Policy:		
Vulnerable Victims and Witnesses		
Policy Code: **VUL 1**	Effective Date: January 15, 2021	Cross-references: ALT 1 BAI 1 CHA 1 CHI 1 DIR 1 HAT 1 IPV 1

All victims and witnesses, regardless of vulnerabilities, should have an equal opportunity to participate in the criminal justice process. The BC Prosecution Service recognizes that serious cases with vulnerable victims and witnesses present unique and complex issues and that such cases should be identified at the earliest stages of the prosecution, so that the issues can be appropriately addressed.

For the purposes of this policy, "serious cases" include those involving "serious personal injury" offences as set out in section 752 of the *Criminal Code*, as well as those involving significant risk of harm whether physical, sexual, psychological, or exploitive in nature.

In this policy, individuals are considered vulnerable victims and witnesses if there is a reasonable likelihood that the individual's effective participation in the justice system will be significantly diminished, or eliminated, if accommodations or supports are not made available to address their unique personal characteristics or circumstances including:

- advanced age
- continuing impacts of the history of colonialism, displacement, and residential schools in Canada, including intergenerational trauma, and other related systemic factors
- ethnic, religious, or cultural identity
- fetal alcohol spectrum disorder or other adverse cognitive conditions
- an issue of mental health or disability
- an issue of physical health or disability
- the accused's position of power over a victim or witness

- precarious legal status (e.g., immigration status or outstanding court orders)
- sexual orientation, gender identity, or gender expression
- significant barriers in communicating
- a significant history of abuse
- significant safety concerns
- social isolation, poverty, or homelessness
- substance dependency
- the violence, exploitation, and prejudice that persons who provide sexual services may face

For matters involving children or vulnerable youth as a victims or witnesses, Crown Counsel should also refer to *Child Victims and Witnesses* (CHI 1).

For matters involving intimate partner violence, Crown Counsel should also refer to *Intimate Partner Violence* (IPV 1).

Process

In serious cases, to assist vulnerable victims and witnesses to effectively participate in the criminal justice process, Crown Counsel should:

- make reasonable efforts to proactively establish and maintain communication with vulnerable victims and witnesses from the earliest stages of the prosecution, through to its conclusion, and to provide them with timely information about the status of the prosecution
- where practicable, work with police, sheriffs, probation officers, or victim services throughout the prosecution process to inform vulnerable victims and witnesses of any supports available within the criminal justice system
- when available, work with cultural or Indigenous organizations, including those identified by the victim or witness to support vulnerable victims
- ensure that any appropriate applications are made to the court for publication bans, testimonial accommodations, or protective orders
- where appropriate, take all reasonable steps to expedite the process, including initiating early resolution discussions or requesting an early trial date

Administrative Crown Counsel should ensure that procedures are in place to:

- identify and assign such cases early
- wherever possible, assign Crown Counsel who have received relevant specialized training and who are available and prepared to maintain conduct of the file, using the same administrative staff member from beginning to end
- provide assigned Crown Counsel with sufficient preparation time to account for the additional complexity of these files

Early Considerations

Crown Counsel should consider applying, at the first opportunity, for an order under section 486.4 or 486.5 of the *Criminal Code*, directing that the identity of a victim or a witness and any information that could disclose the identity of the victim or witness shall not be published in any document or broadcast in any way.

In rare cases, where appropriate, Crown Counsel may also wish to consider applying for an order under section 486.31 of the *Criminal Code*, directing that any information that could identify a witness not be disclosed in the course of the proceedings, or an order under section 486.7 of the *Criminal Code*, to protect the security of a witness. Prior to making such an application, Crown Counsel should consult with a Regional Crown Counsel, Director, or their respective deputy.

Where a vulnerable victim or witness may have difficulty communicating evidence because of a mental or physical disability, Crown Counsel should attempt to determine in the early stages of the prosecution whether presentation of evidence by videotape is appropriate, as provided by section 715.2 of the *Criminal Code* and, if necessary, request the police to obtain a video statement. Under this section, a recorded videotaped statement of a vulnerable victim or witness may be admitted in evidence where the victim or witness testifies and adopts the contents of the video recording.

Where a vulnerable victim was a child or youth at the time of the offence, Crown Counsel should consider whether presentation of evidence by video recording is appropriate, as provided by section 715.1 (CHI 1).

Where a procedural or investigative barrier arises which may adversely affect the prosecution, Crown Counsel should work with police and victim services and, if necessary, senior police management and Administrative Crown Counsel to address such barriers in a timely manner. This may include barriers based on:

- reluctance or hostility of a vulnerable victim or witness

- difficulty locating or staying in communication with a vulnerable victim or witness
- the victim's or witness's inability to obtain transportation to the courthouse or Crown Counsel office
- the need for translation of file materials
- delay in obtaining the required evidence

Where Crown Counsel determines that a vulnerable victim or witness has social support or health issues that may adversely affect their ability to participate in the criminal justice process, Crown Counsel should ask the police and victim services to determine whether there are social supports or services that may address the issue.

In cases where there is a significant danger of harm, either psychological or physical, to a vulnerable victim or witness, and it is reasonable to believe they would be adversely affected if required to participate in multiple judicial proceedings, Crown Counsel should consider the applicability of the policy *Direct Indictment* (DIR 1).

Charge Assessment

Crown Counsel should be mindful that 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. Crown Counsel should make charge assessment decisions as expeditiously as possible.

In assessing a Report to Crown Counsel involving an Indigenous victim, Crown Counsel should bear in mind the overrepresentation of Indigenous women and girls as victims of violent offences, which is a public interest factor that weighs in favour of prosecution.

In determining whether a referral to alternative measures may be appropriate, Crown Counsel should consider the ongoing need for safety of the vulnerable victims or witnesses. Crown Counsel should ensure vulnerable victims are advised that they have the right to refuse to participate in any alternative measures plans, including Indigenous healing circles. Any such referral of a case covered by this policy must be approved in advance by Regional Crown Counsel, a Director, or their respective deputy (*Alternatives to Prosecutions – Adults* (ALT 1)).

If Crown Counsel decide not to charge the accused, they should consider whether it is appropriate to seek a recognizance under sections 810, 810.1, or 810.2 of the *Criminal Code*, which can include supervision and counselling conditions administered by BC Corrections.

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 (First Nations, Métis, and Inuit) persons, whether as a result of overtly racist attitudes or culturally-inappropriate practice, extends to all parts of the criminal justice system.

The history of colonialism, displacement, and residential schools continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Indigenous persons.[1]

The rates of victimization of Indigenous persons, especially for Indigenous women and girls, are also significantly higher than those for non-Indigenous persons.[2]

The continuing consequences of colonialism for Indigenous persons in Canada provide the necessary context for any matter involving an Indigenous person as a victim or witness. These consequences "must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views."[3]

As further 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."*[4]

Crown Counsel should recognize that there is a strong public interest in favour of prosecution in cases involving Indigenous women and girls as victims.

Bail

A warrant should be sought whenever it is necessary to protect a vulnerable victim or witness by seeking a detention order or conditions of release, consistent with *Bail – Adults* (BAI 1). Where it is likely an accused will be released, Crown Counsel should consider terms that will assist the vulnerable victim or witness with safety planning. Crown Counsel

1 *R v Ipeelee*, 2012 SCC 13
2 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016
3 *Ewert v Canada*, 2018 SCC 30 at para 57 and 58; *R v Barton*, 2019 SCC 33 at paras 198-200
4 *R v Barton*, 2019 SCC 33 at paras 198-200

should consider consulting with police, victim services, corrections, probation personnel, or local Indigenous or other justice organizations and, where applicable, Indigenous or other child welfare agencies, in formulating such terms. Where the accused is detained, Crown Counsel should consider seeking a "no contact" order regarding the victim, witness, or other appropriate person pursuant to section 515(12) or 516(2) of the *Criminal Code*.

Reluctant Witnesses

Crown Counsel should recognize that vulnerable victims and witnesses may be reluctant to participate in the criminal justice process. They may minimize or seek to withdraw their evidence. A variety of factors may affect their willingness to co-operate, including past negative interactions with the justice system. Crown Counsel should attempt to ascertain the reasons for their reluctance to testify and develop strategies to address the issues. Crown Counsel should keep in mind that vulnerable victims and witnesses may be particularly subject to pressure, intimidation, and interference. If a witness has been subjected to threats or interference, Crown Counsel should refer the matter to the police for investigation.

In light of the above, Crown Counsel should consider whether it is both necessary and appropriate that the vulnerable victim or witness be personally served with a subpoena to testify. However, before applying for a material witness warrant in such cases, Crown Counsel should consult with their Administrative Crown Counsel and consider the potential to further alienate the victim or witness from the criminal justice system, or adversely impact their dependents, with particular attention to the circumstances of Indigenous women and girls.

In addition, Crown Counsel should consider whether the charge assessment standard (CHA 1) can be met with other available evidence without the witness' testimony.

Preparation for Hearing

Where practicable, Crown Counsel should inform the witness about the accommodations that may be available under sections 486 to 486.31 and 486.7 of the *Criminal Code*. Where appropriate, Crown Counsel should make an application for an order, taking into account all relevant factors, including whether the witness requests any of the accommodations.

In specific circumstances, the court can make an order:

- for the exclusion of the public or that the witness be out of public view (section 486(1))
- for a support person or subject to availability a courtroom dog (sections 486.1 and 486.7)

- for the witness to give testimony from a different room or behind a screen or other device (section 486.2)
- for cross examination by appointed counsel (where the accused is unrepresented) (section 486.3)
- for the non-disclosure of a witness' identity (section 486.31)
- that the court determines is necessary to protect the security of a witness and is otherwise in the interest of the proper administration of justice (section 486.7)

Sections 13 and 19 of the *Canadian Victims Bill of Rights* provide that every victim has the right to request testimonial aids when appearing as a witness in proceedings relating to the offence, through the mechanisms provided by law.

Corroborative Evidence

Crown Counsel should make reasonable efforts to ensure all necessary corroborative evidence is presented at trial.

Sentencing

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.*

Crown Counsel should recognize that in cases involving the abuse of a person who is vulnerable because of personal circumstances, including because the person is Indigenous and female, the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence, pursuant to section 718.04 of the *Criminal Code*.

Any aggravating factors, including those enumerated in section 718.2 of the *Criminal Code*, should be brought to the attention of the court.

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

If a probation or conditional sentence order is appropriate, Crown Counsel should seek conditions that will protect the vulnerable victim or witness. These may include "no contact" and reporting requirements, as well as successful completion of an appropriate treatment program.

If a custodial sentence is appropriate, Crown Counsel should consider seeking a non-communication order prohibiting the offender from communicating with a vulnerable victim or witness during the custodial period of the sentence under section 743.21.

Crown Counsel should consider whether a restitution order is appropriate under section 738 or 739 of the *Criminal Code* and take reasonable steps to provide victims with an opportunity to indicate whether they are seeking restitution for their losses and damages.