

CROWN LAW

SOLICITOR-GENERAL'S GUIDELINES FOR  
PROSECUTING SEXUAL VIOLENCE

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*As at 1 July 2019*

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## 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**

## 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<sup>1</sup> 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. We will review them over time to ensure they continue to represent best practice.

Una Jagose QC  
**Solicitor-General**

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<sup>1</sup> For example <https://sexualviolence.victiminfo.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

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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:
- 2.3.1 does not have sufficient proficiency in the English language to:
- (a) understand court proceedings conducted in English; or
  - (b) give evidence in English; or
- 2.3.2 has a communication disability.
- 2.4 **Complainant** means a person whose allegations are the subject of a charge of sexual offending against a defendant in a criminal proceeding.
- 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 giving propensity evidence in accordance with s 40 of the Evidence Act 2006.
- 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:<sup>2</sup>
- 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 Prosecutors must also 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.<sup>3</sup>
- 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 of having a suitable support person (who is not a witness) present at such meetings.

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<sup>2</sup> Victims' Rights Act 2002, s 7.

<sup>3</sup> 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.

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- 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 as 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.
- 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

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- 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) Section 44 of the Evidence Act 2006 (to offer evidence about a complainant's sexual experience).
    - (b) 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<sup>4</sup> 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

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<sup>4</sup> Or their support person, in certain circumstances: see Victims' Rights Act 2002, s 14.

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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:<sup>5</sup>
- 6.5.1 Decisions on charging and all changes thereto.
  - 6.5.2 The complainant's role as a witness.
  - 6.5.3 The possibility of name suppression<sup>6</sup> 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.<sup>7</sup>
    - (c) Any trial.
    - (d) Any sentencing hearing.
    - (e) Any appeal hearing (whether the appeal is against conviction, sentence or both).<sup>8</sup>
    - (f) Any hearing held under s 406(a) of the Crimes Act 1961 (which relates to matters referred to the Court of Appeal by the Governor-General).

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<sup>5</sup> Victims' Rights Act 2002, s 12. Note that s 13 provides for information to be withheld in certain circumstances.

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

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

<sup>8</sup> 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.

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- 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 and name suppression*

- 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.<sup>9</sup>
  - 6.6.2 Any application by the defendant for bail (including EM bail).<sup>10</sup>
- 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).<sup>11</sup>
- 6.8 Any decisions about bail and permanent name suppression should be communicated to the complainant as soon as possible.
- 6.9 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.
- 6.10 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.
- 6.11 Finally, adult complainants should be advised of the ability to apply to have automatic suppression of their own names lifted.

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<sup>9</sup> Victims' Rights Act 2002, s 28.

<sup>10</sup> Victims' Rights Act 2002, s 30.

<sup>11</sup> Victims' Rights Act 2002, ss 28-30; Bail Act 2000, s 8; Criminal Procedure Act 2011, s 200.

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### *Other information to be provided*

- 6.12 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):
- 6.12.1 Procedures for determining fitness to stand trial or insanity, under the Criminal Procedure (Mentally Impaired Persons) Act 2003, if triggered.
  - 6.12.2 Applications by the prosecutor for the complainant to give evidence in an alternative way, or to have communication assistance, at trial.
  - 6.12.3 Significant pre-trial applications filed by the defendant that may affect them, such as:<sup>12</sup>
    - (a) Applications for stay or dismissal of the charges.
    - (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 prior sexual experience, under s 44 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.
  - 6.12.4 A proposed plea arrangement, if the prosecutor is considering accepting it.<sup>13</sup>
  - 6.12.5 Any sentence indication hearing sought by the defendant.
  - 6.12.6 Where the defendant has been convicted, their right to provide a victim impact statement to the court, and to read it to the court at sentencing if they choose (and if the Judge agrees).
  - 6.12.7 Where the defendant has been convicted and there is associated family violence offending, the possibility of a protection order being made at sentencing.<sup>14</sup>
  - 6.12.8 The possibility of appeals, whether in respect of pre-trial matters, conviction or sentence. The consequences of an appeal being filed

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<sup>12</sup> 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.

<sup>13</sup> It is not necessary to advise the victim of every proposal made by a defendant where the prosecutor has no intention of agreeing to it.

<sup>14</sup> Sentencing Act 2002, s 123B.

should also be clearly explained (for example, where a pre-trial appeal places the trial date in jeopardy).

*How information should be provided*

- 6.13 All information must be delivered in a timely way and in a manner able to be understood by the complainant.
- 6.14 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.
- 6.15 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.
- 6.16 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).<sup>15</sup> Prosecutors should also exercise caution when disclosing personal information about other witnesses.

## 7. MEETING COMPLAINANTS PRIOR TO TRIAL

- 7.1 It is recommended that there be two meetings with the complainant prior to trial (outlined in more detail below):
  - 7.1.1 An initial meeting, not necessarily with the trial prosecutor, to explain the role of the prosecutor and various procedural matters.
  - 7.1.2 A pre-trial meeting with the trial prosecutor, to establish a rapport with the complainant and discuss the trial process in more detail.
- 7.2 Propensity witnesses should also be offered the opportunity to attend a (separate) pre-trial meeting with the prosecutor.
- 7.3 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.
- 7.4 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

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<sup>15</sup> Victims' Rights Act 2002, s 16. See also Evidence Act 2006, ss 87-88.

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well. If a communication assistant has been appointed, the prosecutor should consider whether they should also attend (where practicable).

- 7.5 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.
- 7.6 There will be occasions when evidential matters are raised by either the prosecutor or the witness. These discussions should take place separately.<sup>16</sup> The attending Police officer should keep a full record of evidential discussions, which may need to be disclosed.

### *The initial meeting*

- 7.7 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 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.
- 7.8 When attending an initial meeting with a complainant, prosecutors should explain the following matters:
- 7.8.1 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.
- 7.8.2 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.
- 7.8.3 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).

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<sup>16</sup> For convenience, such a meeting could directly follow an initial or pre-trial meeting.

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- 7.8.4 The mode of trial (whether jury trial or trial by a Judge sitting alone).
- 7.8.5 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.
- 7.8.6 The fact the court will be closed while the complainant gives evidence, and what that means.
- 7.8.7 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.<sup>17</sup> 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 think carefully about whether they wish family members, for example, to fulfil that role).
- 7.8.8 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.
- 7.8.9 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.
- 7.8.10 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.
- 7.9 The prosecutor should answer any questions the complainant may have, although not about evidential matters (the reasons for this should be clearly explained).
- 7.10 The initial meeting also provides an opportunity for the prosecutor to discuss two important matters with the complainant:
  - 7.10.1 The ways in which the complainant 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 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.

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<sup>17</sup> Evidence Act 2006, s 79.

- 7.10.2 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.
- 7.11 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*

- 7.12 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).<sup>18</sup>
- 7.13 When attending a pre-trial meeting with complainants and/or propensity witnesses, prosecutors should clearly explain:
- 7.13.1 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.
- 7.13.2 The need to alert the officer in charge, or the prosecutor, immediately if the complainant or witness realises they know a juror personally.
- 7.13.3 How any alternative ways of giving evidence or other measures (such as additional breaks or communication assistance) will work. In particular, if a video interview is to be played it should be explained when that will occur and who will be present.
- 7.13.4 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.
- 7.13.5 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

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<sup>18</sup> 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.

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will see the defendant's immediate release even if there has been a previous remand in custody.

- 7.14 Prosecutors should also use the pre-trial meeting to prepare witnesses for court thoroughly. Preparation must not extend to coaching but should include:
- 7.14.1 Confirmation that, when giving evidence, the most important thing is to tell the truth.
  - 7.14.2 Reassurance that all that is otherwise expected of a witness is that they be themselves.
  - 7.14.3 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.
  - 7.14.4 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 if leave has been granted under s 44 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.
  - 7.14.5 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.
  - 7.14.6 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*

- 7.15 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.

## 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<sup>19</sup> by a sufficiently experienced prosecutor to identify:
- 8.2.1 The particular vulnerabilities of the witnesses involved, which will determine the need for expert reports as to the way in which the complainant should give evidence or 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 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.

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<sup>19</sup> 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.

## GUIDELINES FOR PROSECUTING SEXUAL VIOLENCE

- 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.
- 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 of interviews*

- 8.6 Video records of witness interviews are extremely sensitive. Prosecutors must be familiar with their obligations under the Evidence Regulations 2007 which require, among other things, the following:

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- 8.6.1 Video records must be kept in “safe custody”.<sup>20</sup> A register should be kept to track who has received or viewed them, and they should be stored securely.
- 8.6.2 Copies of video records must not be provided to the defence unless the court has ordered disclosure under s 106(4B) of the Evidence Act 2006. The transcript must of course be disclosed as soon as practicable.
- 8.6.3 If it is necessary for an expert to view a video record, the expert must be advised of their obligations under reg 20A (which prohibits copying the video record or showing it to anyone else and imposes obligations to keep it in safe custody and return it upon request or at the end of the proceeding).<sup>21</sup>
- 8.6.4 Video records must be returned to the Police at the end of the proceeding.<sup>22</sup>

## 9. ALTERNATIVE WAYS OF GIVING EVIDENCE

- 9.1 In cases involving child witnesses, there is a statutory presumption that the child will give evidence in an alternative way. 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 how the witness will give evidence.<sup>23</sup>
- 9.2 Prosecutors must also give early consideration as to whether witnesses who are not child witnesses should give their evidence in an alternative way, and file the appropriate application.<sup>24</sup> This should be done as early in the proceeding as possible, particularly if an expert report will be required, and certainly before the first trial callover. As set out above, adult witnesses should be consulted about the various ways in which they may give evidence and be invited to express a preference.
- 9.3 As a general rule, where an adult complainant or propensity witness has participated in a video recorded interview, prosecutors should at least consider applying for that to form the basis of their evidence in chief at trial. The advantages of doing so are as follows:
  - 9.3.1 It is generally less stressful and traumatic for the witness than having to recount their evidence verbally in the courtroom.

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<sup>20</sup> Evidence Regulations 2007, reg 31(1).

<sup>21</sup> Evidence Regulations 2007, reg 34(2).

<sup>22</sup> Evidence Regulations 2007, reg 31(2).

<sup>23</sup> Evidence Act 2006, s 107.

<sup>24</sup> Evidence Act 2006, s 103.

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- 9.3.2 The risks 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.
- 9.3.3 The fact finder will hear the “best evidence” of the complainant, in the sense that the video interview will have been conducted nearer to the time of the offending.
- 9.4 However, there may be good reasons for departing from that general rule, including (but not limited to):
  - 9.4.1 The interview contains inadmissible material and the editing process would render it incomprehensible.
  - 9.4.2 The interview is too long to be played at trial and editing would be ineffective.
  - 9.4.3 The witness has a clear and strong preference for giving full *viva voce* evidence, despite the advantages of the use of the video interview having been explained to them. It may be relevant to the witness that, if a video 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.
- 9.5 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 relevant questions are whether the statutory criteria are met, and what is in the best interests of the witness.
- 9.6 Whenever an expert report is sought in respect of alternative ways of giving evidence, prosecutors should consider whether the report should also address the need for communication assistance (discussed further below) to avoid the need for multiple reports (and consequent delays).

## 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 impairment 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).

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- 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 disorders. 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 applications for witnesses to give evidence in 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 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 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 s 44 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 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.<sup>25</sup>
- 11.6 Pre-recording of a witness’s cross-examination and re-examination is not currently recommended in the absence of a supporting legislative framework.<sup>26</sup> It may nevertheless be appropriate to apply for pre-recording in exceptional cases; this should only be done after consultation with Crown Law.

## 12. CONDUCTING THE TRIAL

- 12.1 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.
- 12.2 When a witness is being cross-examined by defence counsel, prosecutors should intervene when a question is “improper, unfair, misleading, needlessly repetitive, or expressed in language too complicated for the witness to understand”.<sup>27</sup> 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.

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<sup>25</sup> 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).

<sup>26</sup> While Crown Law considers existing legislation provides jurisdiction for pre-recording, it is not express and there are insufficient safeguards (for example, there are no provisions limiting the circumstances in which witnesses whose evidence has been pre-recorded should be recalled at trial, or providing the threshold that should be applied on such an application).

<sup>27</sup> Evidence Act 2006, s 85.

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- 12.3 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.
- 12.4 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 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.
- 12.5 Where technology is to be used at trial (for example, where there are video 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.

### *After trial*

- 12.6 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.
- 12.7 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).
- 12.8 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.

## 13. SENTENCING

13.1 If the matter is proceeding to sentencing, whether following a trial or a guilty plea, prosecutors should do the following (or should ensure the officer in charge does so):

13.1.1 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). 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.

13.1.2 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,<sup>28</sup> or whether other directions are appropriate.<sup>29</sup>

13.1.3 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.

13.1.4 Where a victim wishes to read their victim impact statement in court, consider whether a screen or CCTV should be sought for that purpose.

13.1.5 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.

13.1.6 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 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

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<sup>28</sup> Victims' Rights Act 2002, ss 25 and 26.

<sup>29</sup> Victims' Rights Act 2002, s 27.

practical arrangements, such as taking time off work or school, that need to be changed.

- 13.1.7 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.
  - 13.1.8 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.
  - 13.1.9 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.<sup>30</sup>
  - 13.1.10 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.
  - 13.1.11 After sentencing, explain the sentence imposed and any practical implications.
- 13.2 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.

## 14. POST-TRIAL APPEALS

- 14.1 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 placed to explain the grounds of appeal.
- 14.2 If a retrial is ordered on a successful appeal, prosecutors should consult with the complainant as to whether they should proceed to a retrial.

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<sup>30</sup> Sentencing Act 2002, s 123B.

## GUIDELINES FOR PROSECUTING SEXUAL VIOLENCE

- 14.3 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.