

## Family law

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## 1. Family law jurisdiction

### 1.1 Civil jurisdiction

See [Table 1](#) below for your jurisdiction to make different orders under the relevant sections of the Family Protection Act (FPA).

Every question of fact arising in any proceedings under this Act (other than criminal proceedings) must be decided on the *balance of probabilities*.

Constitutional rights and human rights based on treaty obligations apply equally to civil law cases, as they do to criminal law cases. Principles of non-discrimination, especially relating to women and people with disabilities, as well as 'the best interests of the child', are important human rights principles applicable in family protection, family law and some other civil case types, such as adoption, land and inheritance cases.

Women most commonly seek basic rights for themselves and their dependent children through civil law cases often arising as applications for family protection or for family law remedies such as divorce and property settlements, custody of children and access to spousal or child maintenance.

Article [4](#) of the Constitution establishes a broader principle of equality before the law and non-discrimination, 'No laws shall be enacted for one class and not for another class but *the law shall be the same for all the people of this land.*'

As noted in earlier chapters, Tonga has ratified the [Convention on the Rights of the Child](#) (CRC), which provides guidance as to the treatment of children: See [Tone anors v Police \[2004\] Tonga LR 144](#).

Tonga has also signed the [Convention on the Rights of People with Disabilities](#) (CRPD).

Even though Tonga has not ratified or signed the [Convention on the Elimination of all Forms of Discrimination Against Women](#) (CEDAW), you may also consider provisions of CEDAW in interpreting family laws in relation to the treatment of women.

### 1.2 Table 1: Family Law – Civil jurisdiction

#### 1.2.1 Divorce, maintenance and child support orders

- [Divorce Act](#) (DA),
- [Family Protection Act](#) (FPA),
- [Maintenance of Illegitimate Children Act](#) (MICA),
- [Maintenance of Deserted Wives Act](#) (MDWA),
- [Convention on the Rights of the Child](#) (CRC),
- [Convention on the Elimination of All Forms of Discrimination Against Women](#) (CEDAW)

Divorce order (Decree Nisi), s <a href="#">8</a> DA	Variation or discharge of support order, s <a href="#">2</a> MDWA	Maintenance orders, ss <a href="#">17</a> and <a href="#">18</a> DA	Custody and child maintenance order, s <a href="#">19</a> DA
Urgent maintenance order, s <a href="#">19</a> FPA	Maintenance order, s <a href="#">18</a> FPA	Affiliation and maintenance order for illegitimate child, ss <a href="#">2-4</a> MICA	Maintenance order for deserted wife, s <a href="#">2</a> MDWA
<b>1.2.2 Guardianship, custody, access and adoption orders</b> <ul style="list-style-type: none"> <li>• <a href="#">Guardianship Act</a> (GA),</li> <li>• <a href="#">Maintenance of Illegitimate Children Act</a> (MICA),</li> <li>• <a href="#">Maintenance of Deserted Wives Act</a> (MDWA)</li> </ul>			
Jurisdiction for guardianship, custody and access orders, s <a href="#">3</a> GA	Guardianship of parents, s <a href="#">4</a> GA	Power to make guardianship orders, s <a href="#">7</a> GA	Testamentary guardians, s <a href="#">5</a> GA
Customary adoption, s <a href="#">6</a> GA	Wards of the court, s <a href="#">8</a> GA	Removal of guardian, s <a href="#">9</a> GA	Custody orders, s <a href="#">10</a> GA
Order for name change, s <a href="#">10A</a> GA	Disputes between guardians, s <a href="#">11</a> GA	Access rights, s <a href="#">12</a> GA	Variation or discharge of orders, s <a href="#">13</a> GA
Termination of guardianship, s <a href="#">14</a> GA	Custody and access orders, s <a href="#">18</a> FPA	Power to appoint counsel for child, s <a href="#">18</a> GA	Adoption and guardianship order for illegitimate child, ss <a href="#">15-18</a> MICA
Custody order, s <a href="#">2</a> MDWA			
<b>1.2.3 Domestic violence protection orders</b> <ul style="list-style-type: none"> <li>• <a href="#">Family Protection Act</a> (FPA)</li> </ul>			
Protection orders in family or criminal proceedings, ss <a href="#">11-12</a> FPA	Emergency protection order, s <a href="#">13</a> FPA	Temporary protection order, s <a href="#">14</a> FPA	Final protection order, s <a href="#">15</a> FPA
Variation, cancellation of protection order, s <a href="#">20</a> FPA	Police safety order, ss <a href="#">22-24</a> FPA	Compensation order, s <a href="#">30</a> FPA	Withdrawal of complaint-investigation & directions, s <a href="#">32</a> FPA
Service of protection order, s <a href="#">31</a> FPA	Custody and maintenance order, s <a href="#">18</a> FPA	Urgent maintenance order, s <a href="#">19</a> FPA	Application in writing or by telephone, fax, radio or email, s <a href="#">10</a> FPA
Court shall give priority, s <a href="#">9(7)</a> FPA			

## 2. Domestic violence and protection orders

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## 2.1 Introduction

The [Family Protection Act](#) (FPA) put in place the following core measures to assist persons (mainly women and children) subjected to domestic violence:

- Increased power for police to issue protection orders on the spot, for a maximum of seven days.
- A legal requirement to inform victims of their rights and what is involved in legal proceedings.
- The formation of a committee of key community stakeholders, the Family Protection Advisory Council.

As noted in earlier chapters, Tonga has ratified the Convention on the Rights of the Child (CRC), which provides guidance as to the treatment of children: See [Tone anors v Police \[2004\] Tonga LR 144](#).

Key principles from the CRC are:

- The 'best interests' of any affected children should be a primary consideration in any decision which affects them: Art [3\(1\)](#). See child adoption cases where this test is applied in reference to the CRC: [Saavedra anor v Solicitor General \[2013\] Tonga LR 60](#) (CA) The Court of Appeal also applied Art [21\(b\)](#) stating that inter-country adoption should only be used if no suitable care arrangements can be made for a child in their own country.
- Children have a right to be protected from all forms of physical or mental violence, injury, abuse or neglect while in the care of parents, legal guardians or others: Art [19](#).
- Children have a right to be heard and to have their views considered within any proceeding which affects them, based on their age and developmental stage: Art [12](#).

Tonga has also signed the [Convention on the Rights of People with Disabilities](#) (CRPD), which contains important rights and obligations including rights to:

- equality before the law: Art [12](#) and non-discrimination: Art [5](#),
- freedom from exploitation, violence or abuse including gender-based violence in or outside of the home: Art [16](#),
- respect for home and family including the right to marry, found a family and to support and bring up children: Art [23](#).

The CRPD creates a duty upon states to make 'reasonable accommodations' for people with disabilities, so that they can participate in all aspects of life, without discrimination, on the same basis as others: Art [5\(3\)](#).

The CRPD also recognises the multiple layers of discrimination faced by women and girls with disabilities, as they often face discrimination due to both their gender and their disabilities, and are particularly vulnerable to exploitation and abuse, including sexual abuse.

Even though Tonga has not ratified or signed the [Convention on the Elimination of All Forms of Discrimination Against Women](#) (CEDAW), you may also consider provisions of CEDAW in interpreting family laws in relation to the treatment of women.



Under CEDAW women are entitled to:

- protection from all forms of discrimination including gender-based violence as a recognised form of discrimination against women: Art 2. See [CEDAW Committee, General Recommendation No 19: Violence against women](#)
- equality before the law: Art 15,
- equality in marriage, divorce, family relations, right to custody of children and to own marital property: Art 16.

The Tongan Government has also expressed its commitment to addressing violence against women through being a party to the [Beijing Declaration and Platform for Action \(1995\)](#), the [Millennium Development Goals](#) (MDG) and, at the regional level, [the Pacific Plan, the Pacific Women's Platform for Action](#) (PPA).

## 2.2 Purposes of the Family Protection Act

ss 3, 8 FPA

The overall purposes of the Family Protection Act (FPA) include:

- ensuring the safety and protection of all persons, including children, who experience or witness domestic violence;
- providing support and compensation for all victims of domestic violence and economic abuse; and
- enabling the making and enforcement of court orders and Police Safety Orders issued to stop acts of domestic violence: s 3 FPA.

These purposes should guide you when exercising any of your powers under the FPA. The overall question is whether protection is necessary having regard to the purposes of the Act.

The specific purposes of [Part 2](#) (protection orders) of the FPA are to:

- prevent domestic violence and economic abuse between family members and others in a domestic relationship; and
- assist and maximise the safety and protection of persons who experience or fear domestic violence: s 8 FPA.

### 2.2.1 Definitions

ss 2, 4 and 5 FPA

Sections 2, 4 and 5 set out the key terms relevant to domestic protection and other orders under the Family Protection Act.

The first requirement for a protection order under section [12\(1\)\(a\)](#) of the Act is that the parties are in a domestic relationship.

A “domestic relationship” exists between two people if (s 5):

- (a) they were or are married to each other;
- (b) they live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child;
- (d) they are family members living in the same household and including those related by legal or customary adoption;
- (e) they are or were in an engagement, courtship, including an actual or perceived intimate or sexual relationship;
- (f) they share or recently shared the same residence;
- (g) one person is wholly or partially dependent upon on-going care by the other person residing in the same household;
- (h) one person is a housekeeper in the same household.

The Lord Chief Justice Whitten QC in [Tupou anors v Lavulavu \[2020\] TOSC 32; AM 20 of 2019, 10 June 2020](#), looked at this issue under s 5(f) and held there was no evidence before the Magistrate that the parties had recently shared the same residence. The Supreme Court also noted that the word “recently” may give rise “to the potential for subjective and relative interpretations”

A “person at risk” is also widely defined as to who may also fall within the scope of a protection order as the context requires. This includes the complainant, any child or family member living in the complainant’s household, and any person at risk from domestic violence: s 2(1).

The next requirement for a protection order is that a person has committed or is a risk to commit domestic violence against the complainant, or other person at risk: s 12(1)(b). “Domestic violence” means any of the following conduct by a person (the defendant) against a victim within a domestic relationship which:

- is an act or omission or threat by the defendant that is beyond the reasonable expectations and acceptances of family and domestic life; and
  - causes physical abuse, sexual abuse, or mental abuse to the victim or other person at risk; or
  - otherwise harms or endangers the health, safety or well-being of the victim or other person at risk: s 4.

In [Tupou anors v Lavulavu](#) (supra), the Lord Chief Justice Whitten QC clarified that the second element of the definition of domestic violence (at para 88):

“being conduct “beyond the reasonable expectations and acceptances of family and domestic life”, is presumably intended to present an objective test. For most cases, that may not prove difficult.”

Domestic violence includes three specific categories of abuse which are (ss 2 and 4):

- Physical abuse. This is any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life or health, or impair the health or development of the complainant or person at risk. It includes assault, criminal intimidation and force.
- Mental abuse. This includes verbal abuse, emotional abuse and psychological abuse. It must be a pattern of degrading, humiliating, aggressive or intimidating conduct towards a victim, including:
  - repeated insults, ridicule or name calling;
  - threats to cause physical and emotional pain; or
  - showing obsessive possessiveness, domination or jealousy that is a serious invasion of the victim's privacy, freedom, integrity or security.
- Sexual abuse. This includes any conduct of a sexual nature without consent that abuses, humiliates, degrades or otherwise violates the dignity of a person:

In [Tupou anors v Lavulavu](#) the Supreme Court on appeal looked at the issue of whether 'degrading rumours' constituted "mental abuse" (at paragraphs 101-102). 'Abuse' is not defined in the Act.

- The Supreme Court found that degrading rumours could be regarded as verbal, emotional or psychological abuse and even degrading or humiliating conduct, but the next question is: did it meet the other elements of the definition of mental abuse in the Act?
- The definition in s 2 calls for two other features, namely, that the abuse had to be:
  - (a) a pattern established by repeated conduct; and
  - (b) towards the victim. [see paras 104-109].
- "Section 4 refers to an act, omission or threat causing, relevantly, mental abuse to the victim. That would suggest the abuse does not have to be communicated directly by the defendant to the victim for the provision does not prescribe how an act, omission or threat is carried out, but rather the result, namely causing the victim to suffer the relevant abuse."
- This also requires "intention" towards the victim.

"In this regard, I respectfully agree with Niu J in [Fifita v Fifita](#) [2019] TOSC 24; AM 9 of 2019, 6 June 2019 at para 9 "It is possible that the act or acts of adultery was or were or are being committed solely for the purpose and with the intention of inflicting pain upon the victim."

"In my view, adultery must be regarded as "beyond the reasonable expectations and acceptances of family and domestic life". Therefore, if a husband repeatedly tells his wife about his adultery, using language which degrades, humiliates or insults her, and thereby causes her to suffer mental abuse (which includes emotional and psychological abuse), such conduct may constitute domestic violence."

Economic abuse is also included within the scope of protection orders under [Part 2](#) of the Act and is widely defined in section 2.

“Harassment” is relevant in the context of Police Safety Orders under Part 4, section [24\(2\)\(C\)](#) as a condition that the person against whom the order is made must comply with. It includes engaging in a pattern of conduct that induces psychological abuse or the fear of harm in a person including repeatedly:

- watching, or loitering outside of or near the building or place where the person resides, works, carries on business, studies or happens to be;
- making unwarranted phone calls or inducing another to make such phone calls to the person, whether or not conversation ensues; or
- sending, delivering or causing the delivery of unwanted letters, packages, other objects, facsimiles, text messages or other electronic mail to the person.

## 2.3 Process for protection orders

### 2.3.1 Who can apply for a protection order

s [9](#) FPA

An application for a protection order may be made without notice to the respondent (ex-parte) by or on behalf of a person(s) in respect of domestic violence or economic abuse: s [9\(1\)](#).

An application may be made by or on behalf of more than one person: s [9\(5\)](#).

An application for a protection order may be made ex parte, unless you order the application to be on notice: s [9\(6\)](#).

If a complainant is unable to make an application personally due to physical incapacity, immature age, fear of harm or for any other reasonable cause, the following persons may apply on behalf of such a person (s [9\(2\)](#)):

- a family member, guardian or friend;
- a registered counsellor;
- a law practitioner;
- a health practitioner;
- a head of school; or
- a police officer.

Any person making an application on behalf of such a person in such a situation is authorised to act in the best interests of that person: s [9\(3\)](#). They are also protected from civil or criminal liability if they make the application in good faith or give evidence in support: s [9\(4\)](#).

You must give priority to applications for protection orders: s [9\(7\)](#).

### 2.3.2 Rights of complainant in domestic violence proceedings

s [33](#) FPA

In proceedings for domestic violence, the prosecutor or any other person acting for the complainant, must consult with the complainant and fully explain proceedings so that the complainant fully understands their rights, the court procedure and orders made, to reduce the impact of the court hearing on the complainant and any other person at risk.

### 2.3.3 Form of protection order

s [10](#) FPA

A complainant or representative may apply to you or the Supreme Court for a protection order in person orally, in writing, by telephone, radio, by facsimile or e-mail or other means of communication: s [10\(1\)](#).

A written application must comply with [Form 1](#) in the Schedule if made by the complainant. If it is made orally the court clerk must put the application in writing in Form 1: s [10\(2\)-\(3\)](#).

Otherwise, if the written application is made by other persons on behalf of the complainant it must comply with [Form 2](#) in the Schedule: s [10\(4\)](#).

Your court must keep a written register of:

- all applications for protection orders made to the court;
- all protection orders granted by the court; and
- all application for protection orders that have been refused and record the reasons for refusing to make a protection order: s [10\(5\)](#).

An application for a protection order may be brought outside ordinary court hours or on a day which is not an ordinary court sitting day if you are satisfied that the complainant or other person at risk may suffer undue hardship if the application is not dealt with immediately: s [10\(6\)](#).

You must explain the effects of any protection order made or refused to the parties to the proceedings: s [10\(7\)](#).

## 2.4 Protection orders in family or criminal proceedings

ss [11-12](#) FPA

Domestic violence may be raised in family or criminal law proceedings, although this may not be the principal reason why the parties are before you.

If family or criminal proceedings are pending, you may (yourself or if the either party applies), issue a protection order upon such terms and conditions as you think appropriate: s [11\(1\)](#).

You must take into account the safety, health and well-being of the complainant, and the matters set out in section 12(3) and the interests of any other person at risk: s [11\(2\)](#).

The grounds for making a protection order are set out in section [12](#). You may make a protection order if you are satisfied that:

- the respondent and the complainant are in a domestic relationship;
- the respondent has committed or in your opinion is a risk to commit, domestic violence against the complainant, or other person at risk: s [12\(1\)](#); or
- the respondent uses or has used economic abuse against the complainant or other person at risk: s [12\(2\)](#); and
- the making of an order is necessary or desirable for the protection of the complainant, or other person at risk.

In deciding whether to make a protection order, you must consider s [12\(3\)](#):

- (a) the need to ensure that the complainant or other person at risk is protected from domestic violence or economic abuse;
- (b) the well-being and the accommodation needs of the complainant or other person at risk; and
- (c) any other matter you think is relevant.

Such other matters referred to in s [12\(3\)\(c\)](#) are further clarified by subsection [\(6\)](#) which requires you to consider:

- (a) the opinion of the complainant, or other person at risk, of the nature and seriousness of the behaviour in respect of which the application is made; and
- (b) the effect of that behaviour on the complainant or other person at risk.

You may include the names of other family members in the protection order, if satisfied the respondent has committed or is likely to commit an act of domestic violence or economic abuse against other family members: s [12\(4\)](#). Ensure any children at risk of violence are included in the protection orders: Art [19](#) CRC.

Also, you may consider whether the behaviour of the respondent forms part of a pattern of behaviour for which the complainant or other person at risk need protection: s [12\(5\)](#). New Zealand case law on appeal for domestic violence asks you to view the overall pattern of behaviour, rather than focusing on individual episodes of violence, and the combined effect of the alleged acts on the victim. See [SN v MN \[2016\] NZCA 384](#) at [26], [Surrey v Surrey \[2008\] NZCA 565](#) at [99]).

Victims often report that psychological or ongoing mental abuse is just as, if not more harmful, than physical or sexual abuse.

There have not been many published cases since the Family Protection Act came into force as noted by the Lord Chief Justice Whitten QC in [Tupou anors v Lavulavu](#) (supra).

See also: [Masima v Masima \[2019\] TOSC 2; AM 10 of 2019, 10 January 2019](#), [Fifita v Fifita \[2019\] TOSC 24; AM 9 of 2019, 6 June 2019](#). However, [Tupou](#) provides a very thorough analysis of what is required for protection orders.

## 2.5 Standard of proof

The Chief Justice noted in *Tupou*:

“The requirements must be satisfied by admissible evidence which, if accepted, proves the facts relevant to the requirements, to the requisite standard.”

The Supreme Court looked at what standard of proof is required before a magistrate can be satisfied of the truth or accuracy of the facts given in evidence as the Act itself is silent.

[Part 6](#), which provides for offences and penalties, is penal in nature and the criminal standard of proof will apply. However, [Part 2](#) of the Act only provides for civil remedies in the form of protection orders and the standard is on the **balance of probabilities**.

The actual degree of proof required may also depend on the urgency and the seriousness of the alleged actual or threatened domestic violence. If the application is “so urgent that an applicant can only manage to apply orally by telephone and the allegations involve very recent physical violence and threats of further imminent physical violence towards the applicant and her children, it may be open to a magistrate, on that (necessarily uncontradicted) evidence, to apply a lower test or measure of proof to be satisfied that it is more likely than not that the requirements of s [12\(1\)](#) and s [13\(2\)](#) exist such that an emergency protection order should be made.”

The Court also noted that on any ex-parte application, a court must make all necessary enquiries of the applicant to be as fully informed on the application as can reasonably be expected in the absence of [not being contested].

## 2.6 Special procedures for evidence in domestic violence cases

ss [10](#) and [25](#) FPA.

The Family Protection Act is silent on whether the court is bound by the strict rules of evidence, when hearing an application under the FPA. In *Tupou*, it was suggested that O.27 r.6(2) of the Supreme Court Rules will apply to permit, say, hearsay provided the source and grounds are stated, relying on Rule 3(2) of the Magistrate’s Court (Civil) Rules. Rule 3(2) provides where a situation arises that is not covered by the Magistrate’s Court Act, its Rules or any direction of a Magistrate in the proceeding, the corresponding Supreme Court rule shall apply.

The Chief Justice noted the following in terms of evidence for applications under the FPA:

- “47. Evidence on applications under the Act is not confined to affidavit. Section 10 provides for applications to be made orally, even by telephone. Section 25 enables applications for emergency protection orders to be made by police officers where a respondent has failed to comply with a Police Safety Order. In those true emergency situations, a Magistrate may take evidence from the applicant orally on oath even it is no more extensive than swearing to the grounds stated in the application. Whatever the form, the evidence ought to address the requirements for making the particular order.

...

- 49. The Act is silent on whether the court of first instance, in dealing with an application for a protection order, is bound by the rules of evidence. Somewhat curiously, as noted above, s 36(3) provides that on appeals, the Supreme Court and Court of Appeal are *not* bound by the rules of evidence.
- ...
- 51. One practical answer lies in the observation that the fact the Supreme Court is not bound by the rules of evidence does not mean it cannot, in appropriate cases, choose to apply them. So, if the Magistrate below acted on inadmissible evidence, not objected to by any opposite party (beyond an initial ex-parte application), it would be open to the Supreme court to follow suit on the rehearing by not applying the rules to that evidence.
- 52. Another solution lies in the interrelationship between the rules of the two Courts. Order 27 rule 6(2) of the Supreme Court Rules provides that an affidavit filed in support of an application may contain statements of information or belief provided that the source and grounds thereof are stated. O.27 r.6(2) will apply to permit, say, hearsay provided the source and grounds are stated."

## 2.7 Reluctant complainants

Victims of family violence may not wish to testify in court against their partner or former partner. This may be for reasons of fear, or a desire to preserve a relationship, or – conversely – because they are unwilling to be cross examined on a statement they have exaggerated or made up. It is important to understand why a complainant does not wish to give evidence.

It is not uncommon for family violence complainants to make different or contrary statements to other people, take back or withdraw from their original allegation in material ways, or downplay the extent of the violence. Changes to the original statement may also be in response to threats from the alleged offender, including what may happen to their children, their financial situation or to their immigration status.

Consider:

- Where the victim of domestic violence is unable to make an application personally due to physical incapacity, immature age, fear of harm or for any other reasonable cause, whether other persons may apply on behalf of such a person: s [9\(2\)](#) FPA.
- At the prosecution's request, issuing a subpoena for the complainant if they are not willing to appear and give evidence and there is no good reason for this: s [68](#) MCA.
- Options under s [69](#) MCA, when a witness refuses to give evidence, and at what point a complainant may be excused from giving evidence if it is due to circumstances beyond their control.
- Evidence of a complaint made at or shortly after a rape or other sexual offence by the complainant to show that their conduct is consistent with evidence at the trial: s [11](#) EA.
- Admission of previous consistent statements (made at the time or soon after the offending) and ability to refresh memory (if a family violence complainant cannot remember, or can only remember part of, their previous statement: s [154](#) EA.
- Allowing the prosecution to ask leading questions to seek clarification of ambiguities if a complainant's evidence is inconsistent with their previous statement: s [143](#) EA.



- Making a declaration of hostility if the prosecution wishes to challenge that witness's veracity or cross-examine the witness based on the prior inconsistent statement: s [147](#) EA.

See "Evidence" in the DCBB to find out more about these options.

### 2.7.1 Compellability

Family violence complainants are compellable to give evidence against their partners or family members, although many will (and often for good reason) be reluctant to testify: s [129](#) EA.

You may require any person present in court at the hearing of any charge, to give evidence whether they have been summoned to give evidence or not: s [163](#) EA.

Therefore, the complainant can be compelled to testify. However, consider reasons for their reluctance, which you may find out from an intermediary (victim advisor or the prosecutor), before invoking powers under s [163](#) EA or excusing the complainant from giving evidence.

You should consider any possible reasons (for example, pressure from the defendant) for a family violence complainant's failure to appear at court having been summonsed: s [69](#) MCA. This must be due to "circumstances beyond their control."

In [R v Burgess \(No 2\)](#) (unreported, High Court, Dunedin, T16/91, 18 February 1992) at 2, a victim of domestic violence who did not wish to give evidence against the defendant with whom she was in a domestic relationship for fear of the effect on that relationship, was excused from giving evidence.

See also: [Awatere v R \[2018\] NZHC 883](#) at [47], [R v Lologa \[2007\] 3 NZLR 844](#), [Brannigan v Sir Ronald Davison \[1997\] 1 NZLR 140](#) (PC). In [R v Burgess \(No 2\)](#) Williamson J noted that the decision to excuse a witness must be made in the context of the particular allegations, the overall circumstances, the relationship between the persons and the circumstances of the witness at the time when the refusal to give evidence is made.

In deciding whether to grant the prosecution any adjournment (s [31](#) MCA), you may consider:

- Have the police done all that they can to try and locate the complainant? What steps have they taken?
- Is there any evidence that the complainant has been threatened or got at?
- How serious is the offending? What is the strength of the evidence? Can the prosecution continue without the complainant?
- Does the complainant hold fears for their safety if they are compelled to give evidence?
- What if the complainant considers that their relationship – which they wish to preserve – will be destroyed if they are required to give evidence against their partner?

See discussion in [Leighton v Police \[2018\] NZHC 1319](#) (followed in [Ropiha v R \[2018\] NZHC 3204](#)), in respect of the prosecution's obligation to call witnesses whose narratives are essential to the case, irrespective of whether the evidence will help or hinder the prosecution. Although in both cases the Court held that while the police failure to call the complainant was an irregularity, this alone did not result in a miscarriage of justice.

In an extreme case you may consider if the complainant is refusing to give evidence whether they may be imprisoned for contempt of court under s 70 MCA. But this may also hinder reporting of any future episodes of violence.

### 2.7.2 Credibility of a complainant

The assessment of the accuracy and reliability of a primary victim's evidence, whether they are a defendant, complainant, witness or maker of a hearsay statement, must be informed by contextual material such as expert evidence. For example, staying in an abusive relationship or failing to report abuse are not reliable indicators of whether abuse was taking place as both reactions may be explained by a range of factors, including fears for safety, economic dependency and lack of a feasible escape route. A retraction does not mean that the original allegation was false as retractions can be the product of fear, shame and stigma and other pressures.

Long-term or serial victims of family violence may appear less credible given the emotional and psychological consequences of abuse. They may change their story and contradict themselves when giving evidence, have memory lapses, appear highly anxious, agitated and even aggressive. This does not mean the primary victim is generally untruthful but the result of understandable and well documented effects of abuse and coercive control. See for example [Ruka v Department of Social Welfare \[1997\] 1 NZLR 154 \(CA\)](#).

## 2.8 Ensuring the physical and psychological safety of complainants in court

Family violence often manifests as a complex pattern of abusive and controlling behaviours. For some complainants, engagement with the court process can exacerbate or prolong the trauma they have experienced as a result of the family violence. You should be alert to subtle forms of intimidation in the courtroom (verbal and silent), signals or threats of violence to come. Ensure witnesses are not intimidated while giving evidence.

You are responsible for ensuring that family violence complainants feel safe to participate in the court process without fear, while also ensuring fairness to the respondent. Steps you can take include:

- If the hearing is not ex parte (ie: the respondent will be present), make arrangements for the complainant to arrive through a separate entrance to the court complex, and wait in a separate place until the hearing starts (even if it is a makeshift space such as an office or storage room).
- Check if the complainant prefers to have screening in place in court to avoid visual contact between the complainant and respondent if necessary and if any children are giving evidence in court.
- Explain to all parties that they are safe to tell the truth and that the court will protect them from any threats or intimidation, including after the hearing, and that harsh penalties may apply for anyone obstructing justice or interfering with a witness.
- Some courts have in place a risk assessment questionnaire to help guide the court in assessing family violence risks (see for example the Risk Assessment Questionnaire used by the Palau Court).
- Court staff are equipped to advise complainant about making a safety plan if necessary, especially if the complainant will continue to cohabit with the respondent.

### 2.8.1 Safety advice

Advise complainants to:

- remove or secure any items in the house that could be weapons like knives, garden tools
- speak to neighbours they know and trust, and ask them to call the police if they hear violence or abuse
- have an escape plan ready: where to go and how to get there if they feel unsafe to stay where they are
- plan and practice (with children) how they might escape safely and quickly from their home, ready with essential items (phone, charger, keys, money, important papers, medication, items for children)
- have a code word or phrase they can use with someone they trust by phone or text so they know the person is in danger and needs help from them or the police, even if the defendant is in earshot.

## 2.9 Types of protection orders without notice (ex parte)

There are two types of protection orders that may be applied for on an urgent basis without notice (ex parte) to the respondent:

- emergency protection orders which must be decided on the same day as the application under s 13 FPA; or
- temporary protection orders which last for any period up to 90 days under s 14 FPA.

The Supreme Court in [Tupou v Lavulavu \[2020\] TOSC 32; AM 20 of 2019, 10 June 2020](#) compared the two types of orders and noted that:

- applications for emergency protection orders will be marked by an element of urgency in respect of actual or threatened domestic violence which is imminent and which requires urgent intervention to prevent any further occurrence, or the threat of it materializing;
- applications for temporary protection orders will be granted if the court considers it to be in the best interest of the complainant or other person at risk by considering whether there is risk of domestic violence or economic abuse to the complainant or other person at risk if the order is not granted immediately.

### 2.9.1 Emergency protection order

s 13 FPA

On receiving an application without notice to the respondent (ex parte), you may make an emergency protection order (EPO) if satisfied that there are reasonable grounds for believing that if an emergency protection order is not made:

- the respondent may commit domestic violence against the complainant or other person at risk;

- the respondent may cause economic abuse or damage to or removal of the property of the complainant or child or any other member of the family or person at risk living in the same household; or
- the complainant will be prevented or deterred from pursuing the application if the order is not made immediately: s [13\(2\)](#).

An application:

- may be made ex parte and orally or in writing: s [13\(1\)](#);
- requires any order made to be sent immediately to the police in the area where the complainant is residing who are then to try to effect service on the respondent as soon as possible: s [13\(4\)](#);
- limits the period of any order to not exceeding 28 days: s [13\(5\)](#); and
- requires you to determine the application on the same day it is made unless there are exceptional circumstances: s [13\(6\)](#). See *Tupou v Lavulavu* (supra).

You may include any of the standard conditions set out in [Division 4 of Part 2](#) of the Act and specify how long the order is effective for up to 28 days: s [13\(3\)](#) and [\(5\)](#).

### 2.9.2 Temporary protection order

s [14](#) FPA

On an ex-parte application, you may grant a temporary protection order (TPO) if you think it to be in the best interest of the complainant or other person at risk and taking into account:

- whether there is risk of domestic violence or economic abuse to the complainant or other person at risk if the order is not granted immediately: s [14\(1\)](#) and [\(2\)](#).

You may include any conditions listed in [Division 4 of Part 2](#) for any period up to 90 days that you think appropriate: s [14\(1\)](#), [\(6\)](#) and [\(7\)](#).

Such orders are also to be served immediately on the respondent with notice of a date for hearing and that if the respondent does not take any steps in the proceeding, the order may become final: s [14\(3\)](#) and [\(4\)](#). Otherwise, temporary orders are only effective for up to 90 days: see *Tupou v Lavulavu* (supra).

If the respondent fails to appear before the court after being served with the TPO and notice of the hearing and you are satisfied on the evidence that the respondent has been served with a temporary protection order, you may:

- give further directions; or
- order that the temporary protection order becomes final which comes into effect immediately: s [14\(5\)](#).

### 2.9.3 Principles to apply for making orders on a without notice basis

A cautious but realistic approach is needed when considering applications made on a without notice basis, as the New Zealand courts have stated. Overall, this requires you to balance two important considerations:

- the need to protect victims and potential victims of family violence from the effects of delays in making a protection order; and

- making an order without notice which means the respondent is not given the opportunity to be heard before the court imposes conditions on them (see [CRA v Family Court at Blenheim \[2015\] NZFLR 731; \[2015\] NZHC 1604](#), per Dobson J at [20]).

Consider the applicant's own viewpoint; whether they are afraid of future violence and whether that fear is reasonably held. Factors to consider include:

- The nature and seriousness of past violence and risk of future violence. The single most reliable predictor of future violence is a history of prior multiple offences. But a serious one-off episode may still pose sufficient risk to justify an order.
- The applicant's view of the nature and seriousness of the respondent's behaviour (including subjective fears for the future).
- The effect on the applicant of how the respondent behaves.

You must still consider whether the application supports the decision that proceeding on notice would or might entail a risk of harm. Unless it does, the application must proceed on notice.

## 2.10 Final protection orders at a hearing

s 15 FPA

Where an application is made on notice for a protection order and you are satisfied on the evidence that notice has been served on the respondent in accordance with [Form 3](#) in the Schedule, you may:

- give further directions as to the hearing of the application or generally; or
- make any order that you think appropriate, including a final order, and include any conditions set out in Division 4 (below) in [Form 4](#) in the Schedule: s 15(1).

A final protection order remains in force unless varied or cancelled by you on an application by a party, if there is good cause: s 15(2).

In considering the application, you must take into account the best interests of the complainant and any other person at risk: s 15(3).

## 2.11 Withdrawal of complaint

s 32 FPA

Where a complainant makes an oral or written application for withdrawal of an application for a protection order against the respondent, you must:

- Investigate the reasons for withdrawal. Ensure to check especially for any threats, coercion or intimidation made against the complainant which could be the underlying reason they seek to withdraw their complaint.
- Consider the safety and wellbeing of the complainant and any person at risk.

You may then:

- make further directions; or
- grant or refuse the application.

## 2.12 Conditions of protection orders

Division 4, ss 16 and 17

<b>2.12.1 Standard conditions: s 16</b>	
<p>The respondent must not do any of the following acts:</p>	<ul style="list-style-type: none"> <li>➤ commit domestic violence or physically or sexually abuse the complainant, or other person at risk;</li> <li>➤ encourage any other person to engage in behaviour against a complainant or other person at risk where the behaviour, if engaged in by the respondent, would be prohibited by the order;</li> <li>➤ approach the complainant while under the influence of alcohol or non-prescription drugs, and likewise neither shall the complainant so approach the respondent;</li> <li>➤ be in possession of any firearm, and the respondent shall surrender any weapon to the nearest police station or dispose of any weapon that has been used or threatened to be used to commit domestic violence.</li> </ul>
<p>When the complainant (or a person at risk*) and the respondent are living in the same dwelling house, the respondent shall not: s 16(2)</p> <p>* you may order that any of these conditions extends to any other person at risk as well.</p>	<ul style="list-style-type: none"> <li>➤ watch, loiter near, or prevent or hinder access to or from, the complainant's place of residence, business, employment, educational institution, or any other place that the complainant visits often;</li> <li>➤ follow the complainant about or stop or accost the complainant in any place;</li> <li>➤ where the complainant is known to be present on any land or building, enters or remains on that land or building without the complainant's express consent; and</li> <li>➤ make any other contact with the complainant (whether by telephone, electronic message, correspondence, or otherwise), except such contact: <ul style="list-style-type: none"> <li>• as is reasonably necessary in any emergency; or</li> <li>• as is permitted under any order or written agreement relating to the role of providing day-to-day care for, or contact with, or custody of or access to any children.</li> </ul> </li> </ul>
<b>2.12.2 Conditions relating to property and accommodation: s 17</b>	
<p>You may make any of the following orders:</p>	<ul style="list-style-type: none"> <li>➤ an order preventing the respondent from taking, damaging, destroying, burning, selling or giving away any property of the complainant or other person at risk;</li> <li>➤ direct the respondent to:</li> </ul>

	<ul style="list-style-type: none"> <li>• return through a third party any specific personal property of the complainant or other person at risk; or</li> <li>• allow the complainant or other person at risk to recover, have access to, or make use of any specified personal property;</li> </ul> <p>➤ grant the complainant or other person at risk temporary occupancy to a residence or specified part of it whether or not the residence is solely owned or leased by the respondent. This is an effective way to reduce disruption to the complainant and dependent children, taking into account their 'best interests' under Art <a href="#">3(1)</a> of the Convention on the Rights of the Child (CRC). This will provide stability and maintain continuity of their schooling and local support networks.</p>
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### 2.13 Custody, access and maintenance orders

ss [18](#) and [19](#) FPA; s [2](#) Maintenance of Deserted Wives Act; Article [3\(1\)](#), [19](#) Convention on the Rights of the Child (CRC).

A protection order may include, where appropriate, all or any of the following conditions:

- a custody order granting temporary or final custody of any dependent child to the complainant or to another appropriate person if you are satisfied that it is for the safety and welfare of the child and in their best interests;
- an access order to the respondent under such terms and conditions that you think appropriate and in the best interests of the child;
- a maintenance order directing the respondent to pay maintenance in cash or kind or both to the complainant and any dependent children: s [18](#);
- an order for urgent maintenance where it appears that the party is in need of immediate financial assistance, until further orders of the court are made;
- payment of a weekly, monthly or other periodic amount as you consider reasonable: s [19](#).

You may make a custody order, maintenance order or access order for a married couple and their children under section 2 of the Maintenance of Deserted Wives Act. This means that you do not have to make a protection order to make a custody order, access order or maintenance order if the parties are married. See [Masima v Masima \[2019\] TOSC 2; AM 10 of 2019, 10 January 2019](#).

## 2.14 Compensation

s [30](#) FPA

You may make an order that the respondent pay reasonable and fair compensation if the victim suffered any of the following losses due to an act of domestic violence:

- personal injury;
- damage to property; or
- financial loss.

In so doing, you must take into account any of the following matters:

- any pain and suffering of the victim or other person at risk, including psychological harm, shame and humiliation suffered;
- the value of any property of the victim that has been taken, destroyed or damaged;
- the loss of earnings suffered by the victim.

When assessing any expenses claimed you must consider:

- the time that has elapsed between the domestic violence occurring and the hearing of the application for compensation;
- the financial position of the parties;
- the ability of the respondent to pay compensation;
- the relationship between the parties;
- any other order made under this Act including any order that the respondent pay maintenance to the complainant and any dependent children;
- any other order you think relevant to the issues to be determined in relation to the claim for compensation.

## 2.15 Applying to vary or cancel a protection order

s [20](#) FPA

The respondent or the complainant may apply upon written notice to the other party and the court ([Form 3](#) in the Schedule) to vary or cancel a protection order.

Section [20](#) permits any party to apply for a variation or cancellation of a protection order. The court may grant such an application where it is satisfied that good cause has been shown and the application has been made freely and voluntarily.

If you are satisfied that good cause has been shown to vary or cancel the protection order, and the application has been made freely and voluntarily, you may issue an order to this effect and set out the order on [Form 5](#) of the Schedule.

The court clerk must forward the order and any variations made to the original protection order to the complainant and the respondent.



## 2.16 Service of orders and of applications

s [31](#) FPA

The Court shall issue as soon as practicable after filing an application for a protection order:

- a summons directing the respondent to appear at the time and place set out in the summons on [Form 3](#) in the Schedule; or
- a warrant in accordance for the arrest of the respondent (see below): s [31\(1\)](#).

You may issue a warrant of arrest if you are satisfied that the personal safety of the complainant would be seriously threatened unless the respondent is apprehended and brought into custody: s [31\(2\)](#).

The court must give two copies of the application and any summons or warrants to the police officer in charge of the police station nearest to where the respondent lives or was last known to live to personally serve these on the respondent.

Once service is carried out, the police officer must complete and file an affidavit of service in the court.

In the case of a warrant, the police officer shall arrest the respondent and take him into custody.

## 2.17 Power of court to conduct hearings in private

s [39](#) FPA

The court hearing an application for a protection order is not open to the public.

A person may not be present during the hearing of an application unless they are:

- a party to the proceedings;
- an officer of the court;
- a legal or other representative of the party;
- a witness (if allowed by you); or
- any other person whom you permit to be present.

A complainant is entitled to have a person with them throughout the proceedings to provide support and other assistance.

## 2.18 Confidentiality

s [40](#) FPA

Police officers shall not disclose the identity of any person who reports to the police the possible occurrence of domestic violence. You must as far as possible respect the confidentiality of such person and their need for protection in any proceedings for domestic violence.

## 2.19 Duties of police in domestic violence cases

Part 4 (ss [22-26](#)) FPA, and s [27\(2\)](#)

A police officer must give priority to domestic violence cases: s [23\(6\)](#).

In the event the police receive a report of domestic violence from a health practitioner or social service provider under s [27\(1\)\(b\)](#), the police must:

- start the processes required to investigate the incident and take action;
- ensure that the complainant or other person at risk is duly informed about the outcome of the investigations and of their rights and the remedies available under this Act: s [27\(2\)](#).

For any domestic violence incident that comes to their notice, the police must if necessary, make arrangements for persons at risk to find suitable shelter and obtain medical treatment or counselling services: s [26\(2\)](#).

A police officer who is handling any report of domestic violence (if there is sufficient evidence for doing so and either the complainant or the Attorney General supports the prosecution of the offence), must do all things necessary to ensure that a charge is laid with the court to commence prosecution: s [26\(1\)](#).

In every case prosecuted before the court, the police must:

- provide information to the parties about court processes and procedures in a language that they understand, the remedies available under this Act and the right to have access to a lawyer and lodge an appeal;
- as far as practicable, provide specialist female police officers to assist female victims and persons at risk of domestic violence; and
- where necessary, make arrangements for the complainant and persons at risk to find suitable shelter, and to obtain medical treatment or counselling services where needed: s [26\(3\)](#).

## 2.20 Police safety orders

ss [22](#) and [23](#) FPA

If a police officer (above the rank of constable) suspects on reasonable grounds that a person has committed a domestic violence offence (the respondent) they may issue a police safety order immediately to that person (the respondent) and that person shall vacate any land or building occupied by a person at risk, even if they have any legal or equitable interest in the land or building: s [22](#).

The respondent must be or have been in a domestic relationship with a person at risk and the reasonable grounds are that the respondent has either:

- committed or is about to commit a domestic violence offence relating to that person at risk; or
- breached a protection order: s [22\(1\)](#).

In deciding on whether to issue the order, the police officer must have reasonable grounds to believe, that the issue of such an order is necessary to ensure the safety of any person at risk: s [22\(1\)](#). Unless they arrest that person for an offence against any law involving the use of violence.

The police officer must also consider the following matters:

- the likelihood that the respondent will use, or again use domestic violence against the person at risk;
- the welfare of any children residing in the relevant household;
- the hardship that may be caused if the order is issued; and
- any other matter the police officer considers relevant: s [22\(2\)](#).

The police officer should serve the order as soon as practicable on the respondent and the order comes into force immediately upon being served on the respondent: ss [22\(3\)](#) and [23\(1\)](#). If the order has not been served within 48 hours from the time of issue, the order lapses: s [23\(4\)](#).

The order continues in force for the period specified in the order up to maximum of seven days and may be issued without the consent of a person at risk for whose safety the order is proposed to be issued: s [22\(4\)](#), and [23\(2\)](#).

A police officer who issues the order must explain to respondent:

- the purpose, duration and effect of the order;
- the consequences that may follow if respondent breaches the order: s [23\(3\)](#).

### **2.20.1 Effect of police safety order**

s [24](#) FPA

A person against whom a police safety order is issued (respondent) must:

- immediately surrender any weapons in his possession or control, that could be used to commit domestic violence;
- vacate any land or building occupied by a person at risk, whether or not he has a legal or equitable interest in the land or building: s [24\(1\)](#).
- comply with the conditions of the order to not:
  - physically or sexually abuse or threaten to abuse a person at risk;
  - remove, damage or threaten to damage, property or any animal belonging to a person at risk;
  - harass, stalk, intimidate, follow or verbally abuse a person at risk; or
  - make any contact with a person at risk except where it is reasonably necessary in any emergency: s [24\(2\)](#).

### 2.20.2 Breach of a police safety order

s [25](#) FPA

If the respondent who has been served with a police safety order fails to comply with the order or any condition of the order, a police officer must:

- take the person into custody; and
- apply to the Magistrate's Court on behalf of the person at risk for an emergency protection order under section 13: s [25\(1\)](#).

A respondent taken into custody must be brought before the Magistrate's Court within 24 hours: s [25\(2\)](#). But if this is not practicable a police officer of the rank of sergeant or above or in charge of the police station must inquire into the case and, at or before the expiry of that period:

- grant or withhold bail in accordance with the [Bail Act](#); or
- release the person and serve him with a summons requiring him to appear before the Magistrate's Court at the place and time specified in the summons: s [25\(3\)](#).

If the respondent who has been served with the summons does not attend personally at the place and time specified in the summons, you may issue a warrant to arrest him and bring him before the court: s [25\(4\)](#).

## 2.21 Role of health practitioners and social service providers

### 2.21.1 Duty of care and response to reports of domestic violence

s [27](#) FPA

Every health practitioner and social service provider who has been or is notified by a complainant or other person at risk that they have been a victim of domestic violence has a duty of care to:

- examine and refer the complainant or other person at risk to counselling or medical treatment as appropriate; and
- advise the complainant about filing a complaint with the police or refer any child victim for counselling or medical treatment and file a report with the police on their behalf: s [27\(1\)](#).

The health practitioner must examine the complainant or person at risk and, applying the protocol on professional standards and confidential treatment, further advise the victim of support options and medical treatment available: s [27\(3\)](#).

Any social service provider who has been notified by a complainant or person at risk that they have been or are a victim of domestic violence has certain specified duties to assist the victim or other persons at risk as appropriate as set out in section [27\(4\)](#).

Any health practitioner or social service provider must first get the consent of the complainant or other person at risk, before they give any information acquired while doing their duties under this Act to any other person under this Act: s [27\(5\)](#).

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### 3.1 Domestic violence offences and breaches of protection order

Part 6, ss [28-30](#) FPA

A person commits a domestic violence offence if they (s [28\(1\)](#)):

- commit domestic violence (defined in ss [2](#) and [4](#))
- breach a protection order
- fail to comply with a Police Safety Order
- threaten, intimidate or assault a health practitioner or social service provider who is acting under a duty of care under s [27](#).

If a person instigates, counsels or procures another person to commit an act of domestic violence, that person is also guilty of a domestic violence offence: s [28\(4\)](#).

The penalties are (s [28\(2\)](#)):

- for a first offence, a term of imprisonment not exceeding 12 months or a fine not exceeding \$2,000 or both;
- for a second or subsequent offence, a term of imprisonment not exceeding three years or a fine not exceeding \$10,000 or both.

You may also order that the respondent pays compensation in accordance with section [30](#).

It is not a defence to a domestic violence offence that the respondent has paid compensation or reparation to the complainant or to their family: s [28\(3\)](#).

A person who makes a misleading or false application for a protection order commits an offence and is liable on conviction to a term of imprisonment up to 12 months or a fine up to \$4,000, or both.

#### 3.1.1 Sentencing considerations for breach of protection orders

The New Zealand Courts have long recognised that an offence committed in breach of a protection order is a significant source of aggravation: [Preston v R \[2016\] NZCA 568; \[2017\] 2 NZLR 358](#) at [161], [Sharma v R \[2015\] NZCA 468](#), [R v Singh \[2014\] NZHC 1246](#).

In [Morris-Smith v New Zealand Police \[2016\] NZHC 1030](#) Wylie J at [15] noted that where there has been repeat offending over a brief time, a short term of imprisonment is the proper response.

A high degree of physical violence is not required for a breach to be considered serious: [Robinson v New Zealand Police \[2019\] NZHC 1412](#) at [17]. Any significant violence will likely be reflected in a separate charge: [Palmer v Police \[2015\] NZHC 143](#) at [23].

See also: [Weidemann v R \[2018\] NZCA 381](#); [Knight v Police \[2019\] NZHC 1258](#); [McGregor v R \[2019\] NZHC 1069](#).

Breach of protection orders is a category of offending in which prior breach convictions against the same partner may be relevant in assessing the starting point. In these cases, culpability requires taking account of the relationship history: [Mitchell v R \[2013\] NZCA 583, \(2013\) 29 FRNZ 498](#) at [12].

While one set of facts may look less severe compared to another, it may be that the offending in one, while a minor breach in or of itself, is significant in the context of the history between the defendant and the complainant: [Jackson v New Zealand Police \[2019\] NZHC 281](#) at [42].

However, care must be taken to ensure there is no double counting of previous convictions when aggravating personal circumstances are assessed at the second stage of the sentencing exercise.

Breach convictions against different partners should not be factored into the start point but will be a personal aggravating factor that may justify an adjustment to the starting point. See [R v Taveki \[2005\] 3 NZLR 327](#), [Tekuru-Reid v R \[2018\] NZHC 2419](#).

### 3.2 Bail applications in domestic violence cases

s 4 Bail Act (BA).

Section 4(1) provides for the mandatory granting of bail to defendants charged with an offence punishable by imprisonment (except for murder or treason).

Exceptions to granting bail are then set out including where there are *substantial grounds* for believing that, if released on bail with or without conditions, the defendant will (s 4(1)(i) BA):

- fail to surrender to custody;
- commit an offence while on bail; or
- interfere with witnesses or otherwise obstruct the course of justice, whether in relation to the accused or any other person.

Risk lies at the heart of bail determinations. In considering whether there are 'substantial grounds' for the defendant to be remanded in custody or for continued detention, you must also take into account the risk factors set out in s 4(2) BA (see also "Bail Applications" in the DCBB).

In deciding whether to grant bail, the primary considerations are the need to protect the safety of the public and, with a family violence offence, the victim(s) of the alleged offending including any person or people in a family relationship with the victim.

If the defendant is charged with breach of a protection order, your main consideration in deciding on bail, is the need to protect those who are "protected persons" under a protection order.

In determining family violence bail applications, you should:

- outline the greatest risks from s 4(1) and (2) BA,
- identify any (evidence-based) family violence risk factors that apply in the particular case (see "red flag" risk factors below),
- identify any mitigating factors relevant to the defendant, and

- consider whether bail conditions are sufficient to address those risks (bearing in mind the court's primary consideration to protect the complainant).

In the context of family violence offences, some of the risk factors under s [4\(2\)](#) BA that may be considered are set out below.

### 3.2.1 Risk of interfering with witnesses and evidence

s [4\(1\)\(i\)\(c\)](#) BA

The nature of the relationship that exists between the defendant and the complainant (for example, ongoing relationship / having children together) heightens the risk that the defendant will intimidate or interfere with the complainant (witness) or any person in a family relationship with the complainant.

Key considerations include:

- Whether the defendant is likely to put pressure on the complainant to withdraw the charge. Consider the seriousness of the charge, the impact on the defendant, employment implications.
- Does the defendant have a history of breaching orders or bail conditions? Is there a pattern and continuation of offending? See [Poulton v Police \[2018\] NZHC 1201](#).
- Is there evidence of the defendant contacting the complainant or going to places where the complainant is likely to be? See [Hawke v Police \[2016\] DCR 84](#).
- Is there evidence of the defendant contacting the complainant for apparently innocent reasons; for example, emails about child contact or property matters?
- Has the defendant previously breached protection orders or police safety orders? See [Carr v Police \[2015\] NZHC 2853](#), [Anderton v Police \[2018\] NZHC 437](#).
- Is there an element of emotional manipulation or persuasion? For example, the defendant "is scared at the prospect of leaving her", "could not live without her" or is threatening self-harm. See [Manu v Police \[2016\] NZHC 181](#), [Ali v Police \[2016\] NZHC 2189](#).
- Is there a history of non-compliance with court orders generally.

### 3.2.2 Risk of offending while on bail

s [4\(1\)\(i\)\(b\)](#) BA

The likelihood of ongoing contact between a defendant and complainant in family violence matters increases the risk of offending while on bail, both against the complainant and people in a family relationship with the complainant (for example, children or a new partner).

Key considerations include:

- Does the family violence history show a pattern of behaviour or escalation in seriousness of offending? Look at previous violence history and offending against other partners. In [Hassani v Police \[2019\] NZHC 1378](#) at [9] the Court confirmed that a judge may take into account the risk that any future offending against the alleged complainant may escalate in seriousness.



- Do the alleged occurrences involve other family violence risk factors?
- Is the defendant the main aggressor in the relationship?

### 3.2.3 Nature and relative seriousness of the offence charged

s [4\(2\)\(a\)](#) BA

In family violence cases, the seriousness of the charge and the severity of the possible punishment may make it more likely a defendant will attempt to influence the complainant: [Tuhua v Police \[2014\] NZHC 3251](#). You should consider the nature of the relationship between the defendant and the complainant and opportunities for contact.

### 3.2.4 Strength of prosecution case

s [4\(2\)\(d\)](#) BA

Where family violence is alleged, the courts have recognised that the nature and dynamics of family violence are relevant when assessing the strength of the evidence.

### 3.2.5 Character and past conduct and prior criminal record

s [4\(2\)\(b\)](#) BA

In the family violence context other matters showing previous uncharged offending may also be considered in assessing the "character and past conduct" of the defendant: [Thornton v Police \[2016\] NZHC 105](#), [Kira v Police \[2015\] NZHC 1437](#), and [Riley v R \[2016\] NZHC 533](#).

A wide range of material has been received in bail hearings involving family violence, notably risk assessment information. The test is one of relevance.

## 3.3 Bail conditions

s [5](#) BA.

In judging how effective conditions may be under s [5](#) BA, to protect the complainant and other family members from family violence, you should have regard to the unique nature of family relationships and allegations involving family violence.

For example, if the defendant chose to abscond and was bailed to an address sufficiently close to the complainant's location, they may get to the complainant before the Police, as they may know the complainant's schedule (Katz J in [Kohu v Police \[2018\] NZHC 3364](#) at [24]–[28] and [Kira v Police \[2018\] NZHC 3354](#) at [19]).

Bail conditions must be rationally related to the identified risk(s) and be no more than is reasonably necessary to address them. Conditions must also attach to the statutory objective in family violence cases, which is the greater protection of families.

Family violence offending has a unique risk profile, in which conditions of bail can be crucial in managing the risk of future family violence occurring. It is the combination of factors which heightens the risk of lethal and non-lethal violence, rather than any one factor on its own: [Noble v Police \[2014\] NZHC 562](#).

In *Noble*, Katz J declined the bail variation on the basis that several risk factors were present, noting that where a number of risk factors are present, imposing stringent bail conditions may not be sufficient to manage the risk of further offending (at [23]).

When imposing bail conditions, consider:

- the nature of the offending,
- the defendant's family violence history and
- presence of any family violence risk factors (particularly obsessive or stalking-like behaviour and recent separation).

When considering the proximity of the bail address, you should also consider the location of places the complainant regularly goes, for example, workplace, school or child-care centres, addresses of close friends and family.

It is routine for a non-association condition to be imposed in family violence cases, as being "reasonably necessary" to address risks of further offending and/or communication with a complainant": see for eg: [Mataia v New Zealand Police \[2015\] NZHC 1800](#) at [16].

### 3.4 Sentencing

You may adjourn criminal proceedings following conviction to make inquiries prior to sentencing. This may include looking at a rehabilitation programme or course of action for the defendant to undertake.

Successful engagement in a programme can inform consideration of suitable sentence. There should be a plan in place for a programme, with written confirmation that the offender has already enrolled or has a start date.

*Aggravating* circumstances in relation to a domestic violence offence, that you may take into account in ordering greater penalties for the offender are where:

- domestic violence is committed against a child, or the action of domestic violence is performed in the presence of a child;
- domestic violence is committed against a person with special needs, a pregnant woman, or a woman who, due to whatever reason, is incapable of resisting;
- violence is severe or life threatening;
- a weapon is used; or
- the respondent has committed repeated incidents of domestic violence.

### 3.4.1 Discharge without conviction

s [204](#) COA

You may order the defendant to be discharged without conviction absolutely or on the condition that they commit no offence during such period, not exceeding three years from the date of the order. You may do so where you think that:

- it is inappropriate to inflict punishment, and
- a probation order is not appropriate: s [204\(1\)](#) CoA.

You must first consider:

- the circumstances including the nature of the offence, and
- the character of the offender.

Circumstances where it will be appropriate for the court to grant a discharge without conviction will rarely arise and the court should exercise its discretion sparingly. It will not be sufficient without more that an offender is generally a person of good character, has no prior convictions or is a young person. If those factors were sufficient, discharges without conviction would be routinely given and that should not be the case: [R v Maile \[2019\] TOCA 17; AC 23 of 2018, 17 April 2019](#).

The system of criminal law relies upon the principle that those who are guilty should be accountable for the consequences. The first consequence is a conviction. The person is convicted because they have committed the crime. However, if a discharge without conviction is given, it is the same as if the person had been found not guilty. This illustrates that such a discharge must be kept for exceptional cases.

New Zealand appellate decisions have acknowledged the "social problem" of family violence when considering the three-step proportionality test, suggesting that the proportionality scales to be applied may be tipped when the offending occurs in an area of such considerable social concern.

A domestic assault is very serious and it would be difficult to imagine a consequence that would be out of all proportion to such a serious crime, for example, if a man assaulted his partner then, even if a conviction meant he could not travel, that consequence would not be out of proportion to the serious assault. In such circumstances you could not give a discharge without conviction.

See for example: [Heketa v New Zealand Police \[2018\] NZHC 2204](#) per Cooke J at [42].

## 3.5 Best practice approach to risk assessment

Any assessment of risk in deciding bail applications, making protection orders and in sentencing options should be informed by:

- a robust understanding of the nature and dynamics of family violence and how it intersects with child abuse and neglect;
- identifying evidence-based risk factors present and how significant those risk factors might be, with a particular focus on the defendant's current and past actions;

- identifying patterns of behaviour, patterns of violence and use of coercive control;
- the heightened risk and diverse needs of groups that are vulnerable to family violence;
- the victim's own views relating to their risk (noting the nature and dynamics of family violence);
- addressing countervailing factors, ie: factors that reduce or mitigate the identified risks.

Risk assessment is a complex, ongoing and evaluative process rather than a one-off event. You should consider both static risk factors (unchanging factors that statistically increase the risk of family violence) and dynamic factors (precipitating factors that can rapidly increase risk to a victim and their children).

### 3.5.1 Red flag risk factors

In determining the risk of further offending while on bail, Katz J in [Noble v Police \[2014\] NZHC 562](#) noted that "domestic violence has its own unique features" and "its risk profile differs in some respects to other forms of violent offending".

This has led to "red flag" factors being used to assess risk of offending in family violence cases. This approach was initially taken in *Noble* (see "Best practice approach to risk assessment" above) and endorsed in *Fairbrother v Police [2016] NZHC 3033*. The "red flag" factors were further considered in [S v New Zealand Police \[2017\] NZHC 2916](#).

In Tonga, these risk factors are also relevant and so are included for reference.

In *Noble v Police* the risk factors were identified (from a New Zealand, Ministry of Social Development report, April 2010, "[Learning from Tragedy: Homicide within Families in New Zealand 2002-2006](#)"):

- Actual or pending separation between the parties (threatened, imminent, or recent estrangement of being the highest risk).
- Former partner entering a new relationship with someone else (or that the defendant believes they have).
- A history of domestic violence either with the same or previous partners, which may include a history of violating protective orders.
- Jealousy, obsessive behaviour, or pre-occupation with the victim (includes stalking).
- Acute depression (may include threats of suicide).
- Escalation of physical violence or other abusive behaviour.
- Threats to kill the victim or someone associated with them.
- Alcohol and/or drug use: eg: [Campbell v Police \[2018\] NZHC 3438](#).
- Destabilisation – ongoing stresses that can upset emotional balance and mental health.
- Recent acquisition or change in use of weapons.
- Symbolic violence (eg: destruction of victim's property or harming pets).
- Recent termination of employment.

In [S v New Zealand Police](#), Whata J noted that the MSD Report attaches different weight to each risk factor and a more nuanced assessment of the relevance of risk factors is required to consider (at [49] – [51]):

- Factors which are most indicative of a defendant’s potential to cause lethal or serious harm. For example, past patterns of domestic violence separation issues, jealousy, stalking behaviour, unemployment, and history or drug/alcohol abuse.
- The defendant’s past pattern of coercive and/or controlling behaviour (includes documented and undocumented violence).
- The defendant’s personal circumstances. This includes any mitigating factors that might reduce the significance of the identified risk factors (eg: immediate family support).

Whata J also noted that the courts have identified factors which may mitigate the risk of any of the events occurring. These include:

- a lack of family violence convictions and incidents;
- a proposed bail address which is sufficiently far from the complainant;
- delay, particularly if the defendant is likely to spend a significant time in custody awaiting trial (relative to the likely sentence if found guilty);
- significant gaps between past and current offending;
- pro-social support, particularly at any proposed bail address; and
- a history of compliance with court orders.

Case law has also suggested that certain factors do not mitigate the risks:

- A complainant’s own assessment of safety and/or retraction of their complaint.
- The fact a guilty plea is entered. See [Hsu v Police \[2018\] NZHC 3351](#).
- The defendant’s apparent lack of knowledge of the complainant’s address. See [Kira v Police \[2018\] NZHC 3354](#).

The following factors are strong indicators of a defendant’s potential to cause lethal or serious harm:

### 3.5.2 Family violence history

A defendant’s family violence history is relevant in determining:

- their risk of offending and/or risk of interference with witnesses (bail risk assessment);
- what protective conditions should be put in place for the victim and their family (civil and criminal proceedings); and
- whether any past interventions have been effective in reducing the defendant’s family violence offending.

However, in the context of family violence offending, a limited family violence history does not necessarily indicate low risk to the victim. Although family violence frequently involves a pattern of abusive behaviour it is typically under-reported.

### 3.5.3 Intended, attempted or recent separation

Research shows intended, attempted or recent separation is the most significant precipitating, or event-based, factor associated with an increased risk of serious or lethal violence towards women and their children. See for example [Iese v Police \[2019\] NZHC 2776](#).

### 3.5.4 Intimate partner sexual violence

Intimate partner sexual violence is a significant indicator of escalating frequency and severity of family violence. However, victims may not know or understand this. Casework experience suggests that many sexual assaults in intimate relationships are unreported, and often undisclosed, even where other forms of violence are reported (Australian National Domestic and Family Violence Bench Book). See: [S v S FC Nelson FAM-2006-042-550, 2 November 2006](#), and [Justill v Bush \[2015\] NZFC 2407](#).

### 3.5.5 Jealousy and obsessive behaviours

The presence of coercive and controlling behaviours with high levels of possessive jealousy are associated with serious harm and lethal violence. Be alert to:

- the defendant stalking and/or monitoring the victim,
- statements that the defendant cannot contemplate life without the victim,
- high levels of sexual jealousy and monitoring to guarantee sexual fidelity,
- controlling and obsessive behaviours, including limiting victim's contact with friends and family.

See [R v Chase \[2016\] NZHC 2665](#) at [110], [R v Christison \[2013\] NZHC 2813](#), Heath J at [10], and [Muliipu v R \[2013\] NZCA 257](#).

Note that highly intrusive control and/or extreme jealousy are indicators of serious risk even in the absence of physically violent behaviour.

### 3.5.6 Warnings or threats

Mental abuse includes repeated threats to cause physical and emotional pain: s 2 FPA. Threats by the defendant to hurt or cause actual harm to family members – particularly threats with a weapon – can be a way of controlling the victim through fear. Threats to kill are often genuine.

Consider:

- A victim's fear is one of the best predictors of risk and danger, although the absence of fear is not a reliable indicator of safety.
- Implied threats as well as overt threats: [R v Chase](#).
- Threats and abuse of people other than the primary victim.
- Threats used to control the victim from seeking support.
- Threats by the defendant to hurt or kill their partner, a child, other relatives or themselves, if their partner left them.

### 3.5.7 Strangulation or suffocation

Strangulation and suffocation are key indicators for risk of a future fatal attack. Both strangulation and suffocation interfere with a person's ability to breathe, although suffocation may not necessarily involve the application of force to the neck.

### 3.5.8 Victim's assessment of own risk

If a victim expresses fear or concern for their protection, this should be taken as an indicator that protection is an issue: see [Glover v Police \[2018\] NZHC 1879](#) at [13].

Victims are often familiar with the defendant's patterns of behaviour, and attuned to changes in the nature and level of risk this presents as a result. They can also provide information relevant to their safety management.

However, note the following cautions regarding victims' views:

- The episodic nature of family violence, and the coercive and controlling tactics of a defendant, can lead victims to retract statements and/or minimise offending.
- Sometimes victims are not able to make an accurate assessment of their level of risk (for example, when experiencing mental health issues or severe, ongoing coercive control).
- Victims may underestimate their level of risk (eg: the non-disclosure of intimate partner sexual violence) and a victim's perception of their own risk is not sufficient of itself to accurately determine severity or incidence of violence.

In all cases, a victim's views need to be put into context considering the nature and dynamics of family violence and must be considered alongside all other relevant information.

### 3.5.9 Risk factors for children

Family violence death review reports indicate that risk factors for victims of family violence (specifically victims of intimate partner violence) are also indicators of risk for children.

When risk factors are high, both adults and children are at risk or in danger. Family violence and child abuse and neglect are entangled forms of abuse. The most common types of family violence are intimate partner violence and child abuse. In 70 percent of intimate partner violence cases involving children, the children are being abused too.

Even if children are not physically abused, their exposure to violence can cause serious and sometimes permanent harm. Further, an act directed towards a child is often intended to affect another (the parent/mother) to keep and/or increase control over both.

Consider risk factors for children in relation to bail conditions (non-association, geographic exclusion zones), protection orders, sentencing options and contact arrangements.

## 4. Process for emergency or temporary and final protection orders

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<b>4.1 Preliminary matters</b>	
1	There are two type of protection orders that may be applied for on an urgent basis without notice to the respondent: <ul style="list-style-type: none"> <li>• emergency protection order which must be decided on the same day as the application (EPO)</li> <li>• temporary protection order for any period up to go days (TPO).</li> </ul>
2	Is the applicant for a TPO or EPO or a protection order on notice in a domestic relationship with the respondent?
3	If the applicant is an interested person such as a family member, police officer etc applying on their behalf, has the person in need of protection consented (unless they are unable to consent)?
<b>4.2 Protection order on notice</b>	
4	Where an application is made to the court for a protection order on notice, as soon as practicable after filing you must issue: <ul style="list-style-type: none"> <li>• a summons directing the respondent to appear at the time and place set out in the summons; or</li> <li>• a warrant to arrest the respondent if you are satisfied that the personal safety of the complainant would be seriously threatened unless the respondent is brought into custody.</li> </ul>
5	You must give two copies of the application and any summons or warrant to the police officer in charge of the police station nearest to where the respondent lives or was last known to live to serve on the respondent.
6	An affidavit of service completed by the police officer is then filed in the court or, in the case of a warrant, the police officer shall arrest the respondent and take them into custody.
7	The grounds for making a protection order are: <ul style="list-style-type: none"> <li>• the respondent and the complainant are in a domestic relationship;</li> <li>• the respondent has committed or, in your opinion, is a risk to commit, domestic violence against the complainant, or other person at risk; or</li> <li>• the respondent uses or has used economic abuse against the complainant;</li> <li>• or other person at risk; and</li> <li>• the making of an order is necessary or desirable for the protection of the complainant, or other person at risk.</li> </ul>

8	In deciding whether to make a protection order, you must take into account the following: <ul style="list-style-type: none"> <li>the need to ensure that the complainant or other person at risk is protected from domestic violence or economic abuse;</li> <li>the well-being and the accommodation needs of the complainant or other person at risk;</li> <li>any other matter that you consider relevant;</li> <li>the opinion of the complainant, or other person at risk, of the nature and seriousness of the behaviour in respect of which the application is made; and</li> <li>the effect of that behaviour on the complainant or other person at risk.</li> </ul>
9	If the respondent fails to appear before the court after being served with the TPO and notice of the hearing (or an application for a protection order on notice) and you are satisfied on the evidence that the respondent has been served with a temporary protection order (or an application for a final protection order), you may: <ul style="list-style-type: none"> <li>give further directions; or</li> <li>order that the temporary protection order becomes final immediately or make a final protection order (in the case of an application for a protection order on notice).</li> </ul>
10	Determine all the relevant grounds for making a protection order have been met.
11	Record your decision and reasons for your decision including: <ul style="list-style-type: none"> <li>any mandatory or special conditions of the protection order;</li> <li>compensation or expenses payable to the applicant by the respondent;</li> <li>any custody, access or maintenance orders in favour of the applicant.</li> </ul>
<b>4.3 Hearing</b>	
12	The court must give the parties written notice of the time, date, and place for the hearing.
13	You may hear any proceedings in private or exclude any person from the court.
14	You must hear the submissions from the applicant or their appointed representative and any evidence in support.
15	If the respondent appears, hear the submissions from the respondent and any evidence in support.
16	If the respondent does not appear, you may still make a final protection order at the hearing.
17	Decide if all the relevant grounds for making a final protection order have been met on the evidence.
<b>4.4 Withdrawal of complaint</b>	
18	Where a complainant makes an oral or written application for withdrawal of an application for a protection order against the respondent, you must: <ul style="list-style-type: none"> <li>investigate the reasons for withdrawal;</li> <li>consider the safety and wellbeing of the complainant and any person at risk.</li> </ul>

19 You may then:

- make further directions; or
- grant or refuse the application.

#### 4.5 Temporary protection order

20 On receiving an application, you may make a TPO for any period up to 90 days, if:

- it is in the best interests of the complainant or other person at risk; and
- there is risk of domestic violence or economic abuse to the complainant or other person at risk if the order is not granted immediately.

#### 4.6 Emergency protection order

21 On receiving an application, you may make an EPO if satisfied that:

- the respondent may commit domestic violence against the complainant or other person at risk; or
- the respondent may cause economic abuse or damage to or removal of the property of the complainant or child or any other member of the family or person at risk living in the same household; or
- the complainant will be prevented or deterred from pursuing the application if the order is not made immediately.

Note: You must determine an EPO application on the same day on which it is made unless there are exceptional circumstances.