Te Tari Ture o te Karauna
Crown Law

Prosecuting sexual violence

Te aru i te taitōkai

As at 1 January 2025

The Solicitor-General's Prosecution Guidelines
Te Aratohu Aru a te Rōia Mātāmua o te Karauna

Summary | Te whakarāpopototanga

1. There are special considerations which apply when prosecuting sexual violence offending. Prosecutors should: communicate and explain prosecutorial decisions to victims; ensure the victim's evidence is collected and presented in the way that minimises harm to them; and explain to the victim the procedures surrounding the suppression of the victim's own name. It is particularly important for a prosecutor to build a relationship with a victim who is to be a witness at trial, so they feel comfortable giving evidence.

Introduction | Ngā kupu whakataki

2. Prosecuting sexual violence offending raises challenging issues for the criminal justice system and its practitioners. Victims of sexual violence are often particularly vulnerable and particular care is needed to enable their participation in the justice system.

Scope | Te korahi

3. This guideline supplements the guideline on Victims | Ngā pārurenga and should be read together with it. This guideline provides additional guidance in respect of sexual violence cases specifically.

4. This guideline applies to all sexual cases, as defined below, whether they are Crown prosecutions or non-Crown prosecutions.

5. The conduct of investigations is beyond the scope of this guideline. The application of the Test for Prosecution is set out in the guideline on Decisions to prosecute | Te whakatau ki te aru.

Glossary | Kuputaka

6. In this guideline, the following definitions are used (instead of those in the main Glossary, where applicable):

    6.1 *Witness* encompasses both complainants and other vulnerable witnesses, such as witnesses who are giving propensity evidence in sexual cases or witnesses who are vulnerable by reason of their age, disability, experience or other factor. Where necessary, more specific terms such as "complainant", "victim", "child witness" or "propensity witness" are used as defined below. Where a witness is a child, or is unable to make decisions for themselves, references to information being provided to, or views sought from, the witness include their parent or caregiver.

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

6.3 *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, and includes providers contracted to the Ministry of Social Development to provide Court Support Services.

6.4 *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.

6.5 *Sexual case* has the same meaning as in the Evidence Act. 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:

6.5.1 an offence against any of the provisions of ss 128 to 142A or s 144A of the Crimes Act 1961; or

6.5.2 any other offence against a person of a sexual nature.

6.6 *Trial* means both judge-alone trials and jury trials, unless otherwise stated.

6.7 *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.

6.8 *Victim Advisor* means the court victim advisor and includes a specialised sexual violence victim advisor.

Guideline | Te aratohu

Decisions not to prosecute

Decisions made by New Zealand Police

7. Police will generally make the decision to prosecute or not in a sexual case in the first instance, in accordance with the Test for Prosecution in the guideline on Decisions to prosecute | Te whakatau ki te aru.

8. If Police decides not to prosecute where there is a complaint of sexual violation, they should:

8.1 Advise the complainant of the decision, and why it was made, 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.

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

Decisions made by the Crown Solicitor

9. If Police commences 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 guideline on The relationship between prosecutors and investigators | Te hononga i waenga i te kaiaru me te kaitūhura.

10. In cases involving an allegation of sexual violation:

    10.1 The Crown Solicitor, or a partner in the Crown Solicitor's firm, should personally make or approve a decision not to prosecute.

    10.2 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 have to request one (this will differ according to the circumstances of the particular case).

    10.3 While technically the Crown may seek leave to withdraw charges on a without prejudice basis, complainants should be advised that withdrawing charges will be the end of the matter unless further evidence comes to light.

Process where a complainant seeks a review

11. Police (where the decision to be reviewed was made by Police) or the Crown Solicitor (where the decision to be reviewed was made by the Crown Solicitor) determine how a review will be conducted. Reviews should be conducted by someone who was 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 original decision maker. In Crown prosecutions, reviews should be conducted by a prosecutor holding at least a senior classification from Crown Law. In a small Crown Solicitor office where there are insufficient senior prosecutors, or in a difficult or complex case, the matter may be referred to Crown Law. Crown Law may review the matter or refer it to another Crown Solicitor.

12. Complainants should be advised about the process and likely timeframe for the review. In Crown prosecutions the timeframes will be short as there will be charges before the court.

13. If the original decision maker and the reviewer cannot agree about whether a prosecution should be commenced or continued, the matter should be referred to Crown Law for a decision or direction.

14. The requirement to offer a review only applies to decisions not to prosecute or to bring a prosecution to an end. This includes bringing a prosecution to an end for an individual complainant in a case with multiple complainants.

    Commentary

    Police and Crown Solicitors are not required to review decisions to amend or reduce charges if a complainant requests it, although they may choose to.

Specialisation of prosecutors

Crown prosecutions

15. 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, who comprise only a small proportion of all public prosecutors, have particular skills and expertise in prosecuting sexual violence offending.

16. The choice of prosecutor is for the Crown Solicitor. Trials that include charges of sexual violation should ordinarily involve a prosecutor holding at least a senior classification from Crown Law. That prosecutor may be lead or sole counsel, or support an experienced intermediate prosecutor who is leading the trial. In some cases, the Crown Solicitor may assess that a trial may be appropriately conducted by a sufficiently experienced intermediate prosecutor as sole counsel.

Non-Crown prosecutions

17. Some sexual cases will not automatically involve Crown Solicitors because they do not become Crown Prosecutions (for example where the most serious offence is indecent assault and the defendant has not elected a jury trial). However, the Solicitor-General's expectation is that Police will consider instructing Crown Solicitors to conduct these cases if they are proceeding to trial, especially where the case is difficult or complex.

18. In particular, it is expected Police will consider instructing Crown Solicitors in cases which involve either:

    18.1 a witness under the age of 18; or

    18.2 a witness who is vulnerable by reason of their age or disability, or who requires communication assistance.

19. Police should also consider instructing Crown Solicitors in cases including, but not limited to:

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

    19.2 Cases involving multiple complainants.

    19.3 Cases involving propensity evidence.

    19.4 Cases involving complex or novel expert evidence.

    19.5 Cases in which applications are made under:

        19.5.1 Sections 44 and 44AA of the Evidence Act (to offer evidence about a complainant's sexual experience or sexual disposition, or where there is a dispute as to whether evidence is of sexual reputation).

        19.5.2 Section 106F of the Evidence Act (where Police has 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).

19.5.3 Section 106H of the Evidence Act (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).

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

20. A prosecutor conducting a sexual case for the Police Prosecution Service should have sufficient relevant experience and training.

Plea arrangements in sexual violation cases

21. Prosecutors may enter into plea discussions, and reach plea arrangements, as with any other type of offending, in accordance with the guideline on Decisions to prosecute | Te whakatau ki te aru.

22. However, prosecutors should exercise particular care when considering reducing a charge of sexual violation to indecent assault where the evidence supports the more serious charge. Such a reduction is likely to be significant for the victim and impact the sentencing options available. While there may be exceptional cases warranting resolution of the case by way of a guilty plea to indecent assault, such decisions should only be made after consultation with Police and the victim, and ideally with their support. The decision to charge indecent assault should be approved by the Crown Solicitor personally.

Providing information to, and consulting with, complainants

23. In addition to the matters set out in the guideline on Victims | Ngā pārurenga, the following applies in sexual cases:

23.1 Where there is a significant amendment to the charge(s), or a reduction in charge, this should be clearly explained to the complainant, preferably in person.

23.2 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.[1]

23.3 Prosecutors must make all reasonable efforts to advise of the following:

23.3.1 The ways in which complainants and propensity witnesses may give evidence at, or before, trial.[2]

23.3.2 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.[3]

1 Evidence (Video Records and Very Young Children's Evidence) Regulations 2023, reg 58.
2 Victims' Rights Act, s 28B.
3 Victims' Rights Act, s 28BA.

23.3.3 Complainants' names (and other identifying particulars) will be automatically suppressed. Adult complainants should be advised of the ability to apply to have automatic suppression of their own names lifted, and propensity witnesses should be advised that the court may make an order prohibiting the publication of identifying information about them, if sought.

23.4 Prosecutors should consider notifying complainants of the following applications if they are filed by the defendant:[4]

23.4.1 Applications to cross-examine the complainant about their prior sexual experience or sexual disposition under s 44 of the Evidence Act, or where there is a dispute as to whether the prohibition on evidence about sexual reputation in s 44AA is engaged.

23.4.2 Applications for the complainant to give evidence in a different way from that which has been notified by the prosecutor, under s 106F of the Evidence Act.

23.4.3 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.

24. When providing information to the court, prosecutors must be mindful of the statutory prohibition on disclosing the complainant's occupation.[5]

25. If a victim wishes to read their victim impact statement at a sentencing hearing, the prosecutor should consider whether to seek an order closing the court.[6]

Meeting complainants prior to trial

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

27. In Crown prosecutions, there should ideally be two meetings with the complainant prior to trial (outlined in more detail below):

27.1 An initial meeting to explain the role of the prosecutor and various procedural matters.

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

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

[4] 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.

[5] Evidence Act 2006, s 88.

[6] Criminal Procedure Act, s 199AA; and Victims' Rights Act, s 28D.

29. In non-Crown prosecutions, the Police prosecutor should consider meeting with the complainant prior to trial to discuss the matters below. If they are unable to do so, the officer in charge may address them with the victim.

The initial meeting

30. 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 if one has already been assigned, which may depend on whether a trial date has been allocated.

31. Prosecutors should explain the following to complainants in the initial meeting:

    31.1 If the prosecutor conducting the meeting may not be the trial prosecutor, they should make this clear, while reassuring the complainant that the trial prosecutor will meet with them nearer the time of trial.

    31.2 The current mode of trial (whether jury trial or trial by a judge sitting alone). It may be appropriate in some cases to explain that the mode of trial may change.

    31.3 The likely timeframe for setting a trial date and duration of the trial. If the relevant court has a system of backup fixtures, this should be explained.

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

    31.5 That a judge may not approve a complainant's proposed support person if they do not consider they are suitable.[7] The prosecutor should explain that the support person will see and hear everything in the courtroom while the complainant is giving evidence so the complainant should think carefully about who they wish to fulfil that role.

    Commentary
    For example, a complainant may reconsider whether they wish to have a partner or family member as their support person given that person will become aware of all the details of the case, including evidence which may be put to them in cross-examination.

    31.6 The complainant may remain in the courtroom after giving evidence to watch the trial from the public gallery. However, there are generally no special measures adopted (for example, there will be no screen) and they may find watching the trial distressing.

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

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

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7 Evidence Act, s 79.

33.1 The ways in which the complainant is entitled to, or may, give evidence. 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.

33.2 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). Prosecutors should tell the complainant that, if their evidence is pre-recorded, they can still be recalled to give further evidence at trial. Prosecutors should also explain that while the complainant's preferences are important and will be taken into account, the decision about pre-recording will be made by the prosecutor and can be overridden by the judge.

33.3 The level of engagement the complainant wishes to have in 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. Prosecutors should ask complainants if they prefer the officer in charge (on behalf of the prosecutor) or the victim advisor to provide information to them.

34. Finally, the prosecutor should also assess whether a report from a communication assistant may be beneficial.

The pre-trial meeting

35. 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).[8]

36. Prosecutors should explain the following to complainants and/or propensity witnesses at the pre-trial meeting:

36.1 Any matters that should have been, but were not, explained at the initial meeting. Some matters may need to be revisited or confirmed (for example, if orders have been made, any changes such as a late election of jury trial, or where the complainant was considering options such as the identity of their support person or whether they would like any religious or cultural protocols observed at court). In some cases, particularly if it has been a long time since the initial meeting, it would be prudent to touch briefly on all the matters discussed at the initial meeting.

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

36.2 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 orally in court will be video recorded, and the purpose for which that video record may be used.[9]

36.3 If the defendant is going to be self-represented at trial, complainants and propensity witnesses should be advised about the restrictions on cross-examination[10] and the procedure which will be adopted.

Courtroom education

37. Complainants and other witnesses should be provided with courtroom education prior to trial. The prosecutor may decide to do this personally (together with the officer in charge) or decide 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

38. Regional practices vary but 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 victim advisor or officer in charge), the number of people attending should be limited so as not to overwhelm the complainant. For the same reason, consideration should be given to the venue for the meeting; CCTV rooms are typically very small and can easily feel crowded.

Preparation for trial

Avoiding delay

39. Delays can cause serious stress for complainants and other witnesses in sexual cases. Avoiding delay may improve the quality of a witness's evidence and participation and helps achieve finality for complainants, which may assist their recovery.

40. It is critical that sexual cases are reviewed at an early stage[11] by a sufficiently experienced prosecutor to identify:

40.1 The particular vulnerabilities of witnesses, which will guide decisions as to how the complainant should give evidence or whether communication assistance is required (both discussed further below). This will also be informed by the initial meeting with the complainant as recommended by this guideline.

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

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[9] Evidence Act, s 106J.

[10] Evidence Act, s 95.

[11] 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.

40.3 The need for any pre-trial enquiries by Police or other arrangements such as editing video recorded interviews. Prosecutors should allow sufficient time for Police to complete such enquiries and disclose the results without jeopardising the trial fixture.

40.4 Whether expert evidence is required, for example counter-intuitive evidence. Identifying a suitable expert, seeking approval from the Ministry of Justice to instruct them, and preparing their brief (which should be disclosed well before trial) may take weeks. Where practicable, prosecutors should brief expert witnesses in person.

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

41. 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. Similarly, late pre-trial applications, for example to adduce propensity evidence, can jeopardise trial dates, particularly if a decision is appealed.

42. Prosecutors should take the following steps to expedite the trial, which should be highlighted in the Case Management Memorandum (for judge-alone trials) or Trial Callover Memorandum (for jury trials):

42.1 Ensure that disclosure is completed as soon as practicable.

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

42.3 Proactively seek early fixture dates for any pre-trial applications (prosecutors should presume that the decision on the application will be reserved, and there may be an appeal that needs to be determined prior to trial).

42.4 Ensure the court is made aware of anything that may make the trial unsuitable as a backup fixture, or that means it warrants greater priority over other cases.

43. Once a trial date is set, any adjournment is particularly difficult for complainants, especially if it occurs close to the trial date. Complainants will likely have mentally prepared for the trial as well as taken practical steps such as arranging to take time off work or school. Changes may be difficult, particularly if 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 vulnerable adults are involved. Prosecutors should advise witnesses as soon as possible after they become aware an adjournment may be required, to minimise the impacts, and be proactive about getting a formal court decision so they can provide certainty to complainants.

Dealing with video records

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

    44.1 Video records must be kept secure. This requires keeping the means of accessing records (usernames and passwords) secure, and ensuring unauthorised people are not able to view them.[12] There must be an access log to track who has viewed video records.

    44.2 Copies of, or access to, video records must not be provided to the defence unless the court has ordered disclosure.[13] In Crown prosecutions, Police will facilitate any access. The transcript must be disclosed as soon as practicable.

    44.3 Prosecutors may give access to experts (to both video records and transcripts) without judicial approval. They must advise the 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).[14]

    44.4 Video records must either be returned to Police, or the means of access destroyed, at the end of the proceeding.[15] 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).[16]

Ways of giving evidence

45. 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.[17]

46. These witnesses may give their evidence in different ways for different parts of their evidence, and multiple ways may be used in the same proceeding (for example, evidence in chief by Police video recorded interview, and cross-examination and re-examination by a video record created at a pre-recording hearing). Such witnesses may give evidence in alternative ways such as by using CCTV or a screen at a pre-recording hearing.

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[12] 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).
[13] Evidence Act, s 106(4B).
[14] Evidence (Video Records and Very Young Children's Evidence) Regulations, reg 25.
[15] Evidence (Video Records and Very Young Children's Evidence) Regulations, reg 44.
[16] Evidence (Video Records and Very Young Children's Evidence) Regulations, reg 45.
[17] Evidence Act, s 106D(1).

47. Adult witnesses may give evidence in the ordinary way.[18] If a child witness wishes to give evidence in the ordinary way, an application must be made to a judge.[19] Applications must be filed 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.[20]

48. 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 witness will give evidence.[21] A notice is not required if 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. 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.

49. 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 from 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.

50. If circumstances change after a notice has been filed so 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.[22]

Evidence in chief

51. As set out above, adult witnesses must be consulted and asked how they wish to give evidence. 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:

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

    51.2 It minimises the risk of inadmissible evidence being inadvertently given, or admissible evidence being omitted.

    51.3 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.

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[18] Evidence Act, s 106D(3)(a).
[19] Evidence Act, s 106E.
[20] Evidence Act, s 106E(3)(a).
[21] Evidence Act, s 106D(3).
[22] Evidence Act, s 106D(6).

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

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

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

52.3 The witness has a clear and strong preference for giving evidence orally in court, despite the advantages of the video recorded interview being used 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 in the context of cross-examination from defence counsel, which can be unsettling. Children should ordinarily give their evidence in chief by way of their video recorded interview.

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

Cross-examination and re-examination

54. 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.[23] 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.

Commentary
For example, pre-recording of a witness's complete evidence may not be suitable in cases with multiple complainants unless all the complainants' evidence is to be pre-recorded.

55. Pre-recording has benefits for complainants, defendants and the system generally. These include the following:

55.1 Pre-recording supports complainants and propensity witnesses to give the best evidence they can as:

55.1.1 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. Even where witnesses would be giving evidence by CCTV, it can be more stressful for them knowing that a jury is watching.

55.1.2 There is greater flexibility to take breaks as frequently and for as long as needed (within the limits of court sitting times) which may alleviate a witness's stress. Practically, a jury is not kept waiting and the breaks can be edited from the recording, reducing the time needed for trial.

55.1.3 The witness can be questioned in a more natural way. When a jury is present, counsel may ask questions in an artificial way to avoid

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

inadvertently eliciting inadmissible evidence such as hearsay or information prejudicial to the defendant. Where evidence is pre-recorded, inadmissible evidence can be dealt with by simply asking the witness to answer the question again without referring to the inadmissible portion (and editing the first answer from the recording). This is particularly relevant for children who may have difficulty understanding what they can and cannot say, and require questions to be asked as simply as possible.

55.2 It minimises the risk of mistrial as any inadmissible evidence can be edited from the video record that is played at trial. This is fairer to the defendant than a judge directing a jury to disregard inadmissible evidence after they have heard it. Reducing the risk of a mistrial also reduces the risk that a complainant will be subjected to the additional stress and delay occasioned by a retrial.

55.3 The defendant may change their plea after hearing the complainant's evidence because they better understand the case against them (similar to changes of plea after the close of the Crown case at trial). This would avoid the need for a full trial. The certainty of a guilty plea (if entered) benefits the complainant compared to the uncertain outcome of a trial.

55.4 Pre-recording *may* reduce delays for a complainant in giving their evidence, if pre-recording takes place well before the trial. Pre-recording does not require the use of a courtroom with jury trial facilities and is therefore easier to schedule. However, a long delay between a pre-recording and the trial carries risks, as set out below.

56. The potential risks of pre-recording are:

56.1 Pre-recording may increase the delay to trial due to the need for at least one additional hearing (to take the witness's evidence). This is more likely where the defendant seeks orders preventing pre-recording from taking place, requiring a further hearing, with the possibility of appeals. Even if a defendant does not object to pre-recording, there may be disputes about admissibility which require a further pre-trial hearing.

56.2 There is an inherent risk, which cannot be completely eliminated, that the witness will be recalled to give further evidence at trial. Giving evidence on multiple occasions is likely to increase stress for the witness. Applications for recall, and appeals against the decisions on those applications, may also delay the trial. This can be stressful for the witness even if they are not ultimately recalled. The longer the delay between the pre-recording and trial proper, the greater the risk that something will happen that triggers an application by the defendant to recall the witness.

56.3 The uncertainty about the trial outcome can heighten anxiety for victims and their whānau, especially if there is a long delay between giving evidence and learning the outcome.

56.4 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 people close to the witness are also trial witnesses (such as their parents or caregivers), particularly where there is a long delay between the pre-recording hearing and trial. It may be distressing for a victim, particularly a child, to be told they cannot talk about the case with those close to them (such as the people they trusted with their initial disclosure). Further, if there are multiple complainants, taking their evidence at different times may risk the suggestion that there has been collusion between hearings. In order to mitigate these difficulties and avoid any suggestion there has been an opportunity for collusion, it may be prudent to pre-record the evidence of other witnesses as well.

57. A notice which stipulates that a witness is to give all of their evidence by a video record (necessitating a pre-recording hearing) must also stipulate the ways in which the witness will give evidence at that 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. It can generally be presumed that child witnesses should give evidence via CCTV but they should have the opportunity to express a view after visiting the courtroom.

Communication assistance

58. 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 some 17-year-olds may not have an adult vocabulary. Impairments that can impact severely on communication, such as Fetal Alcohol Syndrome and Autism Spectrum Disorder, are often not readily perceptible, especially as some people strive to conceal their impairments.

59. Prosecutors should identify communication difficulties early 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). Where it is possible such assistance may be required, prosecutors should:

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

59.2 Review any video recorded interview as early as possible.

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

60. If any concerns arise from those steps, prosecutors should seek a report from an expert communication assistant. Prosecutors should consider ordering such a report in respect of witnesses under 12 years of age, and any witness with a known mental or intellectual impairment.

61. Communication assistants are not expert witnesses, but neutral professionals appointed by the court (similar to interpreters). Communication assistants recommend to the court how to adapt questioning and wider trial practice to a witness's needs, including in individual consultations with counsel. In a minority of cases, they may attend the trial to monitor questioning (for miscommunication and associated issues with the witness's coping or concentration span) or by actively translating.

62. Prior to trial, prosecutors should advise the trial judge that a communication assistant has been engaged and seek directions for the process at trial (for example, where they will sit, their role at trial, how they will communicate issues to the court, whether counsel should provide questions to them in advance among other practicalities). Ideally, the communication assistant should attend the callover or hearing at which these issues will be discussed.

63. Where practicable, prosecutors should consider meeting the communication assistant prior to trial to discuss how best to 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. These pre-trial discussions will reduce the need for the assistant to interrupt when the witness is being asked questions at trial.

Other pre-trial applications

64. Prosecutors should consider whether any pre-trial applications might be required when doing an initial review of the file:

    64.1 Prosecutors should review the evidence to identify possible disputes and proactively file applications under s 101 of the Criminal Procedure Act if applicable (for example, filing an application in relation to propensity evidence unless defence counsel have confirmed they do not object to its admission). Prosecutors should review transcripts of the complainant's and defendant's video recorded interviews carefully and discuss proposed edits with defence counsel at an early stage to avoid late objections.

    64.2 Prosecutors should be alive to the possibility of evidence being led in breach of ss 44, 87 or 88 of the Evidence Act, which collectively prohibit evidence being given about the complainant's sexual experience, sexual disposition, address and occupation. If the complainant refers to any of these matters in their video interview, the prosecutor should either arrange for editing of the video recorded interview or file an application to adduce the evidence.

65. Where possible, prosecutors should discuss potential defence applications with defence counsel to ensure they are filed promptly. The most common examples in sexual cases are:

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

    65.2 Applications to cross-examine the complainant under s 44 of the Evidence Act.

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

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

Other measures

66. Prosecutors should consider other measures which can improve the trial experience for witnesses in sexual cases. Some will require a formal application while others can simply be discussed with the trial judge (preferably well prior to trial, for example at the pre-trial callover).

67. The availability of these measures will vary but they may include:

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

    67.2 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.

    67.3 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.[24]

    67.4 Where a complainant or propensity witness has asked for it, allowing time for tikanga or cultural processes (such as karakia) prior to and/or at the conclusion of giving evidence.

Conducting a pre-recording hearing

68. A pre-recording hearing should not take place until after the disclosure process is complete and all relevant pre-trial applications have been heard and determined.

69. To that end, the prosecutor should:

    69.1 Proactively liaise with Police to ensure disclosure is completed expeditiously. Disclosing material after a pre-recording hearing risks the defendant filing an application to recall the witness for further cross-examination in respect of the newly disclosed material.

    69.2 Ensure a pre-recording hearing is not set down until after any relevant pre-trial applications have been heard and determined, as these may impact the evidence to be given. 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 has 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 help minimise the risk

[24] 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).

of a witness being recalled for further cross-examination.

70. 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 the outcomes could mean the witness does not need to give evidence at all.

71. Prosecutors should approach the pre-recording hearing in the same way as a trial as this evidence will usually be the most important part of the case. Prosecutors should assume they will have no further opportunity to ask questions of the witness. The prosecutor will need to be familiar with all aspects of the evidence in order to lead all necessary supplementary evidence in chief, object to questions asked in cross-examination, and conduct any necessary re-examination. Photograph and exhibit booklets will need to be prepared if it is intended to refer the witness to them.

Conducting the trial

72. 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.

73. 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 allow the witness a reasonable opportunity to give their evidence completely and accurately. The prosecutor should closely adhere to recommendations in any communication assistance report as to suitable and unsuitable questions.

74. When a witness is being cross-examined by defence counsel, prosecutors should intervene if 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”.[25] This includes questions asked in an intimidating, hectoring or aggressively dismissive manner, or that are designed to humiliate the witness. If a communication assistance report is available, prosecutors should object to any question which does not conform with its recommendations.

75. Prosecutors should seek a break if it appears a witness is becoming too tired or distressed to concentrate. Some witnesses may 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).

76. In cases involving particularly vulnerable witnesses (for example, those requiring communication assistance, very young children, witnesses with mental or intellectual impairment or those experiencing significant mental health issues), 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 the frequency and length of breaks.

[25] Evidence Act, s 85.

77. Prosecutors should highlight technology that will be used shortly before the trial date (for example at the pre-trial callover) to ensure it is available. While the court is responsible for ensuring the requisite technology is available, the prosecutor should assist by ensuring the court knows what is required and has the opportunity to test it. Prosecutors may choose to help with testing to assist the smooth running of the trial.

78. Prior to the judge's summing up, prosecutors should consider whether s 126A of the Evidence Act is engaged and, if so, suggest the judge give any directions considered necessary or desirable to address relevant misconceptions relating to sexual cases.

After trial

79. Ideally, prosecutors should debrief witnesses after they have finished giving evidence and 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.

80. 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 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).

81. 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 because of the passage of time or some other factor. Prosecutors should consult with the witness about such matters at an early stage.

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Victims | Ngā pārurenga
Decisions to prosecute | Te whakatau ki te aru
Sentencing | Te whiu
Case management | Te whakahaere kēhi
Retrials | Te whakahaere anō i te whakamātau
Appeals | Ngā pīra