



NOVA SCOTIA
PUBLIC PROSECUTION SERVICE

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SEXUAL OFFENCES - PRACTICE NOTE

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NOTE:

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE "**WORDS & PHRASES**" SECTION OF THIS PART OF THE MANUAL.

SEXUAL ASSAULTS - PRACTICE NOTE

Charges involving sexual assault present unique and substantial challenges for the prosecutor. Often, the assaults are committed in secluded or private locations and no independent observers are present to substantiate the narration of the victim. The victim is often emotionally or physically traumatized and the crimes are often degrading or involve a betrayal by a perpetrator who had been trusted. The consequences for the offender can be horrendous and the criminal litigation is often very stressful. Consequently, the prosecution of sexual assault offences requires the utmost skill and professionalism on the part of the prosecutor, and heightened sensitivity to the needs and circumstances of the victim.

This Practice Note is intended to provide assistance to prosecutors who embark upon a sexual assault prosecution. While all sexual assaults are serious, this Note is intended to provide guidance in regard to cases which involve one or more of the following features:

- sexual intercourse, fellatio or other direct genital contact
- physical or psychological harm to the victim
- the use of weapons
- a breach of trust or an abuse of authority by the accused
- a victim who is particularly fragile, vulnerable, or who has special needs
- multiple victims

This Practice Note does not purport to anticipate all of the difficult issues which might arise in a sexual assault case. It addresses certain of the most common issues and should be treated as only a starting point in the preparation necessary to the effective prosecution of these complex cases. When reference is made to case law, it would be prudent for the prosecutor to search for the most recent updates or annotations since the updating of policy documents occasionally lags behind legal evolution.

1. Case Management and Victim Contact

(a) Prompt assignment of cases, and expeditious proceedings.

Every effort should be made to ensure that the victim does not have to recount the details of the crime to more persons than are necessary to effectively prosecute the case. Accordingly, Chief Crown Attorneys should

ensure that sexual assault cases are assigned to an individual prosecutor as early in the process as is possible. Wherever feasible, the same prosecutor should conduct the preliminary inquiry and the trial. Chief Crown Attorneys should also do their utmost to ensure that the case is assigned to a prosecutor with trial experience appropriate to the difficulty of the particular case.

In order to minimize the stress and anxiety of victims and to avoid deterioration of memories, Crown Attorneys should endeavour to ensure that sexual offences are dealt with expeditiously. In the scheduling process, priority should be given to these cases whenever possible. Crown Attorneys should be prepared to resist defence motions for unnecessary adjournments, and, where appropriate, investigators should be urged to expedite the completion of prosecution trial briefs.

(b) Interviewing and Informing the victim

Prior to the commencement of the trial, or preliminary inquiry, the prosecutor should interview the victim in preparation for giving testimony and plan the presentation of evidence with a view to minimizing the stress and trauma on victims, and assisting in an accurate and complete presentation of the facts.

i. Timing and frequency of interviews

Interviews with the victim are intended to

- establish a rapport between the prosecutor and the victim,
- inform the victim in regard to numerous matters, including those outlined below, and
- clarify the facts, and/or refresh the victim in regard to the facts.

Several interviews may be required to accomplish these objectives. Experience has shown that it is usually prudent to avoid discussion of the evidence in the first interview with the victim. Interviews should be conducted well in advance of the preliminary hearing or trial, to minimize the risk of an adjournment due to the late disclosure of new information.

During the interview, the Crown Attorney should assess any **special needs** the victim might have, including the ability of the victim to communicate the evidence and the need for testimonial aids (see below).

ii. Presence of third parties

Wherever feasible, the interview of the victim should be conducted in the presence of a police officer or other appropriate third party with whom the victim feels comfortable who can keep an accurate record of any new disclosure. [See the PPS policy document "Interviewing Witnesses"].

Where the victim is under the age of 18, or where otherwise desirable, a support person may be present, unless the support person, because of earlier involvement or the nature of his or her duties, may be a witness at the proceedings.

iii. Informing the victim

The prosecutor with carriage of the case should ensure that the victim has made contact with **Victim Services** and that arrangements have been made to provide the victim with the PPS **sexual assault pamphlet** and other relevant, printed material..

The Crown Attorney with carriage of the case should ensure that the victim has received adequate general **information about the criminal justice system** (including the roles of the Crown Attorney, defence counsel, the judge, and the jury), and specific information with regard to the steps in the process that are expected to occur in regard to his or her case.

Prosecutors should **keep the victim informed** in regard to any plea or sentence resolutions, including any decision to withdraw any of the charges faced by the accused. Significant decisions should be communicated to the victim in advance of the matter being heard in court.

The victim should be made aware of the position that will be taken or which has been taken in regard to interim release, and any orders in regard to release or custody which have been made by the court. Where possible, the victims should be provided with **copies of any order relevant to their safety** e.g. judicial interim release orders containing no-contact conditions.

Victims should also be kept well informed in regard to any **defence applications** that impact their privacy interests such as applications

to adduce sexual history, psychiatric background material, or other third party records.

Victims should also be informed in regard to the obligations of the Crown relating to **disclosure** of the Crown's case so that there are no unrealistic expectations in regard to privacy of information given to the police or the Crown. The nature and scope of **publication bans** should also be explained.

Victims should be made aware that they will have the opportunity to provide a **Victim Impact Statement** and that they will be given assistance in preparing an appropriate Victim Impact Statement (the discussion in regard to Victim Impact Statements need not occur at the early stages of proceedings).

The Sexual Assault Working Group has prepared **checklists** for the interviews of complainants. These should be utilized during the interview process and retained in the PPS case file. Copies of the checklists for first and second interviews of the complainant are attached to this Practice Note.

2. Detention/Judicial Interim Release

As soon as possible, the prosecutor should seek an order under Section 486.4 of the *Criminal Code* ensuring the **non-publication of information of identifying the victim**. If this has not been done at the time that the Information was sworn or at an earlier appearance in court, the prosecutor at the judicial interim release hearing should request the order. The order is mandatory, if the application is made.

(a) Detention orders

The paramount consideration at any bail hearing involving sexual offences is whether the accused presents a continuing danger to the victim or other potential victims. If such a danger exists, the Crown, of course is obliged to seek a detention order unless satisfied that some form of release order will adequately protect the public.

If a detention order is made, or if the accused is remanded in-custody pending a hearing, Crown Attorneys should seek an order under s. 515(12) or s. 516(2) of the *Criminal Code* prohibiting the accused from having any contact with the victim.

(b) Conditions of release

If the accused is released on bail, the prosecutor should seek conditions which minimize risk to the victim or potential victims. Conditions that should be considered include:

- Not to contact the victim, directly or indirectly
- Not to attend within a specified distance of the victim's residence, place of employment or school (only in cases where such places are known to the accused)
- Not to possess any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance and surrender any licence, registration or authorization for these items
- Any other term that may ensure the safety and security of the victim.

Where the offence involves a person under 18 years of age, other conditions which may be appropriate include:

- Not to be in the presence of anyone under the age of 18 years unless supervised by a responsible adult (or by the surety or a responsible adult approved of by the surety)
- Not to attend at any playground, school yard or public park.

3. Trial Issues

(a) Victims with special needs

Where a sexual offence victim has special needs, particularly respecting his or her ability to communicate, Crown Attorneys should make every effort to ensure that full access to, and participation in, the criminal justice system is accorded that victim. Victims with special needs include those individuals who, because of age or any impairment of an intellectual, emotional, physical or sensory nature, are unable, without assistance, to fully access the criminal justice system or to understand, or be understood by, the participants in the system.

Crown Attorneys should be familiar with the amendments to the Criminal Code proclaimed in force January 2, 2006, which provide for any witness to have the assistance of testimonial aids where "necessary to obtain a full and

candid account of the events in question”.

(b) Testimonial aids

Prior to the commencement of the trial or preliminary inquiry, the prosecutor should plan the presentation of evidence with a view to using means that assist in the discovery of truth, minimize the stress and trauma on the victim as he or she participates in proceedings, and minimize the need for adjournments.

Crown Attorneys should consider bringing applications to utilize the following testimonial aids:

i. Support Person

Section 486.1 of the *Criminal Code* provides for an order allowing a support person of the witness's choosing to be present and close while the witness testifies.

ii. Screens & Closed Circuit Television

Section 486.2 of the *Criminal Code* provides for an order allowing a witness to testify from behind a screen, or from outside of the courtroom in certain circumstances.

iii. Video-Recorded Evidence of Children

Sections 715.1 and 715.2 of the *Criminal Code* provide for the admission of video-recorded evidence of a child victim/witness if the recording is made within a reasonable time of the alleged offence, and certain other conditions are met.

(c) Cross examination by an unrepresented accused

Section 486.3 authorizes a judge to prohibit the accused from personally conducting a cross-examination of certain witnesses and provides for the appointment of counsel to conduct such cross-examinations. For detailed guidance, refer to these provisions and the related case law.

(d) Expert evidence

The prosecutor may determine that expert evidence is required to address certain issues that may arise in sexual offences cases. The following are

examples of such issues:

- i. The interpretation of medical findings;
- ii. Issues of memory, particularly in cases of historical sexual offences;
- iii. The need for testimonial aids;
- iv. Difficulty in testifying on account of age, fragility and/or mental disability;
- v. Patterns of disclosure among sexual abuse victims, including inconsistencies in disclosure and recantation.

If expert evidence is required in respect of a victim/witness of sexual abuse, the Crown Attorney should consult with the branch or regional Chief Crown Attorney before engaging an expert witness. If expert evidence is to be presented, notice under s. 657.3 of the *Criminal Code* must be provided to the accused.

Crown Attorneys must use great care when tendering expert evidence on disclosure, recantations, memory or testimonial capacity. Prosecutors should familiarize themselves with recent appellate court decisions on the use of expert evidence, and should ensure that the evidence is being tendered for a permissible purpose. [The Sexual Assault Working Group has developed reference materials (distributed in 2007) which can assist on these issues].

Crown Attorneys should also be aware that the calling of unnecessary expert witnesses may expand the scope of the trial in ways which adversely affect the thrust of the prosecution.

(e) Recantation

In dealing with a victim or witness who recants, the prosecutor should:

- Request a police investigation of the recantation
- Consider the admissibility and availability of expert evidence
- Review the case to determine whether or not there continues to be a realistic prospect of conviction [See the PPS policy re the “Decision to Prosecute”]

- Make disclosure of the recantation and any investigation if a decision is made to continue the prosecution

(f) Production of records of witnesses or the accused (“third party records”)

Sections 278.1 to 278.9 of the *Criminal Code* govern production of records in trials of sexual assault and other related offences. In trials involving the enumerated offences, no record relating to a complainant or a witness shall be produced to the accused unless the production is made in accordance these provisions. The provisions require a trial judge to consider not only the accused’s right to full answer and defence but also the privacy and equality rights of complainants and witnesses.

All Crown Attorneys have been provided with extensive materials on this issue. In particular, the papers assembled by the PPS Sexual Assault Working Group in 2007 should be carefully reviewed by prosecutors in anticipation of this matter arising at a sexual assault trial.

The Nova Scotia Department of Justice has established a pilot program to provide legal assistance to “complainants” whose records are the subject of an application under section 278.3 of the *Criminal Code*. Crown Attorneys should ensure that this program is drawn to the attention of complainants when such applications arise. Attached to this Practice Note are an outline of the program and an application form for legal assistance.

(g) Evidence of the complainant’s sexual activity

(i) Charge screening

The Supreme Court of Canada in *R. v. Seaboyer* (1991) 66 C.C.C. (3d) 321, noted that, historically, the reason that many sexual assault cases did not proceed to trial was because, in the prosecutor’s judgment, the credibility of the victim was questionable. When assessing the strength of a sexual assault case, prosecutors should bear in mind the observation of the Court that the notion that a complainant’s credibility might be affected by whether she has had other sexual experience has been universally discredited. There is no logical or practical link between the complainant’s sexual reputation and whether she is a truthful witness. Crown Attorneys must not be influenced by “rape myths” (see below).

Crown Attorneys are reminded that all sexual assaults are excluded from the Diversion protocol developed in collaboration with other justice partners (see the “Diversion” policy on the PPS website).

(ii) In court proceedings

The *Criminal Code* now includes provisions which prevent the perpetuation of various “rape myths” such as “women cannot be raped against their will”; “only ‘bad girls’ are raped”; anyone not clearly of ‘good character’ is more likely to have consented”. Section 276(1) of the *Criminal Code* provides that evidence of a complainant’s sexual activity whether with the accused or with someone else (whether consensual or not), is not admissible in proceedings with respect to certain sexual offences to support the inference that the complainant is more likely to have consented to the alleged assault, or that the complainant is less credible as a witness, by virtue of prior sexual experience.

Pursuant to s. 276(2), evidence of sexual activity, other than that which forms the subject matter of the charge, is only admissible if there is a judicial determination that the evidence:

- is of specific instances of sexual activity
- is relevant to an issue at trial
- has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice

Sections 276.1 and 276.2 provide a procedure to determine the admissibility of such evidence. The procedure has been further clarified by the Supreme Court of Canada in *R. v. Darrah*, (2000) 148 C.C.C. (3d) 97:

- The defence is required to make a written application setting out detailed particulars of the evidence and its relevance to the issue at trial.
- The defence must file a written affidavit, which may be based on information and belief.
- If the judge finds that the affidavit discloses relevant evidence, capable of being admissible under s. 276(2), the judge will hold an *in camera voir dire* to determine the admissibility of the evidence the defence seeks to adduce.

The *voir dire* must not be a "fishing expedition".

- At the *voir dire*, the accused may be required to submit to cross-examination in order to give any weight to the affidavit.
- The complainant is not compellable at the *voir dire* pursuant to s. 276.2(2). To compel the complainant to be examined on her sexual history before the subject has been found to be relevant to the trial would be an invasion of the complainant's privacy and would discourage the reporting of crimes of sexual violence.

If the evidence is admissible, the evidence can then be used to cross-examine the complainant, in chief by the accused (should he choose to testify himself), or by another witness.

4. Sentencing and Post Conviction Issues

The following actions should be considered by the prosecutor if the accused is found guilty or pleads guilty to a sexual assault:

1. Request a **presentence report** under section 721 of the *Criminal Code* or under section 40 of the *Youth Criminal Justice Act*.

Unless the background of the offender has been fully explored during a trial, a presentence report is generally desirable in sexual offence cases. It is essential that the court have as much information as can be made available in regard to the factors that influence the behaviour of the offender.

2. If sentencing is to occur on a future date and the offender is not in custody, review the **release conditions** to ensure that they are adequate. It may be necessary to seek a fresh order under section 523 (2)(a) for the release or detention of the offender.

By the time that the accused is found guilty, circumstances will have changed from those which prevailed at the bail hearing. The accused is no longer presumed innocent and there is no longer any doubt in regard to the strength of the Crown's case. The accused may be sensing that a substantial term of imprisonment is looming, not far ahead. The release conditions must be able to ensure that the accused will attend for sentencing. The conditions must also ensure the safety of the public, including the victim and the accused himself/herself. There may be a new

basis for a condition that the offender stay away from certain places or persons (similar to the terms of an order under Section 161).

3. Consider the desirability of a **sexual offender risk assessment** at the East Coast Forensic Psychiatric Hospital (ECFPH). [See the ECFPH protocol, included as a separate policy document on the PPS website.]

There is very little chance of success in the treatment of deviant and sexual behaviour if the offender is not matched to the appropriate mode of treatment at the appropriate level of intensity. This cannot be achieved without a comprehensive assessment such as is done at the ECFPH by the Provincial Sexual Offender Assessment and Treatment Program. If such an assessment is appropriate in the case before the court, the court should be informed that the PPS is prepared to complete the necessary referral documents.

Such an assessment, for adults, requires the consent of the accused. (The assessment can be ordered for young persons at any stage of the proceedings --see section 34 of the *Youth Criminal Justice Act*.) In order for the medical professionals to conduct a valid, comprehensive assessment, it is essential that the offender consent to all components of the assessment as outlined in the consent form.

If the accused adult consents to the assessment, the prosecutor should request an order that the sexual offender assessment be provided to the court as part of the presentence report per section 721(4).

4. Ascertain whether or not the victims have been advised of the opportunity to prepare a **victim impact statement** and be prepared to inform the court of this in response to the mandatory inquiry to be made under section 722.2.

Consider whether or not it would be appropriate to seek an adjournment to permit the victim to prepare a victim impact statement, and consider the best mode of presenting the information from the victim (see section 722).

5. Consider whether an order under section 161 should be requested, to **limit contact with children**.

These orders are available if the offender has been found guilty of any of the following offences in respect of a person under the age of 14 years: section 151 (sexual interference), section 152 (invitation to sexual touching), section 155 (incest), section 159 (anal intercourse), subsections 160(2) or 160(3) (bestiality), section 170 (procuring sexual activity), section 171 (permitting sexual activity), section 271 (sexual assault), section 273 (aggravated sexual assault), or section 281 (abduction).

6. For designated offences, seek an order under Section 487.051 for the taking of bodily substances for the purpose of **forensic DNA analysis**.

[Note: This section will be revised to reflect upcoming changes to the Criminal Code.]

The following sexual offences are **primary designated offences** (mandatory order):

Section 151 (sexual interference), section 152 (invitation to sexual touching), section 153 (sexual exploitation), section 155 (incest), section 212(4) (offences in relation to juvenile prostitution), section 271 (sexual assault), section 272 (sexual assault with a weapon), section 273 (aggravated sexual assault).

The following sexual offences are **secondary designated offences** (court has option):

section 160(3) (bestiality in the presence of a child), section 163.1 (child pornography), section 170 (parent or guardian procuring sexual activity), section 173 (indecent acts).

7. Request a mandatory **firearms prohibition** order under section 109(1)(a) if violence against a person was used, threatened or attempted, and the offence for which the accused was found guilty was one for which the accused may have been sentenced to imprisonment for 10 years or more.

If the offender was found guilty of an offence with a lesser maximum punishment, and violence against a person was used, threatened or attempted, consider whether or not an order should be sought under section 110.

8. Request a **forfeiture order** under section 491 in regard to any weapons used in the offence.

9. If there an indication that the accused will **appeal** conviction or sentence, explain the appeal process to the victim. If an appeal is filed, inform the victim of the grounds of appeal, and give any information available in regard to the time frame for the appeal. The victim should also be informed as to whether or not the accused will be at large pending the appeal, and any conditions of release.

10. Although persons convicted of sexual assault are excluded from the conditional sentencing regime when the Crown proceeds by indictment (see the Conditional Sentence policy, as amended on December 19, 2007, available on the PPS website), the accused may seek a conditional sentence if the Crown has proceeded summarily. In formulating a position on sentence Crown Attorneys should be mindful that it is the policy of the PPS, that, unless truly exceptional circumstances exist, conditional sentences are not appropriate for serious sexual assaults, regardless of the mode of procedure. This would include sexual assaults against children, sexual assaults causing significant physical or psychological harm, and sexual assaults involving multiple victims.

SEXUAL ASSAULT COMPLAINANT INTERVIEWS

First Interview - Checklist

- Introduce yourself and explain the role of the Crown attorney, intention for this meeting and the next meeting.
- Explain the court process, including time lines anticipated, court procedure and burden of proof.
- Explain the disclosure process, and lack of confidentiality/privilege with you.
- Explain importance of telling the whole truth.
- Discuss day of trial expectations: manner of dress; time frames; support person(s); where to meet/wait; audience.
- Explain publication ban (P.I., name and identifying information).
- Explain *Criminal Code* procedure for s.276 and 278 application if applicable.
- Provide PPS brochures:
 - The Public Prosecution Service
 - Criminal Case Step-by-Step
 - Pamphlet on sexual assault and
 - Business card.
- Provide copy of statement transcript to be reviewed for next meeting. Discuss why a statement is taken and what use can be made of it in court.

This interview does not involve any discussion of evidence.

SEXUAL ASSAULT COMPLAINANT INTERVIEWS

Second Interview - Checklist

This checklist should be used in accordance with the PPS guidelines for the interviewing of civilian witnesses and should take place in the presence of a third party, preferably a peace officer.

- Discuss court procedure: direct, cross and re-direct examination, objections, breaks.
- Discuss appropriate demeanor in the court and its importance.
- Determine if they have reviewed their statement (don't presume literacy!) and if there are any inaccuracies they (now) identify.
- Discuss testimonial fears, i.e., tears, nausea, embarrassment.
- Discuss importance of telling the whole truth and necessity of being explicit/graphic.
- Direct Examination:
 - Discuss the non-leading question;
 - Crown's job to get the story out;
 - Review questions you intend to ask including those designed to acclimatize or relax the complainant.
- Cross-examination:
 - Discuss the role of defence counsel; the leading question;
 - Crown's role re objections;
 - Review inevitable line(s) of questioning and heads-up re inconsistencies;
 - Demeanor under cross-examination;
 - Opportunity for re-direct examination.
- Discuss 'good witness' advice:
 - Listen to question;
 - Answer what's asked;
 - Be honest;

- Don't guess;
- Speak clearly and at good volume;
- Think before responding;
- Don't argue but don't be afraid to disagree if called for;
- They alone control their responses.

INFORMATION RE: APPLICATIONS FOR PRODUCTION OF PRIVATE RECORDS

Definition: An Records Production Application is an application by an Accused person under S.278.1 - 278.9 of the *Criminal Code* for the production of a Complainants or Witness's private records.

- Records Production Applications can be made at any time during the Pre-Trial or Trial process and must be heard by the Trial Judge.
- The Complainant or Witness has the right to attend the Hearing of the Application and can be represented by Counsel.
- The Hearing of S.278 Applications is 'In Camera' (a closed hearing).
- Defence Counsel must give 7 days notice of the Hearing of the Application to all parties involved and must serve the Application on all parties.
- If a Judge on hearing an Application under S.278 orders production of the records, the Judge will review the records in private before deciding whether any records will be disclosed to the Accused.
- If Disclosure to the Accused is ordered the Judge may order disclosure of certain parts of records only.
- The Department of Justice has commenced a Pilot Program to provide legal representation for Complainants who are the subject of Applications for production of private records.
- The Pilot Program provides representation only to **Complainants** in **sexual offences** where defence counsel are seeking production of **medical, counseling**

or therapeutic records.

- Crown Counsel have been provided with a referral form to be forwarded to the head office of Victim Services when Records Production Applications are made.

Victim Services FAX:424-2056

Pilot Program - Production of Records In Sexual Offences

Please complete this form for ALL applications made pursuant to S.278.3 of the Criminal Code and forward to Victim Services at the above number on becoming aware of such applications.

Complainant Name: Guardian (If applicable):	D.O.B.
Address:	Phone/Contact No.:
Name Of Investigating Officer:	Telephone No:
Has Complainant Inquired About Need for Legal Services?	
Has Complainant Indicated an Intention to Hire a Lawyer?	
	Date of Hearing:
Accused Name:	D.O.B.
Case #:	CC Offence:
Records Sought:	
Entity From Whom Records Sought:	

Synopsis of Issues Raised in Application:

Crown Attorney: _____ **Phone Number:** _____

Date: _____