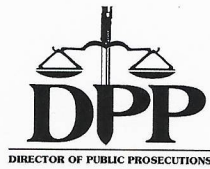


## **ODPP Guidelines on Prosecuting Child Sexual Abuse Cases & Other Crimes Against Children**

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## Introduction

1. The Director of Public Prosecutions is mindful of *inter alia*:
  - Article 41(2) and 15(9) of the Constitution of the Republic of Fiji;
  - The Child Welfare Act 2010;
  - The Convention on the Rights of the Child, adopted by the General Assembly in its resolution 44/25 of 20 November 1989 ratified by the Republic of Fiji in 1993;
  - The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime adopted by the Economic and Social Council in its resolution 2005/20 of 22 July 2005; and
  - The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly by way of Resolution A/RES/40/34 on 29 November 1985.
2. These guidelines are to assist Prosecutors of the Office of the Director of Prosecutions (ODPP) efficiently prosecute child sexual abuse cases and cases where children are victims of crimes in a manner that will ensure the best interests of the child are identified and met at every stage.
3. For the purposes of these guidelines “child” refers to both victims and witnesses who are children and is gender-neutral.
4. Children below the age of 14 years are the most vulnerable victims.<sup>1</sup>
5. It is recognised that “[w]ith the dramatic increase of child sexual abuse cases in Fiji, a greater number of children are being brought into contact with the criminal justice system. Accompanied by this trend are the legal and psychological dilemmas that such cases pose raising fears that child victims of sex offences will be further harmed by the courts. One of these dilemmas concerns how to prosecute an offender without causing additional trauma to children and without infringing the right to a fair trial of the accused. There can be no doubt that childhood sexual abuse is often a traumatic experience. Courtrooms are ascetic, formal settings capable of intimidating adults, let alone children. It is common knowledge that testifying can be a traumatic experience even for adult witnesses”.<sup>2</sup>

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<sup>1</sup> State v A.V unreported Criminal Case No. HAC 192 of 2008, paragraph 34; 2 February 2008; Kumar v State [2015] FJCA 32; AAU0049.2012 (4 March 2015) paragraphs 30-31

<sup>2</sup> Justice Aruna Aluthge, State v Cawi - Ruling [2018] FJHC 965; HAC124.2016 (19 September 2018) “Ruling on Child Friendly Court Procedure”.



6. These guidelines replace the ODPP “Child Protection Guidelines” dated 21 August 2009 and shall be effective from 1<sup>st</sup> September 2019.

## **Co-ordination between the Director of Public Prosecutions and the Director of the Criminal Investigations Division**

7. The Director of Public Prosecutions and the Director of the Criminal Investigations Division agree that:
- all complaints in which a child is a victim shall be investigated expeditiously;
  - unless obviously impractical, all interviews with child victims shall be video-recorded;
  - all matters in which a child is a victim or a witness shall be referred to the ODPP for prosecution without delay;
  - in cases in which the police are unsure whether there is sufficient evidence, the police shall not charge the suspect but should refer the case to the ODPP for advice without delay.

## **Referral to Victims & Witness Assistance Unit (ODPP-VWU)**

8. Upon being allocated the file, the Prosecutor will make necessary inquiries at the outset from the Investigating Officer and the Social Welfare officer assigned to the case (if applicable) and submit a referral to the ODPP Victims & Witness Assistance Unit (ODPP-VWU) with the following information:
- i. Name and age of the victim (in the case of child victims include names of parents/guardians);
  - ii. Name of school or other learning institution;
  - iii. Statement of facts;
  - iv. Contact details for the victim and the parents/guardians (e.g. phone/address);
  - v. Police Docket Number;
  - vi. Name of the accused;
  - vii. Charges;
  - viii. Status of the Accused and information concerning Bail. The information should include any bail conditions concerning the victim;
  - ix. Information on previous referrals for counselling and support;



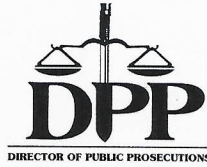


- x. Information concerning the victim's particular vulnerability and/or relevant personal circumstances (e.g. age, intellectual/physical disability, mental health issues)
- 9. The ODPP-VWU will establish and maintain contact with agencies providing support services for victims including the Department of Social Welfare.
- 10. The ODPP-VWU will request the relevant counselling service to prepare a Victim Impact Statement.
- 11. The ODPP-VWU will keep parents/guardian/child apprised of the progress of the case through the court system.
- 12. The ODPP-VWU is to ensure that the child is kept informed of the progress and disposition of cases including the prosecutorial decision not to pursue the case or to withdraw charges, the custodial status of the accused, and progress of the trial and the outcome of the case (including of any appeals).

## Pre-Trial Matters

- 13. The Prosecutor shall take cognizance of the following in deciding what pre-trial measures may be necessary to safeguard the interest and wellbeing of the child:
  - (i) The age, personal circumstances and any particular vulnerabilities of the child;
  - (ii) The circumstance of the offending;
  - (iii) The relationship between the offender and the child;
  - (iv) The current residential address of the victim and the address of the school the child attends;
  - (v) The means by which the report was lodged;
  - (vi) The involvement or intent to involve Social Welfare and/or any other agency providing support services for victims;
  - (vii) The attitude of the child's immediate family or immediate caregiver/s towards the victim;
  - (viii) The attitude of the child's immediate family or immediate caregiver/s toward the accused person
  - (ix) The academic schedule of the child to ensure that any scheduled case meeting or trial does not interfere with the child's schooling.
- 14. Prosecutors should request early trial dates and avoid seeking adjournments unless absolutely necessary. For these reasons, prosecutors should ensure that child files are not placed on court floating lists or are brought forward for trial unilaterally. The Prosecutor must have information regarding dates when it will





not be suitable for the child to testify or be involved in any trial preparation meetings. Such periods may include, for example, periods when the child will be having school examinations or on the child's birthday.

### **Response to Bail Applications**

15. The Prosecutor shall assess the strength of the case, the likelihood of the accused person appearing in Court and the public interest in deciding whether to concede or object to bail.
16. In considering the public interest, the Prosecutor shall give due regard to:
  - (i) The need to protect the child witness;
  - (ii) The need to protect state evidence; and
  - (iii) The potential for and protection of any other children placed at risk by the release of the accused person.
17. If bail is granted to the accused person, the Prosecutor shall ask for the necessary conditions to be present that best ensures the continued protection of the child.
18. In the event that bail is granted, the Prosecutor shall request, *inter alia*, the following orders:
  - (i) The accused not to directly or indirectly interfere with witnesses;
  - (ii) The accused be restrained from coming into direct or indirect contact with the child victim;
  - (iii) The accused be restrained from entering the vicinity of the school the child attends or being within 100 metres of the school;
  - (iv) The accused be restrained from entering the area in which the child victim resides without first obtaining permission from the Court;
  - (v) The accused to surrender all travel documents to the Court;
  - (vi) The Prosecutor, having established the reactions of family members to the accused and the child victim, shall apply to the Court for no, or, at the very least, limited supervised access to the child, by other members of the family who have shown an affinity to or for the accused person.
  - (vii) The accused be required to report to a particular police station / police post weekly.

## Preparation for Trial

### Building Rapport

19. The Prosecutor shall introduce him/herself in person to the victim as soon as practicable after a decision is made by the Director of Public Prosecutions to file charges.
20. Before meeting the child, the Prosecutor will first get acquainted with the child's personal circumstances concerning any particular vulnerability and/or relevant personal circumstances including the age, intellectual/physical disability, mental health issues of the child. The Prosecutor may seek guidance or advice from the child's guardian and/or counsellor on the best way to interact with the child.
21. The Prosecutor shall conduct a follow-up visit with the victim 14 days before the trial to introduce the victim to the Court room in which the victim shall likely give evidence.
22. Unless unavoidable, there should not be a change in the Prosecutor who has been assigned to prosecute the case and who has interacted with the child in preparation for trial. Where there will be a change, the Prosecutor first assigned to the case will personally introduce the new Prosecutor to the child and explain briefly the need for the change.

### Pre-testimony meeting and interview

23. The Prosecutor may, in exceptional cases, have pre-testimony meetings with the child victim if considered necessary in order to enable the Prosecutor to reach a better informed decision about any aspect of the case.
24. During these meetings, the Prosecutor will explain the court process and answer any questions or concerns the child may have about giving evidence in court.
25. The purpose of the pre-trial interview is for the Prosecutor to be able to assess the credibility and reliability of the child's evidence. The Prosecutor must not rehearse, practice or coach the child in relation to the child's testimony. The Prosecutor must not directly or indirectly encourage the child to give testimony which is untruthful. Leading questions should be avoided.<sup>3</sup>

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<sup>3</sup> Momodou, R v [2005] EWCA Crim 177 (02 February 2005); Pre-Trial Witness Interviews Code of Practice issued by Director of Public Prosecutions of England, Ken Macdonald QC, on 22 February 2008, paragraph 7.1



26. During the pre-testimony meeting, the child will be provided with a copy of the written police statement which will be handed to the child to read or it will be read back to the child to refresh the child's memory. Where the police have conducted a video-recorded interview with the child, the child will view the video. The Prosecutor shall go through the child's written statement or video-interview. The Prosecutor may seek any clarifications or ask further questions that may be relevant to any aspect of the child's testimony. The Prosecutor must avoid suggestive questions.
27. Avoid asking the child to demonstrate intimate touching of his/her own body.
28. The Prosecutor will review with the child any exhibits or documents that the child will be required to identify or testify about during the child's testimony.
29. Persons that may be present during pre-trial meetings with the child may include a police officer, the support person who may be a counsellor or the child's guardian. The Prosecutor must take all necessary steps to ensure that such person is not also a witness in the case.
30. If such support person is present at the pre-trial interview, he/she plays a passive role and must not respond to questions or provide information on behalf of the child. The support person or guardian must not influence or prompt the responses of the child in any way.<sup>4</sup>
31. If during the pre-trial interview the child provides further inculpatory or exculpatory information which is material to the case, this shall be recorded in a further witness statement by a police officer and disclosed to the defence.
32. The Prosecutor shall request the ODPP-VWU to arrange a court-room familiarisation visit for the child. The counsellor or support person who will be present in court with the child during the child's testimony should also attend this familiarisation visit. It is advisable for the Prosecutor to also attend this visit and explain the testimony process and address any concerns or fears the child may have.

### Agreed Facts

33. The Prosecutor shall work closely with Defence Counsel in the preparation and submission of agreed facts pursuant to section 135 of the Criminal Procedure Act with a view to:

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<sup>4</sup> Pre-Trial Witness Interviews Code of Practice issued by Director of Public Prosecutions of England, Ken Macdonald QC, on 22 February 2008, paragraph 5



- (i) Minimizing time spent in trial;
- (ii) Clarifying the issues under contention; and
- (iii) Minimizing any discomfort or embarrassment for the child victim in terms of the giving of his/her evidence in a court of law.

### **Requests for Special Measures for Testimony**

- 34. The Prosecutor is to assess the needs of the child and apply to the court pursuant to section 295 and section 296 of the Criminal Procedure Act for any special measures that may be required for the child to testify at the trial. The court retains the authority to decide whether to grant the application or to grant the request with any modifications it deems fit in the circumstances of each case.
- 35. Prosecutors are to be mindful that “[t]he Constitution, the Criminal Procedure Act and the Juveniles Act in particular, allow the promotion of child friendly courts and procedures in the best interests of child victims and witnesses. The use of videotaped testimony, the extension of hearsay exceptions, and closed-circuit television, early docketing of cases involving child victims, and the use of expert witnesses to testify about the effects of sexual abuse are some of the special measures that can be taken under legislative provisions. In addition, courts are being asked to rule on the use of innovative procedures in individual cases. The purpose of these reforms is to minimize the presumed traumatic effects on children of court appearances and maximize children's ability to provide accurate testimony.”<sup>5</sup>
- 36. The special measures the Prosecutor may request include but is not limited to the following:

#### **(i) Name Suppression Application**

- 37. The Prosecutor shall apply for a name suppression order for the victim and/or the child witness depending on the nature and circumstances of the offending and/or the child's involvement in the offending itself at first call.

#### **(ii) Closed- Circuit Television/ Screen**

- 38. The Prosecutor may apply for provision for the taking of the child's evidence through CCTV or for the provision of a screen to separate the child witness from the accused during the taking of the child's evidence.

#### **(iii) Closed Court**

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<sup>5</sup> State v Cawi - Ruling [2018] FJHC 965; HAC124.2016 (19 September 2018)

39. The Prosecutor will request that the child's evidence be taken in closed court.

***(iv) Support Person to be present***

40. The Prosecutor may apply to the Court for permission to have a child support officer or mother/relative/adult friend present in Court and seated close to the child witness during the taking of his/her evidence.

***(v) Attire and courtroom setting to be less formal***

41. The Prosecutor may make applications for the Judge and the parties to reduce formal court attire for instance by removing wigs and court robes.
42. An application may also be made for the courtroom setting to be less formal wherein the Judge is to be seated level to the child witness and for all parties to remain seated during questioning.
43. These measures will assist to reduce the anxiety of the child in a courtroom setting.

***(vi) Self-represented Accused not be allowed to cross-examine the child***

44. In case an accused is representing himself/herself at the trial, the Prosecutor shall make an application that he/she not be permitted to cross-examine the child directly.<sup>6</sup>

***(vii) Alternative modes of receiving the child's testimony***

45. The Prosecutor will make an assessment as to whether it would be in the best interest of the child that a prior recorded witness statement<sup>7</sup> or video-recorded interview is admitted in lieu of examination in chief. The child will be made available for any additional questioning by the Prosecutor, for cross-examination and for questioning by the Court. The Prosecutor must make this assessment in a timely manner and abide by any notice and other procedural requirements of the law.
46. Where an early trial date is not feasible for reasons beyond the control of the Prosecutor and it is in the interest of the child that his or her testimony be taken without delay, the Prosecutor will seek to have the child's testimony taken in

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<sup>6</sup> Oral Ruling of Justice Morais 17<sup>th</sup> of October 2018 in State v Tevita Lewai [2018]FJHC HAC 129. 2018; Rusiate Tuidravu v State [NO. AAU0035 OF 2005] (10 November 2006) at paragraphs 23 and 24; Sections 34 and 35 of the Youth Justice and Criminal Evidence Act 1999 [UK]

<sup>7</sup> Section 134 Criminal Procedure Act 2009; State v Cawi - Ruling [2018] FJHC 965; HAC124.2016 (19 September 2018).



advance of the trial in accordance with applicable laws and procedures including sections 295 and 296 of the Criminal Procedure Act.

## The Trial Process

47. The Prosecutor shall ensure that the child is comfortably situated at designated waiting areas at the court premises whilst awaiting the call of the case for trial.
48. The Prosecutor shall ensure that the child is accompanied by the support person and/or an adult and/or legal guardian with which the child is comfortable.
49. The Prosecutor shall ensure that the screen is in place prior to the child entering the room to give evidence, or in the event of the use of CCTV, that the camera is focused on the Judge and the Prosecutor and not on the accused person.
50. The Prosecutor shall ensure that court sessions where a child will be testifying will not be lengthy and are adapted to the child's age and attention span. Applications for breaks shall be made as necessary.

## Questioning Child Victims & Witnesses – General

51. The trial process must accommodate the needs of the child and the child must be able to give the best evidence possible.<sup>8</sup>
52. All Prosecutors must be aware of relevant developments on questioning child victims and witnesses during trials. It is now accepted that *"if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round."*<sup>9</sup>

## Examination-in-Chief by the Prosecutor

53. In the course of examination-in-chief the Prosecutor shall adopt language, tone and facial expression that is child friendly.
54. The Prosecutor shall ensure that age-appropriate questions are posed. The child must be advised that if he or she does not understand the question, the questions may be rephrased and restated.

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<sup>8</sup> R v Barker [2010] EWCA Crim 4

<sup>9</sup> Lubemba, R. v [2014] EWCA Crim 2064 (09 October 2014)



55. The Prosecutor should not ask long, excessive or repetitive questions.
56. The Prosecutor should be guided by the child's choice of vocabulary and terminology for describing the accused and other persons who feature in the testimony, for body parts and/or objects.
57. As far as possible and where relevant, the Prosecutor may elicit any victim impact information from the child during his/her testimony in chief.

### **Cross Examination by Defence lawyer**

58. The Prosecutor shall ensure that the best interest and welfare of the child is safeguarded during cross-examination by raising appropriate objections to unfair and improper questions and manner of questioning.
59. Prosecutors are to recognise that there are limitations on cross-examination of a child. The importance of the limitation on cross-examination is to protect vulnerable witnesses and enable them to give the best evidence they can.<sup>10</sup>
60. The Prosecutor shall object to questions which are complex, confusing, not clear or which may not elicit reliable testimony from the child.
61. The Prosecutor may request the Court to dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of the child failing to understand, becoming distressed or acquiescing to leading questions.<sup>11</sup>
62. The Prosecutor shall object to any hint of badgering, intimidation, sarcasm, ridicule or aggression directed at the child.
63. Any comment on the credibility of the child or of inconsistencies in the evidence of the child shall be made in the absence of the child.<sup>12</sup>

## **CONVICTION & SENTENCE**

64. The Prosecutor shall ensure that detailed sentencing submissions addressing all relevant sentencing considerations and applicable case law is submitted to the court.

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<sup>10</sup> Wills v R [2011] EWCA Crim 1938 (02 August 2011); R v B [2010] EWCA Crim 4 ]

<sup>11</sup> Criminal Practice Directions Amendment No 2 paragraph 3E.4; Lubemba, R. v [2014] EWCA Crim 2064 (09 October 2014)

<sup>12</sup> R v B [2010] EWCA Crim 4 (21 January 2010) ; R v Wills [2011] EWCA Crim 1938, [2012] 1 Cr App R 2,

65. The Prosecutor will state the tariff for child rape as **11-20 years imprisonment**<sup>13</sup> and address any aggravating factors in sentencing submissions. Factors that may be considered in sentencing include but are not limited to<sup>14</sup> :

- (i) whether the crime had been planned, or whether it was incidental or opportunistic;
- (ii) whether there had been a breach of trust;
- (iii) whether committed alone;
- (iv) whether alcohol or drugs had been used to condition the victim;
- (v) whether the victim was disabled, mentally or physically, or was especially vulnerable as a child;
- (vi) whether the impact on the victim had been severe, traumatic, or continuing;
- (vii) whether actual violence had been inflicted;
- (viii) whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;
- (ix) whether the method of penetration was dangerous or especially abhorrent;
- (x) whether there had been a forced entry to a residence where the victim was present;
- (xi) whether the incident was sustained over a long period such as several hours;
- (xii) whether the incident had been especially degrading or humiliating;
- (xiii) if a plea of guilty was tendered, how early had it been given? No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;
- (xiv) time spent in custody on remand;
- (xv) extent of remorse and an evaluation of its genuineness;
- (xvi) if other counts or if serving another sentence, totality of appropriate sentence.

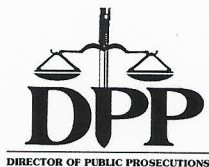
66. The Prosecutor may call witnesses at a sentencing hearing to testify about the impact of the crimes and the harm caused to the victim including expert witnesses and counsellors.

67. The Prosecutor shall ensure that the duly completed Victim Impact Statement (VIS) is submitted to the Court after conviction and prior to the sentencing hearing.

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<sup>13</sup> Aitcheson v State [2018] FJSC 29; CAV0012.2018 (2 November 2018)

<sup>14</sup> Ram v State [2015] FJSC 26; CAV12.2015 (23 October 2015)



## POST-TRIAL

68. The Prosecutor shall advise the Director of the Public Prosecutions following Judgment and/or the delivery of Sentencing Remarks whether an appeal against an order of acquittal or leniency of sentence should be pursued. The advice shall be given within seven (7) days from the date of Judgment or Sentence.
69. The Prosecutor will undertake a debriefing session with the child and the child's guardian(s) and explain the outcome of the trial and receive any information from the child and the guardian(s) regarding the child's experiences during the process.
70. The Prosecutor shall advise the child and the guardian(s) that any acts of reprisal or retaliation against the child as a result of the child testifying may be reported to the police.
71. The ODPP-VWU shall inform the appointed counselling service of the outcome of the process and obtain information on continuation of counselling and support that may be required. The ODPP-VWU shall continue to receive updates about the well-being of the child periodically until such time as is deemed necessary.

Dated this 6<sup>th</sup> day of August, 2019

Christopher T. Pryde  
Director of Public Prosecutions