CROWN LAW

SOLICITOR-GENERAL'S GUIDELINES FOR PROSECUTING SEXUAL VIOLENCE

As at 3 July 2023

Te Tari Ture o te Karauna
Crown Law

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Please note: This introduction has been carried through from the original version of the Guidelines, it has not been updated for this version.

ATTORNEY-GENERAL'S INTRODUCTION

Prosecuting sexual violence crimes raises challenging issues for the criminal justice system and its practitioners. Sexual violence is an area where the traditional cornerstones of the rule of law, fair trial rights, and evidential standards interact.

The need for change in this area has been widely recognised, notably by the Law Commission's findings in its 2015 report The Justice Response to Victims of Sexual Violence.

Victims and witnesses of sexual violence crimes are often vulnerable or young - frequently both. For people in these groups, particular care is needed to ensure the system enables their participation in the justice system. The importance of this is recognised in existing obligations such as the requirement to respect the rights of children to be heard (under the UN Convention on the Rights of the Child). In New Zealand, the importance of the interests of complainants and victims has been recognised in the provisions of the Victims' Rights Act 2002.

All of this supports a shift to a tailored approach to prosecutorial practice in this area. For example, vulnerable witnesses or victims may require additional measures to support them in providing full and accurate evidence. This is vital to ensure that, as individuals, they realise their right to access to justice. It is also part of ensuring a fair and thorough trial in full compliance with the rule of law.

These guidelines are part of the Crown's response to these concerns. They have been designed to mitigate or remove existing systemic barriers which create difficulties for complainants, while upholding and enhancing wider legal requirements around the prosecution process and fair trial rights. These Guidelines will provide an important resource for prosecutors undertaking these often complex trials, and have my full support.

Hon David Parker

Attorney-General

Please note: This introduction has been carried through from the 2022 version of the Guidelines, it has not been updated for this version.

SOLICITOR-GENERAL'S INTRODUCTION

All prosecutors working on sexual violence cases will be aware of the disproportionate impact on the individuals involved, particularly victims and witnesses, that can result from delay, poor communication, or a lack of support.

These Guidelines define and promote best practice, so as to reduce the impact of these issues in sexual violence trials. In preparing the Guidelines we have sought to ensure that securing access to justice in response to crimes of sexual violence must, as far as possible, not place a further burden on individuals, whānau and communities.

In developing these Guidelines we have engaged with a wide range of organisations and individuals with diverse roles in the criminal justice sector. Because of the limited scope of the Guidelines we have not been able to include every suggestion, but all comments were carefully considered and we thank all of those who contributed and assisted.

These Guidelines are addressed specifically to prosecutors because the Solicitor-General has direct oversight of all public prosecutions in New Zealand. This allows for professional guidance based on our detailed knowledge of the role and responsibilities of a prosecutor before and during a trial. Work is being done elsewhere to ensure that similar standards of best practice and training opportunities are available for the other parties involved in sexual violence prosecutions – in particular the judiciary and legal professionals at the defence bar. There are also resources[1] designed for victims and witnesses which provide specific support for those individuals.

These Guidelines are published following a programme of training directed at all prosecutors working in this area. This edition has been reviewed and updated to incorporate the amendments to the Evidence Act 2006, Criminal Procedure Act 2011 and Victims' Rights Act 2002 made by the Sexual Violence Legislation Act 2021. We will continue to review them over time to ensure they continue to represent best practice.

Una Jagose QC
Solicitor-General

[1] For example https://sexualviolence.victimsinfo.govt.nz/

1. APPLICATION

1.1 These Guidelines have been written for prosecutors, but witnesses and other participants in the justice system may find them useful.

1.2 These Guidelines should be read together with the *Solicitor-General's Prosecution Guidelines* and the *Victims of Crime – Guidance for Prosecutors*, both of which apply in respect of all prosecutions. The purpose of these Guidelines is to provide additional guidance to prosecutors in respect of prosecutions for sexual violence offending, once commenced. The conduct of investigations and the application of the test for prosecution are beyond the scope of the Guidelines. To the extent there is any inconsistency between these Guidelines and either the *Solicitor-General's Prosecution Guidelines* or the *Victims of Crime – Guidance for Prosecutors*, these Guidelines are to be preferred.

1.3 These Guidelines apply to all sexual cases in New Zealand, whether they are Crown prosecutions (as defined in the Criminal Procedure Act 2011 and Crown Prosecution Regulations 2013) or prosecutions that are not Crown prosecutions and therefore conducted by staff of the New Zealand Police Prosecution Service.

1.4 These Guidelines do not apply in respect of prosecutions in the Youth Court unless or until a prosecution is transferred to either the District or High Courts. Prosecutors in the Youth Court should follow the Guidelines as far as practicable.

1.5 The Solicitor-General has only a limited role in relation to private prosecutions. However, it is expected that private prosecutors, and lawyers conducting private prosecutions in particular, will act in accordance with these Guidelines as far as practicable. It is noted the term "prosecutor" is not defined in the Victims' Rights Act 2002, suggesting private prosecutors have the same statutory obligations as public prosecutors under that Act.

2. INTERPRETATION

2.1 In these Guidelines the term "**witness**" is used broadly to encompass both complainants and other vulnerable witnesses, such as witnesses who are giving propensity evidence in sexual cases or witnesses who are otherwise vulnerable by reason of their age, intellectual disability or some other factor. Where necessary, more specific terms such as "complainant", "victim", "child witness" or "propensity witness" will be used and are defined below. In all cases, where a complainant or witness is a child, or for any reason is not able to make decisions for himself or herself, references in these Guidelines to information being provided to, or views sought from, the complainant or witness include their parent or caregiver as appropriate.

2.2 **Child witness** has the same meaning as in the Evidence Act 2006. At the time of publishing these Guidelines it means a witness who was under the age of 18 when the proceeding was commenced, and includes complainants but not defendants.

2.3 **Communication assistance** has the same meaning as in the Evidence Act 2006. At the time of publishing these Guidelines it means oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who for any reason (for example, insufficient proficiency in the English language, age, or a disability) requires assistance to:

2.3.1 understand court proceedings; or

2.3.2 give evidence.

2.4 **Complainant** means a person whose allegations are the subject of a charge of sexual offending against one or more defendants.

2.5 **Independent Sexual Violence Advocate** means a person who works with or for a specialist sexual violence support service, or a sexual harm crisis support service, to support complainants and victims of sexual violence.

2.6 **Officer in charge** means the Police officer in charge of the case.

2.7 **Propensity witness** means a witness for the prosecution who is to give or is giving evidence as defined in s 40(1) of the Evidence Act 2006 related to their personal experience of a sexual nature about or with any one or more defendants.

2.8 **Sexual case** has the same meaning as in the Evidence Act 2006. At the time of publishing these Guidelines it means a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with, for:

2.8.1 an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961; or

2.8.2 any other offence against the person of a sexual nature.

2.9 **Trial** means both Judge-alone trials and jury trials, unless otherwise stated.

2.10 **Victim** means a complainant in respect of whose allegation(s) there has been a plea or verdict of guilty against a defendant in a criminal proceeding.

2.11 **Victim Advisor** means the Court Victim Advisor, and includes a specialised Sexual Violence Victim Advisor.

3. PRINCIPLES

3.1 The overarching principles for prosecutors to follow when dealing with witnesses are:[2]

3.1.1 To treat the witness with respect, courtesy and compassion.

3.1.2 To respect the witness's dignity and privacy.

3.1.3 To minimise stress for the witness, as far as possible.

3.2 To give effect to these principles prosecutors must, at a minimum, be cognisant of the mandatory statutory requirements in the Victims' Rights Act 2002 to consult with, and inform, complainants about matters concerning them and significant events throughout the prosecution.[3]

3.3 Witnesses each have different needs. Some need more support than these Guidelines recommend; others need less. Some are hostile to the prosecution and do not wish to engage at all. Prosecutors should consult with witnesses, the officer in charge and other relevant people (for example the Victim Advisor or Independent Sexual Violence Advocate, if applicable) to determine the appropriate level of support in each case.

3.4 These Guidelines will need to be applied flexibly to meet the needs of individual cases. In particular, in Crown prosecutions, it is for the Crown Solicitor to determine how a matter should be prosecuted, in the particular circumstances of the case. The conduct of a proceeding in court is a matter for the presiding Judge.

4. THE DECISION TO PROSECUTE

Decisions made by the New Zealand Police

4.1 The decision to prosecute or not in a sexual case will generally be made by the New Zealand Police in the first instance, in accordance with the prosecution test in the *Solicitor-General's Prosecution Guidelines*.

4.2 Where it is decided not to prosecute in a case where there is a complaint of sexual violation, the Police must:

4.2.1 Advise the complainant of the decision, and the reasons for it, in person unless that is not practicable (for example, where the complainant is overseas). Complainants should be given the option

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2 Victims' Rights Act 2002, s 7.

3 Victims' Rights Act 2002, ss 28-30. See also relevant provisions in the Bail Act 2000 and the Criminal Procedure Act 2011 regarding bail and name suppression respectively.

of having a suitable support person (who is not a witness) present at such meetings.

4.2.2 Advise the complainant they may seek a review of the decision not to prosecute, and how long they may take to consider whether they wish to request one (this will differ according to the circumstances of the particular case).

Decisions made by the Crown Solicitor

4.3 If the Police commence a prosecution and the matter subsequently becomes a Crown prosecution, the Crown Solicitor's Office will make a fresh prosecution decision, in accordance with the *Solicitor-General's Prosecution Guidelines*.

4.4 In cases involving an allegation of sexual violation:

4.4.1 The Crown Solicitor, or a partner in the Crown Solicitor's firm, should personally approve a decision *not* to prosecute (where it has been made by a person not holding one of those positions).

4.4.2 A decision not to prosecute, and the reasons for it, should be explained to the complainant in person unless that is not practicable (for example, where the complainant is overseas). Complainants should be given the option of having a suitable support person (who is not a witness) present at such meetings. The complainant must be advised they may seek a review of the decision not to prosecute, and how long they may take to consider whether they wish to request one (this will differ according to the circumstances of the particular case).

4.4.3 While technically the Crown may be seeking leave to withdraw charges on a without prejudice basis, complainants should be advised that the prospects of being able to re-lay charges in future, in the absence of any further evidence coming to light, are negligible. The withdrawal of charges should be presumed to be the end of the matter.

Process where a complainant seeks a review

4.5 It is for the Police (where the decision to be reviewed was made by the Police) or Crown Solicitor (where the decision to be reviewed was made by the Crown Solicitor) to determine how a review should be conducted. Reviews should be conducted by personnel who were not involved in the original decision. Reviews of Police decisions should be conducted by a person of a more senior rank or classification than the person who made the original decision. In Crown cases, reviews should be conducted by a prosecutor holding at least a senior classification from the Crown Law Office. In a small Crown Solicitor warrant where there are insufficient senior prosecutors, or in a difficult or complex case, the matter may be referred to

Crown Law for review.

4.6 Complainants should be advised of the process to be adopted for the review and the likely timeframe to complete it. In Crown prosecutions the timeframes will necessarily be short as there will be charges before the Court.

4.7 Where there is a disagreement between the original decision maker and the reviewer as to whether a prosecution should be commenced or continued, which cannot otherwise be resolved, the matter should be referred to Crown Law for a decision, or for direction on the process for resolving the matter.

4.8 The requirement to offer a review only arises in respect of decisions not to prosecute at all or to bring a prosecution to an end (in a case involving multiple complainants, this will include a decision to bring the prosecution to an end in respect of an individual complainant). For the avoidance of doubt, there is no requirement to review a decision to amend or reduce charges if requested by the complainant, although the Police or Crown Solicitor may elect to do so. Where there is a significant amendment to the charge(s), or a reduction in charge, this should always be clearly explained to the complainant, preferably in person.

5. SPECIALISATION OF PROSECUTORS

Crown prosecutions

5.1 The majority of sexual cases will become Crown prosecutions, either because the charges include offences listed in the Schedule to the Crown Prosecution Regulations 2013 or because there has been an election of jury trial. Crown prosecutors (Crown Solicitors and their staff) have particular skills and expertise in prosecuting sexual violence offending by virtue of their role, and comprise only a small proportion of all public prosecutors.

5.2 The choice of prosecutor is for the Crown Solicitor to make in all the circumstances of the case. Trials that include charges of sexual violation should ordinarily involve a prosecutor holding at least a senior classification from the Crown Law Office. That prosecutor may be lead or sole counsel, or supporting a sufficiently experienced intermediate prosecutor who is leading the trial. There will, however, be trials that are appropriately conducted by a sufficiently experienced intermediate prosecutor as sole counsel, an assessment the Crown Solicitor is best able to make.

Non-Crown prosecutions

5.3 Some sexual cases will not become Crown prosecutions. The most common example is where the most serious offence charged is indecent assault. If there is no election of jury trial, these cases will not involve Crown Solicitors. However, the Solicitor-General's expectation is that the Police will consider

instructing Crown Solicitors to conduct these cases, especially where the case is difficult or complex, if they are proceeding to trial.

5.4 In particular, it is expected the Police will consider instructing Crown Solicitors in cases which involve either of the following:

5.4.1 a witness under the age of 18; or

5.4.2 a witness who is otherwise particularly vulnerable by reason of their age or intellectual disability, or who requires communication assistance.

5.5 Examples of other cases in which the Police should consider instructing the Crown Solicitor may include, but are not limited to:

5.5.1 Cases which are historical in nature (which may involve stay applications).

5.5.2 Cases involving multiple complainants.

5.5.3 Cases involving propensity evidence.

5.5.4 Cases involving complex or novel expert evidence.

5.5.5 Cases in which applications are made under:

(a) Sections 44 and 44AA of the Evidence Act 2006 (to offer evidence about a complainant's sexual experience, sexual disposition or sexual reputation).

(b) Section 106F of the Evidence Act 2006 (where the Police have stipulated that a complainant or propensity witness is to have all of their evidence pre-recorded prior to trial and the defendant has applied for a direction that no pre-recording hearing is held).

(c) Section 106H of the Evidence Act 2006 (where a witness has had all of their evidence pre-recorded and the defendant has applied for a direction that the witness be recalled for further cross-examination).

(d) Section 27 of the Criminal Disclosure Act 2008 (for non-party disclosure).

5.6 Where a sexual case is to be conducted by the Police Prosecution Service, it is expected that the prosecutor will have sufficient relevant experience and training to do so.

6. PROVIDING INFORMATION TO, AND CONSULTING WITH, COMPLAINANTS

6.1 Information and consultation are of vital importance, not only to the court's decision-making, but also to the complainant's experience of, and preparedness to continue to engage with, the prosecution. Providing better information and consultation may help to reduce stress for a witness and thereby improve the quality of their evidence in court. It may also reduce complainant attrition and, in the longer term, increase reporting rates for sexual offences.

6.2 There are mandatory statutory obligations to provide complainants[4] with information about the prosecution. Under the Victims' Rights Act 2002 that information may be provided by either the prosecutor (usually via the officer in charge) or court staff (such as a Victim Advisor). The prosecutor (or officer in charge, on the prosecutor's behalf) will almost invariably be best placed to provide information to the complainant; court staff will not have the same contextual understanding of the prosecution or the significance of individual events. The officer in charge will also have had the most prior contact with the complainant (as the prosecutor and court staff do not become involved until charges are laid, which in most cases will be some time after a complaint is made to the Police).

6.3 The officer in charge should therefore be the person who has presumptive responsibility for providing complainants with information about the prosecution, unless some other course has been agreed with the prosecutor. References in this section to the prosecutor should therefore be taken to include the officer in charge. The prosecutor will remain responsible for providing information to the officer in charge (for example about what has happened in court) to ensure information is provided to the complainant quickly and accurately.

6.4 It is critical to ensure that engagement with a complainant is informed by the complainant's own wishes. Some complainants will want more information about the prosecution than others. Some may have a preference for receiving information from the Police rather than court staff, or vice versa. Consultation with the complainant at an early stage, as to the level of engagement they wish to have, is essential.

Information required to be provided by statute

6.5 The following information **must** be provided to complainants, as a matter of law:[5]

6.5.1 Decisions on charging and all changes thereto.

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[4] Or their support person, in certain circumstances: see Victims' Rights Act 2002, s 14.

[5] Victims' Rights Act 2002, s 12. Note that s 13 provides for information to be withheld in certain circumstances.

6.5.2 The complainant's role as a witness.

6.5.3 The possibility of name suppression[6] and the steps the complainant may take in respect of suppression of their own name.

6.5.4 The date and venue of:

(a) The first appearance.
(b) Any preliminary hearing.[7]
(c) Any trial.
(d) Any sentencing hearing.
(e) Any appeal hearing (whether the appeal is against conviction, sentence or both).[8]
(f) Any referral of the conviction or sentence by the Criminal Cases Review Commission under s 17 of the Criminal Cases Review Commission Act 2019.

6.5.5 The outcome of the prosecution, including:

(a) Any guilty plea or finding of guilt, and the sentence imposed.
(b) Any finding that the defendant is unfit to stand trial.
(c) Any finding that the charge was not proved.
(d) Any acquittal or deemed acquittal (eg a discharge under s 147 of the Criminal Procedure Act 2011).
(e) Any pardon.

Additional obligations in respect of bail, name suppression, ways of giving evidence and victim impact statements

6.6 Complainants must also be advised of, and their views sought in relation to, the following:

6.6.1 Any application by the defendant for permanent name suppression.[9]

6.6.2 Any application by the defendant for bail (including EM bail).[10]

6.6.3 The ways in which they may give evidence at, or before, trial.[11]

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6 This appears to be a reference to name suppression for the defendant, although it is not explicit in the statute.

7 While still technically a statutory requirement, this is redundant given that preliminary hearings are no longer a feature of the criminal process.

8 These are the only types of appeals mentioned in the statute, but complainants should also be advised of other appeals, such as significant pre-trial appeals.

9 Victims' Rights Act 2002, s 28.

10 Victims' Rights Act 2002, s 30.

11 Victims' Rights Act 2002, s 28B.

6.6.4 If the defendant is convicted, or is acquitted on account of insanity, the different ways in which a victim impact statement may be presented to the court.[12]

6.7 Complainants should also be advised of applications for interim name suppression and applications for variation of bail conditions (particularly those which may mean the complainant is more likely to see the defendant somewhere, or at some time, they do not expect, such as variations to residential or curfew conditions). As with applications for bail and permanent name suppression, prosecutors should ascertain the complainant's views and convey them to the Court, unless that is not practicable (such as where the prosecutor is confronted with an application in court, without prior notice, and an adjournment has been refused or is not appropriate).[13]

6.8 Any decisions about bail and permanent name suppression should be communicated to the complainant as soon as possible.

6.9 If a pre-recording hearing is to take place, the views of the complainant or witness whose evidence is being pre-recorded should be sought as to the presence of the media at that hearing, in accordance with reg 58 of the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023.

6.10 A remand in custody at any point (whether bail was sought or not) must be notified to the officer in charge as soon as possible, as it will trigger the operation of the Victim Notifications Register.

6.11 Witnesses who are not complainants should also be advised of the possibility (if applicable) of the court making an order prohibiting the publication of identifying information about them. This will be particularly relevant to propensity witnesses in sexual cases.

6.12 Finally, adult complainants should be advised of the ability to apply to have automatic suppression of their own names lifted.

Other information to be provided

6.13 Complainants should also be informed about the following matters, and have the outcomes or implications explained to them (as well as being consulted where appropriate):

6.13.1 Procedures for determining fitness to stand trial or insanity, under the Criminal Procedure (Mentally Impaired Persons) Act 2003, if triggered.

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12 Victims' Rights Act 2002, s 28BA.

13 Victims' Rights Act 2002, ss 28-30; Bail Act 2000, s 8; Criminal Procedure Act 2011, s 200.

6.13.2 Notifications and/or applications by the prosecutor for the complainant to give evidence in a particular way (whether the ordinary way or an alternative way), under ss 106D or 106E of the Evidence Act 2006.

6.13.3 Applications by the prosecutor for the complainant to have communication assistance when giving evidence, under s 80 of the Evidence Act 2006.

6.13.4 Significant pre-trial applications filed by the defendant that may affect them, such as:[14]

(a) Applications for stay or dismissal of the charges, under s 147 of the Criminal Procedure Act 2011.
(b) Applications for severance under s 138(4) of the Criminal Procedure Act 2011.
(c) Applications to transfer the trial to a different court, under s 157 of the Criminal Procedure Act 2011.
(d) Applications to offer evidence about the complainant's veracity, under s 37 of the Evidence Act 2006.
(e) Applications to cross examine the complainant about their prior sexual experience, sexual disposition or sexual reputation under ss 44 and 44AA of the Evidence Act 2006.
(f) Applications for non-party disclosure of personal information about them, under ss 24-29 of the Criminal Disclosure Act 2008.
(g) Applications for the complainant to give evidence in a different way to that which has been notified by the prosecutor, under s 106F of the Evidence Act 2006.
(h) Applications for further cross examination of a complainant or propensity witness where cross-examination has already taken place prior to trial and been recorded, under s 106H of the Evidence Act 2006.

6.13.5 A proposed plea arrangement, if the prosecutor is considering accepting it.[15]

6.13.6 Any sentence indication hearing sought by the defendant.

6.13.7 Where the defendant has been convicted, or acquitted on account of insanity, their right to provide a victim impact statement to the court.

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[14] Prosecutors will need to determine whether and when to advise complainants about pre-trial applications and decisions. Much will depend on the merits of the application and the circumstances of the complainant. However, prosecutors should at least *consider* providing this information, and have a good reason for deciding not to do so.

[15] It is not necessary to advise a complainant of every proposal made by a defendant where the prosecutor has no intention of agreeing to it.

6.13.8 Where the defendant has been convicted and there is associated family violence offending, the possibility of a protection order being made at sentencing.[16]

6.13.9 The possibility of appeals, whether in respect of pre-trial matters, conviction or sentence. The consequences of an appeal being filed should also be clearly explained (for example, where a pre-trial appeal places the trial date in jeopardy). In appropriate cases the prosecutor may also consider it appropriate to advise the victim of the possibility of an application to the Criminal Cases Review Commission once appeal rights have been exhausted.

How information should be provided

6.14 All information must be delivered in a timely way and in a manner able to be understood by the complainant.

6.15 Prosecutors should generally avoid making promises to complainants. They must ensure any time estimates given are realistic. In any case where there is a change of circumstances which changes advice that has been given to a complainant, prosecutors should ensure it is explained promptly.

6.16 When ascertaining the complainant's views before the court makes a decision (for example, about bail or name suppression), it should be made clear to the complainant that their views will not be determinative, and that the court will need to consider a range of factors when coming to its decision.

6.17 When providing information to the court, prosecutors must be mindful of the statutory prohibition on disclosing the complainant's contact details (including their occupation, residential address, email address or telephone numbers).[17] Prosecutors should also exercise caution when disclosing personal information about other witnesses.

7. MEETING COMPLAINANTS PRIOR TO TRIAL

7.1 In this section the references to a "trial" include, as applicable, a hearing at which the complainant's evidence, or that of a propensity witness, including cross-examination is to be pre-recorded and later played at trial as a video record.

7.2 It is recommended that there be two meetings with the complainant prior to trial (outlined in more detail below):

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16 Sentencing Act 2002, s 123B.

17 Victims' Rights Act 2002, s 16. See also Evidence Act 2006, ss 87-88.

7.2.1 An initial meeting, not necessarily with the trial prosecutor, to explain the role of the prosecutor and various procedural matters.

7.2.2 A pre-trial meeting with the trial prosecutor, to establish a rapport with the complainant and discuss the trial process in more detail.

7.3 Propensity witnesses should also be offered the opportunity to attend a (separate) pre-trial meeting with the prosecutor.

7.4 Some complainants will need more support than is recommended in these Guidelines. Conversely, some complainants may be hostile to a prosecution, or for some other reason may not wish to meet with the prosecutor at all. Prosecutors should decide, on a case by case basis, whether and when to offer to meet with complainants and other witnesses.

7.5 Where a meeting is to take place, the prosecutor should make enquiries with the Police as to whether there are any religious or cultural protocols which should be observed at the meeting. The prosecutor should ensure they know how to correctly pronounce the name of the complainant, and any others attending in support.

7.6 The officer in charge, or another Police officer, should always be present at any meeting between a prosecutor and a witness. The witness should be given the option of having a support person, and/or the Victim Advisor, present as well. If a communication assistant has been appointed, the prosecutor should consider whether they should also attend (where practicable).

7.7 There should be no evidential discussions during the initial meeting or pre-trial meeting. Meetings should be confined to the matters set out below as well as any other non-evidential matters raised by either the prosecutor or the witness. The attending officer should make a notebook entry recording who was present and the nature of the meeting (e.g. "initial meeting with prosecutor"), but there is no need to keep a full record of the discussion.

7.8 There will be occasions when evidential matters are raised by either the prosecutor or the witness. These discussions should take place separately.[18] The attending Police officer should keep a full record of evidential discussions, which may need to be disclosed.

The initial meeting

7.9 In non-Crown prosecutions, and Crown prosecutions where the Crown Solicitor has assumed responsibility at the second appearance, the initial meeting should take place before, or shortly after, the Case Review Hearing. In other Crown prosecutions the meeting should take place after the Crown has assumed responsibility (usually after the Case Review Hearing) but prior

[18] For convenience, such a meeting could directly follow an initial or pre-trial meeting.

to callover, if practicable. Ideally, this meeting will involve the trial prosecutor but this will often not be possible, particularly in jury trial matters where trial dates are not allocated until later in the process, and the identity of the trial prosecutor is not yet known.

7.10 When attending an initial meeting with a complainant, prosecutors should explain the following matters:

7.10.1 The role of a prosecutor and, in particular, that they are not the complainant's lawyer. The fact the prosecutor conducting the meeting may not be the trial prosecutor should also be made clear, if that is the case, while reassuring the complainant that they will meet with the trial prosecutor nearer the time of trial.

7.10.2 The fact the prosecutor will not be permitted to rehearse their evidence with them, and the reasons for that. The prosecutor should specifically ensure the complainant understands this.

7.10.3 The position with respect to bail and name suppression (if applicable) and what that means. If the defendant is remanded in custody the prosecutor should make sure the complainant understands they may apply for bail at any time. The prosecutor should also ensure the complainant knows what to do if there is a breach of bail (for example if they are contacted by the defendant), or if they are concerned by any other matters (such as unwanted contact from supporters of the defendant).

7.10.4 The current mode of trial (whether jury trial or trial by a Judge sitting alone). The prosecutor may also think it appropriate in some cases to explain that the mode of trial may change.

7.10.5 The likely timeframe for setting a trial date (which will vary from region to region), and the duration of the trial itself. If the court in which the trial is to be held operates a system of backup fixtures, this system should be explained.

7.10.6 The fact the court will be closed while the complainant gives evidence, and what that means.

7.10.7 While a complainant is entitled to have a support person with them when giving evidence, there are some people who are not suitable and the Judge must approve the identity of the support person.[19] It should be made clear that the support person will be able to see and hear everything that goes on in the courtroom while the complainant is giving evidence (so the complainant may wish to

[19] Evidence Act 2006, s 79.

think carefully about whether they wish family members, for example, to fulfil that role).

7.10.8 Defendants cannot be compelled to give evidence. Whether the defendant gives evidence will be their decision to make and there should be no expectation they will do so.

7.10.9 The complainant may remain after giving evidence, to watch the trial from the public gallery, if they wish to. However, there are generally no special measures adopted (for example, there will be no screen) and the experience of watching the trial can be distressing.

7.10.10 The media will be entitled to be present and report on any aspect of the proceeding, subject to any suppression orders made by the Judge.

7.11 The prosecutor should answer any questions the complainant may have, although not about evidential matters (the reasons for this should be clearly explained).

7.12 The initial meeting also provides an opportunity for the prosecutor to discuss three important matters with the complainant:

7.12.1 The ways in which the complainant is entitled to, or may, give evidence at the trial. The prosecutor should explain the different options (which will depend on the individual circumstances of the case, such as whether a video recorded interview was conducted) and give the complainant the opportunity to express any preferences (whether then or at a later point). If a video recorded interview may be played at trial, this should be clearly explained to the complainant, including when that will occur and who will be present.

7.12.2 The possibility of the complainant's evidence, including cross-examination, being pre-recorded prior to trial. The prosecutor should explain the process and give the complainant the opportunity to express any preferences (whether then or at a later point). It is important to ensure the complainant understands that, if their evidence is pre-recorded, there remains the possibility of being recalled to give further evidence at trial. It should also be explained that while the complainant's preferences are important and will be taken into account, whether pre-recording is appropriate in all the circumstances of the case is a decision for the prosecutor to make, and it can be overridden by the Judge.

7.12.3 The level of engagement the complainant wishes to have with the prosecution. Some complainants wish to know about every court date and every development; others prefer to put the matter out

of their minds until they are required to come to court or otherwise be involved. Complainants should also have the opportunity to express a preference as to who provides information to them as between the officer in charge (on behalf of the prosecutor) or the Victim Advisor.

7.13 Finally, the initial meeting is also an opportunity for the prosecutor to assess whether a report from a communication assistant may be beneficial.

The pre-trial meeting

7.14 The pre-trial meeting should take place at least a week prior to trial, unless that is not practicable (for example, where the complainant is overseas or elsewhere in New Zealand).[20]

7.15 When attending a pre-trial meeting with complainants and/or propensity witnesses, prosecutors should clearly explain:

7.15.1 Any of the above matters not explained at the initial meeting. Some matters may need to be revisited or confirmed (if orders have since been made, or there has been a change such as a late election of jury trial, or where the complainant was left to think about options such as the identity of their support person). In some cases, particularly where there has been a long delay between the initial meeting and the pre-trial meeting, it would be prudent to touch briefly on all the matters discussed at the initial meeting.

7.15.2 The need to alert the officer in charge, or the prosecutor, immediately if the complainant or witness realises they know a juror personally.

7.15.3 How any alternative ways of giving evidence or other measures (such as additional breaks or communication assistance) will work. In particular, if a video recorded interview is to be played it should be explained when that will occur and who will be present. It should also be explained that any evidence given *viva voce* will be video recorded, and the purpose for which that video record may be used.[21]

7.15.4 If the defendant is going to be self-represented at trial, complainants and propensity witnesses should be advised about the restrictions on cross examination[22] and the procedure which will be adopted.

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[20] Note, however, that the Police are responsible for the costs of transporting a complainant for the purpose of a pre-trial meeting. Cost therefore should not be a barrier if the complainant wishes to meet with the trial prosecutor prior to trial.

[21] Evidence Act, s 106J.

[22] Evidence Act, s 95.

7.15.5 The complainant's ability to be present when the verdicts are taken, should they wish, will depend on them being able to attend court at very short notice. The prosecutor should ensure the complainant understands this, so they can make arrangements accordingly. Otherwise a plan should be put in place to ensure they learn of the verdict as quickly as possible, in a manner they are comfortable with.

7.15.6 The possible outcomes of the trial. In particular, expectations about a remand in custody following a guilty verdict should be carefully managed, as it can be distressing for a complainant to see an offender "walk free". Equally, it should be explained that a not guilty verdict will see the defendant's immediate release even if there has been a previous remand in custody.

7.16 Prosecutors should also use the pre-trial meeting to prepare witnesses for court thoroughly. Preparation must not extend to coaching but should include:

7.16.1 Confirmation that, when giving evidence, the most important thing is to tell the truth.

7.16.2 Reassurance that all that is otherwise expected of a witness is that they be themselves.

7.16.3 An explanation as to what to expect in evidence in chief, cross-examination and re-examination, and judicial questions (and what those terms mean). Regardless of who is asking the question, the witness should listen carefully and, if they do not understand the question or need clarification, it is important to ask for the question to be repeated or rephrased.

7.16.4 In some cases it may be appropriate to tell the witness of any specific topics on which it is expected they will be challenged (but obviously without suggesting possible answers, which would stray into coaching). For example, the prosecutor may consider it appropriate to tell the witness if they are likely to be accused of lying, or questioned about sensitive issues (including previous sexual experience, sexual disposition or sexual reputation if leave has been granted under ss 44 or 44AA of the Evidence Act 2006; or previous criminal convictions). Similarly, it may be appropriate to warn the witness that they may be confronted with sensitive material such as photographs or text messages.

7.16.5 Showing the witness exhibits about which they might be asked questions, particularly where the exhibit is potentially confusing (such as spreadsheets of phone data, or floor plans of an address), so that they can orient themselves to the material ahead of time.

This may save time at trial and assist the witness to feel more confident when giving evidence.

7.16.6 Advice that cross-examination is not a personal attack, but a professional task and part of defence counsel's duty to their client. In particular, witnesses should be warned that they may not always understand the relevance of a question that is asked, or wish to answer some questions, but that they must do their best to answer in any event. Appropriate techniques if they are having difficulty include pausing before answering (at which point the prosecutor may object to an improper question), asking for a break or asking for clarification.

Courtroom education

7.17 At some stage prior to trial, complainants and other witnesses should be provided with courtroom education. It is a matter for the prosecutor to determine whether he or she should undertake this personally, together with the officer in charge, or whether it should be undertaken by a Victim Advisor. If a communication assistant is being used, they should also attend the courtroom visit if practicable.

Meeting the trial Judge

7.18 While regional practices vary, some Judges may ask to meet the complainant prior to trial, particularly if they are a child or young person. These meetings can reduce later stress for the complainant, as they will be confronted with fewer people they do not know when they attend the trial. Such meetings should be attended by the prosecutor and defence counsel, as well as a support person. While it may be appropriate for others to attend (such as the Court Victims Adviser or Police Officer in Charge), care should be taken to ensure the number of people attending is limited, so as not to overwhelm the complainant. For the same reason, consideration should be given to the appropriate venue for the meeting; CCTV rooms are typically very small and can easily feel crowded.

8. PREPARATION FOR TRIAL

Avoiding delay

8.1 Delays before trial can cause serious stress for complainants and other witnesses in sexual cases, where finality of the prosecution is a high priority. Avoiding delay is therefore particularly important in these cases, not only because it may improve the quality of a witness's evidence and participation in the trial, but also to achieve finality for complainants, which may in turn assist with their recovery.

8.2 It is critical that sexual cases are reviewed at an early stage[23] by a sufficiently experienced prosecutor to identify:

8.2.1 The particular vulnerabilities of the witnesses involved, which will guide decisions as to the way in which the complainant should give evidence or identify a need for communication assistance (both discussed further below). This will also be informed by the initial meeting with the complainant as recommended by these Guidelines.

8.2.2 The need for any other pre-trial applications (discussed further below).

8.2.3 The need for any pre-trial enquiries by Police or other arrangements such as editing video recorded interviews. It is critical to allow sufficient time for such enquiries to be completed and for the results to be disclosed without jeopardising the trial fixture.

8.2.4 Whether any expert evidence is required, for example counter-intuitive evidence. If so, a suitable expert will need to be identified and approval sought from the Ministry of Justice to instruct them. They will then need time to prepare their evidence (which frequently takes many weeks), which must be disclosed well prior to trial. Where practicable, prosecutors should plan to brief expert witnesses in person.

8.2.5 Any need for the trial to be prioritised or fast-tracked (and consequent need to fast-track disclosure if not already complete).

8.3 The above matters should be identified as early as possible because of the potential impact on the trial timeframe. A late decision, for example, that communication assistance is required can result in trials being adjourned due to the shortage of communication assistants in New Zealand. This will contribute to pre-trial delays and consequent stress for witnesses. Similarly, late pre-trial applications, for example to adduce propensity evidence, can jeopardise trial dates, particularly given the possibility of appeal from any decision.

8.4 The following steps are examples of those prosecutors can take to expedite the trial and should be highlighted in Case Management Memorandum (for Judge-alone trials) or Trial Callover Memorandum (for jury trials):

8.4.1 Ensuring that disclosure is completed as soon as practicable.

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[23] In a Police case this exercise should be completed prior to the Case Review Hearing. In a Crown case it will obviously be influenced by the time at which the Crown Solicitor has assumed responsibility, which in non-schedule jury trial matters will be much later in the proceeding than in schedule matters. In all jury cases the Crown should ensure, as far as practicable, that all pre-trial applications are identified and filed before the first callover, as required by the Criminal Procedure Act 2011.

8.4.2 Notifying the court of pre-trial applications as early as possible, including those anticipated to be filed by the defendant.

8.4.3 Proactively seeking early fixture dates for the hearing of any pre-trial applications.

8.4.4 Ensuring the Court is made aware of any matter that may make the trial unsuitable as a backup fixture, or that means it should accord greater priority to the trial over other cases.

8.5 Once a trial date has been set, any adjournment of a trial is particularly difficult for complainants, especially if the adjournment occurs close to the trial date. Complainants will not only have mentally prepared for the trial but may have taken practical steps such as arranging to take time off work or school. Changes to these arrangements may be difficult, particularly where the complainant does not wish other people to know the reason for their absence. Unless it is clear that the trial should be adjourned, prosecutors should generally resist applications for adjournments, particularly if child witnesses or impaired adults are involved. When prosecutors become aware an adjournment may be required, they should advise witnesses as soon as possible to minimise the impact on them, and be proactive about getting a formal decision from the court so that there is certainty as to what is happening.

Dealing with video records

8.6 Video records of Police interviews of witnessescontain extremely sensitive information. Prosecutors must be familiar with their obligations under the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023which require, among other things, the following:

8.6.1 Video records must be kept secure. This requires that the means of accessing it (eg passwords) are kept secure, and ensuring unauthorised people are not able to view them.[24] An access log must be kept to track who has viewed video records (where the video record is being accessed remotely, the storage facility will automatically create that record and nothing more is required).

8.6.2 Copies of, or access to, video records must not be provided to the defence unless the court has ordered disclosure under s 106(4B) of the Evidence Act 2006, in which case access must be facilitated by the Police (not the prosecutor). The transcript must of course be disclosed as soon as practicable.

8.6.3 Prosecutors may give access to experts, to both video records and transcripts, without requiring judicial approval, but must advise the

[24] Evidence (Video Records and Very Young Children's Evidence) Regulations 2023, reg 42 (in respect of video records) and reg 45 (in respect of transcripts).

expert of their obligations under reg 34 (to keep the records and means of access secure and destroy them once they are no longer needed).[25]

8.6.4 Video records must either be returned to the Police, or the means of access destroyed, at the end of the proceeding.[26] All reasonable steps must be taken to destroy transcripts but the Regulations recognise that may not be possible (for example, it would not be reasonable to delete an entire back up of a server because there is a copy of a transcript on it).[27]

9. WAYS OF GIVING EVIDENCE

9.1 Sections 106C to 106J of the Evidence Act govern the giving of evidence by complainants and propensity witnesses in sexual cases, regardless of their age. Such witnesses are entitled to give their evidence, including cross-examination and re-examination, in an alternative way.[28]

9.2 These witnesses may give their evidence in different ways for different parts of their evidence, and multiple ways may be used. For example, a witness who participates in a Police video recorded interview may give their evidence in chief by way of that interview, and their cross-examination and re-examination by way of a video record which is created at a pre-recording hearing. At the pre-recording hearing they may give evidence in alternative ways such as by using CCTV or a screen.

9.3 Adult witnesses may also give evidence in the ordinary way.[29] If a child witness wishes to give evidence in the ordinary way, an application must be made to a Judge under s 106E of the Evidence Act no later than when the Case Management Memorandum (for Judge-alone trials) or Trial Callover Memorandum (for jury trials) is filed. The Judge may direct that a child complainant or witness can give part or all of their evidence in the ordinary way if satisfied that the child fully appreciates the effect on them of doing so.[30] The Judge may call for an expert report to assist them in making that assessment.[31]

9.4 Prosecutors must file a written notice with the court no later than when the Case Management Memorandum (for Judge-alone trials) or Trial Callover Memorandum (for jury trials) is filed, stipulating the ways in which the

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25 Evidence (Video Records and Very Young Children's Evidence) Regulations 2023, reg 25.

26 Evidence (Video Records and Very Young Children's Evidence) Regulations 2023, reg 44.

27 Evidence (Video Records and Very Young Children's Evidence) Regulations 2023, reg 45.

28 Evidence Act 2006, s 106D(1).

29 Evidence Act 2006, s 106D(3)(a).

30 Evidence Act 2006, s 106E(3)(a).

31 Evidence Act 2006, s 106E(3)(b).

witness will give evidence,[32] unless the witness is a child and the prosecutor has filed an application for them to give evidence in the ordinary way under s 106E of the Evidence Act, in which case no notice is required. If the notice filed by the prosecutor stipulates that the witness is to give their cross-examination evidence by way of a video record made prior to trial, the notice must be filed as early as practicable, but no later than the Case Management Memorandum or Trial Callover Memorandum, as applicable.

9.5 There is no need to file any evidence, such as an expert report, or supporting information with the notice. However, evidence may be required if the defendant files an application seeking that the witness give evidence in a different way to that stipulated in the notice, under s 106F of the Evidence Act. That issue can be considered in the event such an application is filed.

9.6 If circumstances change after a notice has been filed, such that it is no longer possible or desirable for the witness to give evidence in the way stipulated in the notice, an amended notice should be filed as soon as practicable.[33]

Evidence in chief

9.7 As set out above, adult witnesses must be consulted about the various ways in which they may give evidence and be invited to express a preference. As a general rule, where an adult complainant or propensity witness has participated in a video recorded interview, prosecutors should at least consider using it as the basis of their evidence in chief. The advantages of doing so are as follows:

9.7.1 It is generally less stressful and traumatic for the witness than having to recount their evidence verbally in the courtroom.

9.7.2 The risk of inadmissible evidence being inadvertently given, or admissible evidence being omitted, is minimised as there will be certainty as to what is said in evidence in chief.

9.7.3 The fact finder will hear the "best evidence" of the witness, in the sense that the video recorded interview will have been conducted nearer to the time of the offending.

9.8 However, there may be good reasons for departing from that general rule, including (but not limited to):

9.8.1 The interview contains inadmissible material and the editing process would render it incomprehensible.

9.8.2 The interview is too long to be played at trial and editing would be ineffective.

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[32] Evidence Act 2006, s 106D(3).

[33] Evidence Act 2006, s 106D(6).

9.9 The witness has a clear and strong preference for giving full *viva voce* evidence, despite the advantages of the use of the video recorded interview having been explained to them. It may be relevant to the witness that, if a video recorded interview is played, they will first answer questions in court about the details of the offending in the context of cross-examination from defence counsel, which can be unsettling. In respect of child complainants and propensity witnesses, the witness should ordinarily give their evidence in chief by way of their video recorded interview.

9.10 Cost and the need for extra hearing or trial time are irrelevant to any decision as to ways in which evidence should be given. The focus must be on the best interests of the witness.

Cross-examination and re-examination

9.11 As with evidence in chief, complainants and propensity witnesses are entitled to give the remainder of their evidence by way of a video record made prior to trial. In practice this requires a pre-recording hearing to be convened prior to trial at which the entirety of the witness's evidence will be taken.[34] Prosecutors should discuss the benefits and risks of pre-recording with the witness and ascertain their preferences. Some cases will be better suited to pre-recording than others. To give one example, pre-recording of a witness' complete evidence will generally not be suitable in cases with multiple complainants unless all the complainants' evidence is to be pre-recorded.

9.12 The principal benefits of pre-recording include:

9.12.1 The jury will not be present. The presence of fewer people (particularly strangers) is generally less stressful for witnesses giving evidence of a sensitive nature. This is obviously a neutral factor where the witness would be giving evidence by CCTV in either event, or where jury trial has not been elected.

9.12.2 Where jury trial has been elected, a pre-recording hearing may be able to take place more quickly than a trial, as a jury courtroom is not required, so the witness may not have to wait as long before giving evidence.

9.12.3 The risk of mistrial is minimised as any inadmissible evidence given inadvertently can be edited from the video record that is played at trial.

9.12.4 There may be changes of plea after the complainant's evidence has been taken, in the same way as there may be changes of plea after

[34] The definition of "cross examination evidence" includes supplementary evidence in chief, cross examination and re-examination: Evidence Act 2006, s 106D(7).

the close of the Crown case at trial. In such cases the need for a full trial is avoided.

9.13 The potential risks of pre-recording are:

9.13.1 A notification by the prosecutor that a witness's cross-examination evidence is to be pre-recorded may delay the trial, in three ways:

(a) The defendant may oppose pre-recording by applying for the witness to give evidence in a different way.[35] Where such an application is made, the need for an additional pre-trial hearing, and the possibility of an appeal,[36] will inevitably delay both the pre-recording hearing and the trial.

(b) If pre-recording is confirmed to take place, the fact an additional pre-trial hearing is required to take the evidence may delay the trial if there are constraints on the availability of courtrooms and/or Judges.

(c) Once the pre-recorded hearing has taken place, there may be arguments about the admissibility of parts of the recording which may require further pretrial hearings and/or appeals.[37]

9.13.2 A witness whose evidence has been pre-recorded may be ordered to be recalled for further cross-examination.[38] Even if unsuccessful, applications and appeals[39] in respect of recall may delay the trial.

9.13.3 There is obviously no verdict given at the end of the pre-recording hearing. A witness may experience substantial delays between the giving of their evidence and being advised of the outcome of the trial.

9.13.4 A witness whose evidence has been pre-recorded must not discuss the case, or their evidence, with any other witnesses in the trial. That may not be practical if there is to be a long delay between the pre-recording hearing and the trial, and people close to the witness are witnesses for trial (such as their parents or caregivers). Further, in cases involving multiple complainants, the taking of their

35 Evidence Act 2006, s 106F.

36 Both parties have rights of appeal against decisions in respect of pre-recording, in both Judge-alone and jury trial matters: Criminal Procedure Act 2011, ss 215(2)(ba) and 217(2)(ia).

37 Evidence Act 2006, s 106I(4).

38 Evidence Act 2006, s 106H.

39 Both parties have rights of appeal against decisions in respect of further cross examination, in both Judge-alone and jury trial matters: Criminal Procedure Act 2011, ss 215(2)(bb) and 217(2)(ib).

evidence at different times may risk the suggestion that there has been collusion between hearings.

9.14 When filing a notice which stipulates that a witness is to give all of their evidence by a video record made prior to trial (necessitating a pre-recording hearing), the prosecutor must also stipulate in the notice the ways in which the witness will give evidence at the pre-recording hearing (for example by the use of CCTV or screens). As set out above, adult witnesses must be consulted about these matters; it should not be assumed that they would prefer not to be in the courtroom or, if in the courtroom, that they would prefer not to see the defendant. In respect of children, it can generally be presumed that the witness should give evidence via CCTV but they should have the opportunity to express a view after visiting the courtroom.

10. COMMUNICATION ASSISTANCE

10.1 Communication difficulties are frequently underestimated. For younger witnesses in particular, communication abilities will vary – some children can cope with adult language at about 12 years of age, while many 17 year olds do not have an adult vocabulary. Impairments that can impact severely on communication, such as Foetal Alcohol Syndrome and Autism Spectrum Disorder, are often not readily perceptible, especially as some people strive to conceal their problems out of embarrassment.

10.2 Early identification of a communication difficulty is key because of the need to obtain expert reports and arrange communication assistance through the court registry (there is a shortage of suitably experienced communication assistants in New Zealand).

10.3 To identify the need for communication assistance early, prosecutors should, in cases where there appears to be a possibility such assistance may be required:

10.3.1 On receipt of the file, ask the officer in charge to investigate for vulnerabilities (including consulting family, teachers and medical professionals).

10.3.2 Review any video recorded interview as early as possible.

10.3.3 Ask writers of reports as to ways of giving evidence to comment on the witness's communication capacity and needs.

10.4 If any concerns arise from those steps, prosecutors should seek a report from an expert communication assistant. As a general rule, whether or not concerns are raised by the officer in charge, prosecutors should consider whether to order such a report in respect of witnesses under 12 years of age, and any witness with a known intellectual or learning disability or disorder (including Autism Spectrum Disorder).

10.5 Communication assistants are not expert witnesses but neutral professionals appointed by the court (similar to interpreters) who have specialist expertise with communication difficulties. Communication assistants assess the witness and report to the court with recommendations as to how to adapt questioning and wider trial practice to the witness's needs, including in individual consultations with counsel. They may also attend the trial to assist with questioning, either by monitoring questioning (for miscommunication and associated issues with the witness's coping or concentration span) or by actively translating, but this is likely to be required only in the minority of cases. It will often be the case that the reports provide the Judge and both counsel with enough information to be able to question the witness appropriately, without the need for the communication assistant to attend the trial.

10.6 Prior to trial, prosecutors should ensure the trial Judge is aware that a communication assistant has been engaged and seek directions for the process at trial (which will depend on the circumstances of the particular case; for example where they will sit, whether they will simply observe and intervene where necessary or act more as an interpreter, how they will communicate issues to the court, whether counsel should provide questions to them in advance etc). Ideally, the communication assistant should attend the callover or hearing at which these issues will be discussed.

10.7 Where practicable, prosecutors should consider meeting the communication assistant prior to trial to obtain advice as to how to best examine the witness. Defence counsel should also be afforded that opportunity. In some cases it may be appropriate to give the communication assistant the questions counsel intend to ask in writing. Engaging with the communication assistant in this way prior to trial will reduce the need for the assistant to interrupt when the witness is being asked questions at trial.

11. OTHER PRE-TRIAL APPLICATIONS

11.1 The Criminal Procedure Act 2011 contemplates that all pre-trial applications will be filed before the first trial callover. It should generally be presumed that the decision on the application will be reserved for a period of time, and that there may be an appeal of that decision which needs to be determined prior to trial. In sexual cases it is critical that pre-trial applications are filed as soon as possible so that the trial is not delayed unnecessarily. Prosecutors should be proactive about seeking fixture dates for the hearing of pre-trial applications.

11.2 Upon the initial review of the file, prosecutors should consider whether any pre-trial applications might be required. In addition to identifying the need for notices or applications for witnesses to give evidence in a particular way (whether the ordinary way or an alternative way) and communication

assistance applications (described above), prosecutors should review all of the evidence to identify any possible areas of dispute and proactively file applications under s 101 of the Criminal Procedure Act 2011 if appropriate (for example, where propensity evidence is to be led, prosecutors should file an application unless defence counsel have expressly confirmed they do not object to its admission). Transcripts of both the complainant's and defendant's video recorded interviews should be reviewed carefully and proposed edits discussed with defence counsel at an early stage to avoid late objections. Prosecutors should also be particularly alive to the possibility of evidence being led in breach of s 44 of the Evidence Act 2006, where the complainant refers to sexual conduct with another person in their evidence, and either arrange for editing of the video recorded interview or file an application to adduce the evidence.

11.3 Where possible, applications to be filed by the defence should be identified and discussed with counsel to ensure they are filed promptly. The most common examples of these in sexual cases are:

11.3.1 Applications for severance under s 138(4) of the Criminal Procedure Act 2011.

11.3.2 Applications to cross examine the complainant under ss 44 and 44AA of the Evidence Act 2006.

11.3.3 Applications for a non-party disclosure hearing under s 24 of the Criminal Disclosure Act 2008.

11.3.4 Applications for disclosure of video records under s 106(4B) of the Evidence Act 2006. Prosecutors should be proactive about ensuring that defence counsel have made arrangements to view video recorded interviews well prior to trial.

Other measures

11.4 There are other measures which can improve the trial experience for witnesses in sexual cases and which prosecutors should therefore consider. Some will require a formal application and others can simply be discussed with the trial Judge (preferably well prior to trial, for example at the pre-trial callover, although this may not be possible where the identity of the trial Judge is not yet known).

11.5 The availability of some of these measures will vary from region to region but they may include:

11.5.1 Allowing witnesses to view their video recorded interview before they appear, rather than with the Judge or jury (to allow time to process the evidence and to minimise time at court).

11.5.2 Calling complainants and propensity witnesses, particularly children, only at the beginning of a sitting day. This may mean

shorter sitting days (especially on the first day) or other evidence can be scheduled for afternoons between those witnesses.

11.5.3 Taking frequent breaks, either scheduled in advance or as requested by the prosecutor or the complainant (or their support person or Victim Advisor) including short in-court "mini" breaks.[40]

12. CONDUCTING A PRE-RECORDING HEARING

12.1 Like a trial, a pre-recording hearing cannot take place until the disclosure process is complete and all relevant pre-trial applications have been heard and determined.

12.2 To that end, the prosecutor must:

12.2.1 Proactively liaise with the Police to ensure disclosure is completed as expeditiously as possible. While this should occur in respect of trial in any event, it is critical that disclosure is complete prior to any pre-recording hearing. The need to disclose further material following a pre-recording hearing risks an application by the defendant to recall the witness for further cross-examination in respect of the newly disclosed material.

12.2.2 Ensure a pre-recording hearing is not set down until any relevant pretrial applications have been heard and determined, as these may impact on the evidence to be given at the pre-recording hearing. Obvious examples are applications for the witness to give evidence in a different way under s 106F of the Evidence Act, applications under ss 44 or 44AA of the Evidence Act, or applications for non-party disclosure under s 27 of the Criminal Disclosure Act. If none have been filed, it may be prudent for the prosecutor to seek formal confirmation from the defendant that no such applications will be filed, such as at callover or by way of memoranda filed in court, before a pre-recording hearing is set down. This will further minimise the risk of a witness being recalled for further cross-examination.

12.3 Similarly, requests for sentence indications and applications to dismiss charges under s 147 of the Criminal Procedure Act should be dealt with prior to pre-recording hearings, as their outcomes could obviate the need for the witness to give evidence at all.

12.4 Prosecutors should approach the pre-recording hearing in the same way as a trial, given that the evidence to be taken will usually be the most important part of the case. While there will obviously be no need to prepare

[40] Where everyone remains in place in court but the witness has a few minutes' privacy in the CCTV room (only the judge's camera remains on).

addresses, or cross-examination of potential defence witnesses, it should be assumed there will be no further opportunity to ask questions of the witness. The prosecutor will therefore need to be familiar with all aspects of the evidence in order to lead all necessary supplementary evidence in chief, object appropriately to questions asked in cross examination, and conduct any necessary re-examination. It will also be necessary to ensure that photograph and exhibit booklets have been prepared if it is intended to refer the witness to them.

13. CONDUCTING THE TRIAL

13.1 In this section the references to a "trial" include, as applicable, a hearing at which the complainant's evidence, or that of a propensity witness, including cross-examination is to be pre-recorded and later played at trial as a video record.

13.2 In evidence in chief and re-examination, prosecutors must be careful to ask questions which are comprehensible to the witness, free of undue suggestion or coercion and which give the witness a reasonable opportunity to give their evidence completely and accurately. If a communication assistance report has been prepared, the prosecutor should closely adhere to its recommendations as to suitable and unsuitable questions.

13.3 When a witness is being cross-examined by defence counsel, prosecutors should intervene when a question, or the way in which it is asked, is "improper, unfair, misleading, needlessly repetitive, or expressed in language too complicated for the witness to understand".[41] This includes questions asked in an intimidating, hectoring or aggressively dismissive manner, or questions that are designed to humiliate the witness. Again, where a communication assistance report is available, prosecutors should object to any question which does not conform with its recommendations.

13.4 At all stages of a witness's evidence, prosecutors should seek a break where it appears a witness is becoming too tired or distressed to concentrate. Some witnesses will decline the offer of a break, even when they need one, for example if they think the Judge would prefer to carry on or to avoid being seen as disrupting the trial. While ultimately it will be a matter for the Judge, prosecutors should, therefore, use their own judgement rather than wait for the court to suggest a break be taken. Prosecutors should try to avoid the witness being required to decide whether or not they need a break.

13.5 In cases involving particularly vulnerable witnesses (for example, those requiring communication assistance, very young children, witnesses with intellectual disabilities or those suffering from other conditions such as Post

[41] Evidence Act 2006, s 85.

Traumatic Stress Disorder), it may be prudent to agree certain matters with the Judge and defence counsel prior to trial. This might include the types of questions that may not be asked, the nature of the involvement of the communication assistant (if applicable) and agreeing upon the frequency and length of breaks to be taken. Such agreements can reduce the need for intervention during the trial.

13.6 Where technology is to be used at trial (for example, where there are video recorded interviews to be played), that should be highlighted shortly before the trial date (for example at the pre-trial callover). In general, the court is responsible for ensuring it has the requisite technology available at trial, but the prosecutor should assist by ensuring the court knows what is required and has the opportunity to test it. Prosecutors may elect to assist with that process to ensure the smooth running of the trial.

13.7 Prior to the Judge's summing up, prosecutors should consider whether it is appropriate to suggest to the Judge that s 126A of the Evidence Act 2006, which requires the Judge to give any directions considered necessary or desirable to address relevant misconceptions relating to sexual cases, is engaged.

After trial

13.8 Ideally, prosecutors should debrief witnesses after they have finished giving evidence, to answer any questions they may have. Often that will not be possible (for example, because another witness is to be called immediately and the complainant is not remaining at court). In those circumstances, the officer in charge should meet with the witness and prosecutors should offer to answer any questions at a later time.

13.9 If practicable, the prosecutor or the officer in charge should advise the complainant of the verdict, either in person or by telephone. Alternatively, if the complainant has already learned of the verdict, the prosecutor or officer in charge should offer to answer any questions they may have. Prosecutors should be mindful of the possibility of an appeal and/or retrial when meeting with witnesses after trial and ensure discussions are recorded by the officer in charge if evidential matters are discussed (beyond simply a repetition of what was said at trial).

13.10 If a mistrial is declared or (in the case of jury trials) no verdict is reached, prosecutors should consult with the complainant before deciding whether to proceed with a further trial. If a further trial is required, prosecutors should consider pre-trial matters afresh. For example, the way in which a witness gave evidence may no longer be suitable whether because of the passage of time or some other factor. Prosecutors should consult with the witness about such matters at an early stage.

14. SENTENCING

14.1 If the matter is proceeding to sentencing or disposition, whether following a trial, guilty plea, or finding of not guilty on account of insanity, prosecutors should do the following (or should ensure the officer in charge does so):

14.1.1 Where a victim impact statement is to be provided, explain its nature and purpose and who will see it, as well as explaining what type of material should not be included (for example, overly inflammatory material, references to unrelated matters or offending other than that before the court). Victim impact statements should be addressed to the Judge, rather than to the offender. Where inappropriate material appears in a victim impact statement, prosecutors should either redact the material or acknowledge in their submissions to the court that it should not be taken into account. Any redactions should be discussed with, and explained to, the victim prior to the sentencing hearing.

14.1.2 Where a victim impact statement is provided, consult the victim as to whether any parts of it should be withheld from the defendant, explaining that the Judge will then not be able to take those parts into account,[42] or whether other directions are appropriate.[43]

14.1.3 Where a victim impact statement is provided, ensure the victim is asked whether they wish to read it in court. It will need to be explained that this is a matter of discretion for the Judge.

14.1.4 Where a victim wishes to read their victim impact statement in court, they must be asked how they wish to present it.[44] The prosecutor should also consider whether an order closing the Court should be sought.[45]

14.1.5 Where s 24A of the Sentencing Act 2002 applies, explain that someone will be in contact with them to discuss the possibility of restorative justice. Where s 24A does not apply (for example, where no guilty plea was entered), the prosecutor may think it appropriate to explain what restorative justice is and ascertain the victim's willingness to participate.

14.1.6 If it becomes apparent that the sentencing hearing will be adjourned (for example, because the required reports have not been prepared in time), be proactive about alerting the court and having the matter formally adjourned as soon as possible to

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42 Victims' Rights Act 2002, ss 25 and 26.

43 Victims' Rights Act 2002, s 27.

44 Victims' Rights Act 2002, ss 22 and 22A set out the way in which a victim impact statement may be presented.

45 Criminal Procedure Act 2011, s 199AA and Victims' Rights Act 2002, s 28D.

minimise the impact of an adjournment on the victim(s). Victims should be notified as soon as possible if a matter is likely to be adjourned as they may have made practical arrangements, such as taking time off work or school, that need to be changed.

14.1.7 Prior to the sentencing hearing, ensure victims are advised about the sentencing process. Victims should be made aware they may attend in person even if they do not want to present their victim impact statement personally, and should be advised that the hearing will be open to the public. It should be clearly explained that the facts of the offending will be outlined by the Judge in some detail so they are prepared for that.

14.1.8 Advise victims of the full range of sentencing options available to the court, and the submissions the prosecutor will be making as to the appropriate sentence.

14.1.9 Where there is associated family violence offending, consider applying for a protection order as part of the sentence. This will require consultation with the victim as an order may only be made if the intended protected person does not object.[46]

14.1.10 If the sentencing hearing is in a list court, and the victim is planning to attend, consider asking for it to be heard at a fixed time (or first or last in the day) to minimise waiting time for the victim.

14.1.11 After sentencing, explain the sentence imposed and any practical implications.

14.2 Where there has not been a trial, prosecutors should offer to meet with the victim to discuss the above matters, as well as the matters that would typically be covered in pre-trial meetings (to the extent they are relevant), particularly where the victim is planning to attend the sentencing hearing.

15. POST-TRIAL APPEALS

15.1 If a convicted defendant files an appeal, the prosecutor should ensure the victim is informed of the nature of the appeal (whether against conviction, sentence or both) and the process for dealing with it. In the case of appeals from Crown prosecutions (which includes all jury trials), that process will be formally facilitated by the Crown Law Office together with the officer in charge and/or Victim Advisor. However, prosecutors may consider informing the victims themselves as well in appropriate cases, such as where the victim is particularly vulnerable and will benefit from receiving this advice from the prosecutor personally, given the prosecutor will be best

[46] Sentencing Act 2002, s 123B.

placed to explain the grounds of appeal.

15.2 If a retrial is ordered on a successful appeal, prosecutors should consult with the complainant as to whether they should proceed to a retrial. Depending on the reasons for which the retrial has been ordered, the witness may not be required to participate in a retrial if their evidence was pre-recorded, or given *viva voce* and recorded in accordance with s 106J of the Evidence Act.

15.3 If there is to be a retrial, prosecutors should consider pre-trial matters afresh (in the same way as for a mistrial or hung jury). For example, the way in which a witness gave evidence may no longer be suitable whether because of the passage of time or some other factor. Prosecutors should consult with the witness about such matters at an early stage.