circumstances should a material witness warrant be sought for a victim who has failed to appear. The new policy states that prior to making such an application, Crown Counsel are advised to consult with Administrative Crown Counsel as well as consider all of the evidence, including the likelihood the victim will testify, the severity of the alleged intimate partner violence, and the need to protect children and others at risk.

There was a recent high profile case in Alberta where an Indigenous woman who was a victim of sexual assault was shackled and remanded into custody for five nights by the presiding judge, even though she indicated her intent to testify against her attacker. While such extreme cases are rare, policies that encourage Crown to pursue material warrants when victims are reluctant to testify can have a deterring effect on the willingness of victims to engage with the criminal justice system. There are a multitude of reasons why victims may be reluctant to testify-including fear of escalating violence, ongoing coercive control, economic dependence, loss of privacy, and lack of trust in the criminal justice system. Placing robust limits on the use of material warrant applications will help to avoid re-traumatization and further will facilitate the use of other forms of evidence when a victim is unable or unwilling to testify.

9. Testimonial Accommodations and Publication Bans

The testimonial accommodations section of the policy is substantially the same, but has been reformatted for greater accessibility. It now reads:

Sections 13 and 19 of the Canadian Victims Bill of Rights provides that every victim has the right to request testimonial aids when appearing as a witness in proceedings, through mechanisms provided by law.

It is recommended that Crown Counsel should consider whether testimonial accommodations or a publication ban are available under sections 486 to 486.5. In appropriate circumstances, the court can make an order for:

- the exclusion of public or witness to be out of the public view (section 486(1))
- a support person (section 486.1)
- the witness to give testimony from a different room or screen or other device (section 486.2)

- cross examination by appointed counsel (where the accused is unrepresented) (section 486.3)
- a publication ban regarding the victim's identity (sections 486.4 and 486.5)

The policy further states that in rare cases and where appropriate, Crown Counsel may also consider applying for an order under section 486.31 of the *Criminal Code*, directing that any information that could identify a witness not be disclosed in the course of the proceedings or an order under 486.7 of the *Criminal Code*, to protect the security of a witness. Prior to making such an application, Crown Counsel should consult with a Regional Crown Counsel, Director, or their respective deputy.

10. Preparation for Hearing

The guidance provided to Crown Counsel on matters related to preparation for hearings for highest risk domestic violence cases is substantially similar to the previous policy. Crown are directed to assign counsel to the file at an early date, increase communication with other criminal justice stakeholders and provide information to victims about the availability of testimonial accommodations and publication bans.

The IPV 1 also directs Crown Counsel to take similar trial preparation measures when working with vulnerable victims who are defined in the policy Vulnerable Victims and Witnesses-Adult (VUL 1). Within the VUL policy, vulnerable victims include persons of advanced age, those with physical or mental health disabilities, those with a significant history of abuse, Indigenous peoples, those with precarious legal status, people working in the sex trade and those living in extreme poverty and homelessness (among others). Early assignment of counsel, improved coordination with other stakeholders and providing information to victims about available testimonial accommodations will assist the most marginalized victims to participate more fully and equitably in the criminal justice system.

11. Resolution Discussions

The IPV 1 policy affirms the rights of victims (as codified within the *Canadian Victim Bill of Rights* and the *Criminal Code)* to convey their views about decisions made by criminal justice authorities and have their views considered on matters such as resolution discussions. Resolution discussions often result in guilty pleas or admissions by the accused as to facts which otherwise would have to be proven by the Crown.

The policy further affirms that in cases of serious injury or severe psychological harm, Crown Counsel should take reasonable steps to inform the victim, their representative and the police of the proposed resolution and give the parties an opportunity to express their concerns. The new policy provides that those concerns will automatically be made known to and taken under consideration by a Regional Crown Counsel, Director, or their respective deputy. While charged with taking any

concerns expressed by victims, families or the police under advisement, the final decision regarding charges or disposition will ultimately rest with the BC Prosecution Service.

The policy has been updated to specify that where the charges allege that the accused is responsible for a death or where there are serious charges that have or will likely raise significant public concerns about the administration of justice, Crown Counsel must engage in prior consultation with a Regional Crown, Director or respective deputy before concluding any resolution discussion or stay of proceedings

12. Sentencing

The new policy gives substantially similar guidance on sentencing as the previous policy including providing for:

- The victim's opportunity to give a victim impact statement
- Bringing the court's attention the aggravating circumstance of abuse of a spousal or common law partner which should increase the sentence imposed by the court as per s. 718.2 (a)(ii) of the *Criminal Code*
- Recommending that Crown Counsel consider whether the offender should participate in The Relationship Violence Prevention Program, offered by the Corrections Branch.
- Recommending that Crown Counsel consider whether "no contact" conditions and report requirement and successful completion of an assaultive behaviour program are appropriate conditions to protect the victim.
- Recommending the Crown Counsel consider requesting an order under s. 743.21 prohibiting the offender from communicating, directly or indirectly, with any victim or witness during the custodial period of the sentence.
- Recommending that Crown Counsel consider whether a weapons prohibition is necessary.
- Recommending that, where a prohibition order is made, Crown Counsel should also see an order that a firearms licence be surrendered.
- Recommending that Crown Counsel consider whether a restitution order is appropriate under section 738 or 739 of the *Criminal Code*, and to take reasonable steps to provide victims with an opportunity to indicate whether they are seeking restitution for their losses and damages.

The policy includes the following addition:

- Crown Counsel should consider seeking a DNA order under section 487.051. This section of the *Criminal Code* allows a provincial court judge to issue a warrant to take bodily substances for forensic DNA analysis in enumerated circumstances.

13. Further Information: Recognized Risk Factors

As noted in Section 5 on Bail Considerations, the IPV 1 policy has removed all references to the B-SAFER Risk Factors listed in SPO 1 and replaces it with a list of recognized risk factors listed within the IPV policy. The list of risk factors is contained in the section *Further Information: Recognized Risk Factors*. The list of risk factors is largely consistent with the risk factor assessment frameworks used by the RCMP and the Ministry for Children and Family Development. The risk factor identification process includes an examination of factors typically associated with incidents of intimate partner violence such as those related to the personal history of the accused, the victim's perception of risk and the relationship history-including factors such as previous violence, relationship status, threats, forced sex, stalking, choking and the relative social and cultural powerlessness of the victim.

14. Appendix A: Corrections Branch Relationship Violence Prevention Program

The final section of the IPV 1 policy provides an updated description of the Corrections Branch Violence Prevention Program. This Program is mandated for medium to high risk intimate partner violence offenders and other court ordered persons (such as section 810 defendants). It is currently comprised of two consecutive components: *Respectful Relationships*, a 10-week program delivered by Corrections Branch staff, and the *Relationship Violence Program*, a 17-week program that is delivered by contracted service providers.

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[i] https://www.amnesty.org/en/latest/campaigns/2017/11/what-is-online-violence-and-abuse-against-women/

[iiii] The Bail Picklist can be found at http://www.provincialcourt.bc.ca/types-of-cases/criminal-and-youth/links