Policy:		
Sexual Assaults – Adult Victims		
Policy Code:	Effective Date:	Cross-references:
SEX 1	December 18, 2023	ALT 1 BAI 1 CHA 1 CHI 1 DIR 1 HAT 1 IPV 1 SEX 2 VIC 1 VUL 1 YOU 1.4

This policy provides guidance for Crown Counsel regarding sexual assaults against adults (sections 153.1, 271 to 273, and historical charges). For offences against children, refer to the *Child Victims and Witnesses* (CHI 1) policy.

Consent

Sexual assault is any touching of an objectively sexual nature of another person without their consent. Sexual assault is an assault upon human dignity and a violation of human rights.[1]

Consent exists only when each participant voluntarily wants all aspects of the touching, including its sexual nature, to occur. Consent must exist at the time of the touching and can be withdrawn or revoked at any time. Canadian law does not recognize apparent, implied, or advance consent; so, a sexual partner cannot assume that silence, lack of resistance, or ambiguous conduct means that the touching is consensual.[2]

No consent is obtained if it is the product of coercion, certain types of fraud, or the exercise of authority, or when the sexual activity is induced by an abuse of a position of trust, power, or authority (sections 265(3), 273.1(2)(c)).[3] For allegations involving HIV non-disclosure, refer to the *Sexual Transmission, or Realistic Possibility of Transmission, of HIV* (SEX 2) policy.

Myths, stereotypes, and biases about victims of sexual offences are irrelevant and harmful and can severely distort the criminal justice process.[4] Crown Counsel should guard against

1 *R v Ewanchuk*, [1999] 1 SCR 330 at para 69, *R v Osolin*, [1993] 4 SCR 595 at para 165
2 *R v G.F.*, 2021 SCC 20 at paras 27-29, 32; *R v Barton*, 2019 SCC 33 at paras 1, 87-89, 107, 118-119; *R v J.A.*, 2011 SCC 28 at paras 23, 34, 43-44; *R v Ewanchuk*, [1999] 1 SCR 330 at paras 31, 51, 97, 103; *R v Kirkpatrick*, 2022 SCC 33
3 *R v G.F.*, 2021 SCC 20 at paras 34-36
4 *R v Barton*, 2019 SCC 33 at paras 1, 7, 198-200; *R v Find*, [2001] 1 SCR 863 at paras 101-103; *R v Seaboyer*, [1991] 2 SCR 577; *R v Ewanchuk*, [1999] 1 SCR 330 at paras 82, 87-97

and address these harmful distortions in order to support the impartiality and truth-seeking function of the justice system and the substantive equality of all persons.

Victims

Criminal trials can be particularly challenging for victims of sexual assault. Crown Counsel should ensure that victims are aware of available community, police-based, and Indigenous victim assistance programs, including specialized programs for victims of sexual violence (*Victims of Crime* (VIC 1)). Crown Counsel should take steps to establish and maintain direct communication with the victim and provide timely information about the status of the prosecution. Crown Counsel should consider whether the *Vulnerable Victims and Witnesses* (VUL 1) policy applies. The *Intimate Partner Violence* (IPV 1) policy will apply if the sexual assault was committed by an intimate partner.

Crown Counsel should exercise significant restraint in seeking a material witness warrant for a sexual assault victim who fails to appear in court. Before applying for a material witness warrant, Crown Counsel should consult with Administrative Crown Counsel.

Charge Assessment

Crown Counsel should make timely charge assessment decisions in sexual assault cases. Significant delay in making charge assessment decisions may particularly increase the emotional stress of vulnerable victims or witnesses and may weaken their resolve or ability to effectively participate in the criminal justice process.

It will generally be in the public interest to prosecute sexual assaults whenever the evidentiary test for charge assessment is met. In assessing the evidence, Crown Counsel should not usurp the role of the judge or jury by substituting their own subjective view of the ultimate weight or credibility of evidence for those of the judge or jury (*Charge Assessment Guidelines* (CHA 1)). Crown Counsel should be particularly vigilant to ensure that their own assessments of the evidence are not influenced by myths, stereotypes, or biases about victims or persons accused of sexual violence.

If a charge is approved, Crown Counsel should consider whether to take steps to protect the privacy of the victim (e.g., by using initials rather than the victim's full name on the charging document). Crown Counsel should also consider applying, at the first instance, for an order under section 486.4 directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way. Crown Counsel should take reasonable steps to consult the victim or witness to determine whether the victim or witness wishes to be the subject of a publication ban. If Crown Counsel applies for a ban and the court orders it, Crown Counsel should inform the relevant victim or witness of the existence of the order and, if they do not wish to be

the subject of a publication ban, inform them of their right to revoke or vary the order (section 486.5(8.2)).

Crown Counsel should consider seeking consent to proceed by direct indictment when one or more of the factors listed in the *Direct Indictment* (DIR 1) policy arise, including when there is significant danger of harm, either psychological or physical, to victims or witnesses and it is reasonable to believe that they would be adversely affected if required to participate in multiple judicial proceedings.

Alternatives to Prosecution

In appropriate cases, an alternative to prosecution may be considered. For adult accused, Crown Counsel should refer to *Alternatives to Prosecutions – Adults* (ALT 1) policy. For guidance on extrajudicial measures for accused young persons, Crown Counsel should refer to the *Youth Criminal Justice Act – Extrajudicial Measures* (YOU 1.4) policy.

An alternative to prosecution should only be approved if the following conditions are met:

- the victim has been consulted and their views have been considered
- the accused's risk to reoffend can be managed through the use of the alternative to a prosecution
- it would not be contrary to the public interest

An alternative to prosecution would generally be contrary to the public interest for sexual offences involving an abuse of a position of trust, power, or authority.

Crown Counsel considering an alternative to prosecution for a sexual assault should refer the matter to BC Corrections (adult accused) or the Ministry of Children and Family Development (youth accused) and request a risk assessment. Before making the referral, Crown Counsel should consider whether it is necessary or appropriate to approve a charge first, so that protective conditions may be imposed, including an order of no contact with the victim.

Bail

When formulating a position on bail, Crown Counsel should have particular regard for victim and public safety (*Bail – Adults* (BAI 1)). Crown Counsel should request a warrant whenever it is necessary to seek a detention order or protective conditions of release.

Section 515(4.1) of the *Criminal Code* requires the court to prohibit the accused from possessing firearms and other weapons in a release order unless the court considers that such a condition is

not required in the interests of the safety of the accused, or the safety and security of a victim or any other person.

For accused who are detained in custody, Crown Counsel should consider seeking a "no communication" order requiring the accused, while in custody, to abstain from communicating, directly or indirectly, with the victim, witness, or other person (sections 515(12), 516(2)).

Preparation for Hearing

Administrative Crown Counsel should ensure that the procedures in their offices provide for:

- early identification and assignment of the case to Crown Counsel who, whenever possible, will retain conduct through the life of the file
- early identification and notice to the victim of available testimonial accommodations
- priority in scheduling to ensure that the case moves expeditiously through the criminal justice system

Testimonial accommodations

Crown Counsel should make victims and witnesses aware of available testimonial accommodations (VIC 1).

Crown Counsel should make an application for the testimonial accommodations provided for under section 486, 486.1, 486.2, 486.3, and 486.4 orders whenever appropriate, taking into account all relevant factors, including whether the witness requests an accommodation.

When the accused is charged with an offence under sections 271 to 273, the court must order that the accused not cross-examine the victim and appoint counsel to conduct the cross-examination unless the proper administration of justice requires the accused to personally conduct the cross-examination (section 486.3(2)).

Private records

Disclosure

Crown Counsel must not disclose any personal "record", as defined under section 278.1, unless the accused first obtains a court order for its disclosure or the victim or witness waives the application of the legislative provisions (sections 278.1 to 278.9). If an accused seeks to obtain a record in the possession of the Crown or a third party that falls within the definition of a section 278.1 record, an accused must file a written application (section

278.3). Anyone with privacy interests in the record has the right to appear, have counsel represent them, and make submissions at the hearing of the application. The public is excluded from the hearing (section 278.4).

Admissibility

Crown Counsel should take all reasonable steps to stop or prevent an accused from using or adducing a record in which a victim may have a reasonable expectation of privacy, or which may constitute or contain the victim's sexual history, unless the accused has complied with sections 278.92 to 278.96 and a judge has ruled that it is admissible.

Other Sexual Activity of the Victim

A trial of a sexual offence is concerned with the alleged incident that forms the subject matter of the charge, not a victim's other sexual activity (often referred to as prior sexual activity). Other sexual activity includes communications made for a sexual purpose or whose content is of a sexual nature (section 276(4)). Sexual activity other than the alleged incident is usually irrelevant, can infringe upon the victim's privacy and dignity, and referring to or adducing it can be prejudicial.[5] For these reasons, evidence of other sexual activity is presumptively inadmissible.

An accused may not ask any questions or lead evidence about other sexual activity without first applying for and being granted permission by a judge (sections 276, 278.92 to 278.96).[6] If the victim wishes to do so, the victim has the right to appear and make submissions and be represented by counsel at the application.

Crown Counsel may not lead any evidence about the victim's other sexual activity without first applying for and being granted permission by a judge under the test in *R v Seaboyer*.[7]

Resolution

Victims should be given the opportunity to provide a victim impact statement and information pursuant to section 722 of the *Criminal Code*, section 4 of the *Victims of Crime Act*, and sections 15 and 19 of the *Canadian Victims Bill of Rights*.

When formulating a position on sentencing, Crown Counsel should have particular regard for the safety of the public, including victims.

5 *R v Barton*, 2019 SCC 33 at paras 59-65
6 *R v J.J.*, 2022 SCC 28 at paras 19-34
7 *R v Seaboyer*, [1991] 2 SCR 577

Before concluding resolution discussions, withdrawing charges, or directing a stay of proceedings, Crown Counsel should take reasonable steps to inform the victim of the proposed resolution and provide them an opportunity to express any concerns they may have.

Crown Counsel should not stay proceedings, withdraw, or call no evidence on a charge falling under this policy unless the charge assessment decision was wrong in fact or law, unreasonable, or there has been a material change in circumstances, and the charge assessment standard (CHA 1) is no longer met. Crown Counsel should consult a Regional Crown Counsel, Director, or their respective deputy before staying proceedings or calling no evidence on, withdrawing, or resolving by way of recognizance, any charge falling under this policy.

Sentencing

Crown Counsel should bring to the attention of the court any aggravating factors, including those listed in section 718.04, 718.2, and 718.201. When community supervision is imposed, Crown Counsel should seek conditions to protect the victim and the public, which may include rehabilitative programs.

When there is evidence that the assault was motivated by bias, prejudice, or hate towards the victim, as set out in section 718.2(a)(i), Crown Counsel should refer to the *Hate Crimes* (HAT 1) policy and consider all relevant aggravating circumstances.

Indigenous Persons

Numerous government commissions and reports, as well as the judgments of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system.

The history of colonialism, displacement, and residential schools in Canada has translated into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Indigenous persons. In addition, the rates of victimization of Indigenous persons, especially for Indigenous women and girls, are significantly higher than those for non-Indigenous persons.[8]

The continuing consequences of colonialism for Indigenous persons in Canada provide the necessary context for any matter involving an Indigenous accused. These consequences "must be remedied by accounting for the unique systemic and background factors

8 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016

affecting Indigenous peoples, as well as their fundamentally different cultural values and world views."[9]

As stated by the Supreme Court of Canada:

> *There is no denying that Indigenous people — and in particular Indigenous women, girls, and sex workers — have endured serious injustices, including high rates of sexual violence against women. … [O]ur criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons — and in particular Indigenous women and sex workers — head-on.*[10]

In a trial involving an Indigenous victim, Crown Counsel should consider requesting that the judge provide an express instruction to the jury aimed at countering prejudice against Indigenous persons.[11]

Crown Counsel should also ensure that their sentencing positions reflect the gravity of the problem of violence against Indigenous persons in our society and, as appropriate, make submissions to the court during the sentencing hearing about the applicability of sections 718.04 and 718.201.

9 *Ewert v Canada*, 2018 SCC 30 at paras 57 and 58; *R v Barton*, 2019 SCC 33 at paras 198-200; also *BC First Nations Justice Strategy*, February 2020
10 *R v Barton*, 2019 SCC 33 at paras 198 and 200
11 *R v Barton*, 2019 SCC 33 at paras 200-204