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Memorandum

To:	Chief Victim Advisor
From:	Nikki Pender, Barrister
Date:	September 2021
Subject:	Witness Familiarisation

"Whether or not it is always the case, the trauma of participating in a rape trial as a victim-witness has become common cultural knowledge. Fear of a second assault by the criminal justice system also appears to discourage women from reporting sexual assaults and rapes to police or being willing to continue through the justice process.

If rape survivors perceive that they will be treated with dignity and respect and be given a chance to state their case, they will be willing to involve themselves with the criminal justice process. If they expect the process to be unfair or experience it as such, they may choose not to report or curtail their involvement. …Thus, a key to increasing the reporting of rape would be altering practices that lead to perceptions and experiences of unfairness on the part of rape survivors.

Preparation for court is necessary for the prosecutor to meet her/his case obligations, and minimal preparation may be adequate. However, rape survivors' evaluations of the preparation they received suggest that lack of contact, cursory information, and requests made without apparent concern for their emotional impact lead survivors to question the fairness of the justice process. They will share their experiences with others and thus influence others' decisions about the legal system. Altering the manner in which rape survivors are prepared for court could go a long way to increase their perceptions of fairness and provide a cushion of support for the criminal justice process when the outcome of the case is unfavourable."[1]

A. Konradi (1997) *Too little, too late: prosecutors' pre-court preparation of rape survivors*

[1] A Konradi (1997) *Too little, too late: prosecutors' pre-court preparation of rape survivors* (1997) 22 Law & Social Inquiry 1 at 30.

SUMMARY

1. Studies have found that pre-trial preparation can improve the quality and reliability of witnesses' evidence as well as improve their experience of the trial process. However, in criminal trials in Aotearoa New Zealand, witnesses receive very little information about the trial process and almost no training about cross examination and how to approach it. Witnesses often struggle to give clear and cogent evidence and many are left disillusioned, even revictimised, by the process.

2. The reluctance to prepare prosecution witnesses for giving evidence may stem from a fear that it could constitute unethical coaching. The illustrations of 'witness prepping' depicted in U.S. legal dramas in films and on television – where evidence is routinely rehearsed, and witnesses are seen to be schooled on what to say – could reinforce ethical concerns. Recent changes to prosecutor guidelines[2] may mean that witnesses in sexual offending cases will receive more pre-trial preparation in future, but there remain limits on the extent to which prosecutors can properly prepare witnesses without influencing or being seen to influence a witness' testimony. A more independent solution is warranted.

3. This paper considers academic studies and case law as to the ethical bounds of witness preparation. It uses the term 'witness familiarisation' to mean permissible training that is designed to demystify the trial process, improve the witness' ability to communicate oral evidence and enhance their overall experience; this can be contrasted to 'coaching' which can (or can appear to) influence the content of a witness' evidence through preparation and rehearsal.

4. The paper also outlines a proposed structure of a witness familiarisation programme that is independent of police and prosecutors. It posits the possibility of a pilot programme and suggests a methodology for analysing the results of such a trial.

[2] Crown Law Office: *Solicitor-General's Guidelines for Prosecuting Sexual Violence* as at 1 July 2019 https://www.crownlaw.govt.nz/assets/Uploads/Solicitor-Generals-Guidelines-for-Prosecuting-Sexual-Violence.pdf

BRIEF

Background

5. Involvement in the court process is known to present a broad range of stressors for witnesses and complainants and can be detrimental to their well-being.

6. In the Chief Victims Advisor's Victim Survey (2019), one of the key themes that emerged was that the criminal justice system is failing to communicate with victims. This theme included the system failing to keep victims informed and failing to listen to victims or enable their voices to be heard.

7. The Chief Victims Advisor's report *Te Tangi o Te Manawanui: Recommendations for reform* highlighted that though Court Victim Advisors are able to prepare complainant-victims for the court process by showing them the layout of the courthouse and courtroom, and where everyone will sit in the court, their role is ultimately to serve the court, not the victim. This, combined with their high case workload often precludes them from properly being able to prepare complainants to feel confident to give their best evidence, especially when being cross examined. In contrast, some other jurisdictions such as the United Kingdom, have developed a thorough independent witness familiarisation processes.

8. *Te Tangi o Te Manawanui: Recommendations for reform* recommends providing victims with legal aid so that they can access a professional witness familiarisation service that includes the opportunity for neutral content role play practice in cross examination. Such a service is currently available in Aotearoa New Zealand for a fee in civil cases.

9. This research paper examines best practice overseas and in Aotearoa New Zealand to outline what a good witness familiarisation service could provide to complainants and witnesses.

10. It will be used initially as an internal resource and be provided to the Minister of Justice and the Minister for the Prevention of Family Violence and Sexual Violence.

Objectives

11. The objectives of the research are to:

    (a) Outline why witness familiarisation is needed and the benefits it has for victims in the criminal justice system.

    (b) Identify promising practice in Aotearoa New Zealand and overseas in witness familiarisation services and how this could work in the Aotearoa New Zealand criminal justice system.

    (c) Outline what a witness familiarisation service includes (for example: familiarising the witness with the layout of the court, the likely sequence of events, different responsibilities/roles of the people in the courtroom, neutral content role play etc).

BENEFITS OF WITNESS PREPARATION

12. In a 2018 qualitative study of the experiences of victims of sexual violence in Aotearoa New Zealand,[3] Gravitas Research and Strategy found that few participants were properly prepared to give evidence in court. However, those witnesses who did receive adequate preparation reported feeling in more control and found the experience less stressful than those who did not.[4] Other overseas studies have also found a correlation between the investment of time spent preparing sexual violence complainants for the process of giving evidence and the complainants' subjective experience of the trial process and willingness to participate in the prosecution.[5]

13. In 2006, the Canadian Department of Justice commissioned a comprehensive survey of victims of crime and criminal justice professionals.[6] The survey asked 112 victims of crime, among other things, whether they received help in preparing to give evidence and what assistance they felt they needed to prepare for court:[7]

> Out of 36 victims whose cases went to trial, 24 reported that they or a family member testified at the trial; eight did not testify; and four did not answer the question. Of the 24 who testified, 20 received help in preparation, most often from victim services (n=17), but also from the Crown Attorney handling their case (n=9). The various types of assistance included an explanation of courtroom procedures; an explanation of the respective roles of the Crown Attorney and defence counsel; an introduction to the courtroom; and practice in testifying. A small number of victims said that they received other types of assistance, such as a review of basic behaviour in the courtroom and what to expect…
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> Just over half of the 24 victims who testified at trial reported that they felt prepared for it. Almost all of them attributed their preparedness to the support they received prior to and during their testimony. Those who felt unprepared for testifying either said that they felt frightened, threatened, or re-victimized or said that they had inadequate time to prepare. Several victims (both those who felt prepared and those who did not) said that they were nervous about testifying but that, in the end, they were able to handle the experience reasonably well.
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> ….
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> All 36 victims whose cases went to trial were asked to suggest ways to help victims with testifying. The most common suggestions were better explanations of the court process and of what to expect in the courtroom (e.g. preparation for defence tactics) and improved protections or wider

[3] Gravitas Research and Strategy Ltd (2018) *Improving the Justice Response to Victims of Sexual Violence: Victims' Experiences*, a research report commissioned by the Ministry of Justice.
[4] Gravitas (ibid) at 58.
[5] A Konradi *'Too little, too late: prosecutors' pre-court preparation of rape survivors'* (1997) 22 Law & Social Inquiry 1; A Konradi *'Understanding rape survivors' preparations for court'* (1996) 2 Violence Against Women 25 at 49; A Konradi '*Pulling strings doesn't work in court: moving beyond puppetry in the relationship between prosecutors and rape survivors'* (2001) 10 Journal of Social Distress and the Homeless 5 at 13; T Tyler and A Lind *'A relational model of authority in groups'*(1992) 25 Advances in Experimental Social Psychology 115; I Bacik, C Maunsell and S Gogan *The Legal Process and Victims of Rape* (Dublin: Dublin Rape Crisis Centre, 1998) p 8 (All studies are cited in L Ellison *Witness Preparation and the Prosecution of Rape* (2007) *Legal Studies* 27(2): 171–187).
[6] Prairie Research Associates Inc, *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada* report prepared for the Canadian Department of Justice dated 22 June 2006 https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr05_vic1/index.html
[7] Prairie Research (*ibid*) at pp. 45-46.

availability of existing protections. Other suggestions included preparing for testimony through role-playing and permitting victims of crime to have their own lawyer.

14. Proper witness preparation has also been shown to have quantitative benefits in that it can improve the reliability of the testimony being given. In a joint research project conducted in 2010, Professor Louise Ellison of the University of Leeds' School of Law and Professor Jacqueline Wheatcroft of the University of Liverpool's School of Psychology used mock cross examination experiments to compare the accuracy of evidence given by groups of unprepared adult witnesses with that given by prepared witnesses.[8] Their key findings included that prepared witnesses were significantly more likely than their unprepared counterparts to provide correct responses, seek clarification during cross examination and be appreciative of the guidance they had received beforehand.[9]

15. Professor Wheatcroft has explained from a psychological perspective why people make better witnesses when they are prepared for the process of giving evidence:[10]

> A number of psychological reflections can be made which may explain why familiarisation might be helpful ... Researchers suggest that more complex tasks, such as answering lawyerly cross-examination questions, require greater cognitive effort and thereby activate executive and frontal systems, with the potential to lead to fewer correct responses as a result of lowered processing capacity. Inhibition of correct responses may also be influenced by witnesses drawing upon cognitive coping methods, such as those defaults to more autonomic responses that require little in the way of cognitive work, yet result in lower accuracy. In the complex context of the courtroom, mental shortcuts, which can often help to streamline information in daily activities, can become detrimental, resulting in a greater number of errors (Wheatcroft, 2016).
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> The prior exposure to techniques used in cross-examination in court appears to allow witnesses to organise their knowledge of events so that information may be accessed more readily in response to lawyerly questions. Thus, familiarisation guidance appears to allow for some method of 'updating' to occur, making the information accessible for use as and when appropriate. Further, familiarisation with the questioning techniques seems to 'free up' capacity in the brain to process information, but if a witness is not given guidance the frontal-executive brain systems are potentially forced to work harder, leaving less processing capacity to work on the process of comprehending, understanding, formulating and responding to questions. Witnesses may become nervous and frustrated.

[8] L. Ellison and J.M Wheatcroft (2010): *Exploring the Influence of Courtroom Questioning and Pre-trial Preparation on Adult Witness Accuracy* Research Briefing Paper produced for the Arts & Humanities Research Council (AHRC), Universities of Leeds and Liverpool. This study also compared complex and simple styles of cross examination questions.

[9] Ellison and Wheatcroft (ibid). These findings came with some caveats due to the fact that the mock cross examination experiments involved "witnesses" who were not facing an imminent trial either as victims of crime or otherwise.

[10] J.M. Wheatcroft (2017), *Witness assistance and familiarisation in England and Wales: The Right to Challenge*, The International Journal of Evidence & Proof 2017, Vol. 21(1-2) 158–168.

COMPARATIVE OVERSEAS PRACTICES

United States

16. In the United States, preparing witnesses is considered part of a lawyer's ethical obligation. The same intensity of preparation given to private witnesses is also provided to complainants in sex crime cases. Prosecutors routinely meet with complainants to explain court procedures, the respective roles of participants and the physical layout of the court:[11]

> The sensitivity with which lawyers handle survivors, whatever the circumstances of the crime, is as crucial as their litigating skills. The human element is what makes sexual crimes unique. Not only can victims experience a catharsis if the offender is prosecuted, a witness who is gently guided through the whole process improves our chances in the courtroom of getting a conviction.

17. In the U.S., witness preparation can also include extensive rehearsals of testimony, both evidence in chief and cross examination. However, this latter practice is controversial and has raised ethical misgivings about the extent to which it can influence or even contaminate a witness' evidence.[12] One commentator has said of the U.S. approach to witness preparation more generally:[13]

> Witness proofing occupies an 'awkward position' in the U.S. system, being caught in a conflict within the adversary system itself between partisanship and zealous representation, on the one hand, and the duty of candour towards the court, commitment to truth and the integrity of adjudicatory system, on the other hand. The tension between these procedural values results in competing commitments and renders the open-textured ethical standards even more inconclusive for those who are required to abide by them. Under these circumstances, the risk of the preparation session being turned into an opportunity for reshaping of evidence in a traceless manner is not one that can be easily discarded.

18. The regular depiction of 'witness proofing' sessions in American TV courtroom dramas, means that public perceptions of witness preparation are likely to be equated with the U.S. approach.

[11] L Fairstein *Sexual Violence: Our War Against Rape* (New York: Berkeley Publishing Group, 1995) p 12, cited in L Ellison *Witness Preparation and the Prosecution of Rape* (2007) *Legal Studies* 27(2): 171–187.
[12] Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1 (1995); Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of 'Coaching*,' 1 Geo. J. of Legal Ethics 389 (1987); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829 (2002); Hal R. Lieberman, *Be Aware of Ethical Witness Preparation Rules*, New York Law Journal (25 May 2000); S.V.Vasiliev (2011). *From liberal extremity to safe mainstream? The comparative controversies of witness preparation in the United State*s. International Commentary on Evidence, 9(2), 5. https://doi.org/10.2202/1554; Harold K Gordon, *Crossing the Line on Witness Coaching* New York Law Journal (8 July 2005); Roberta K. Flowers, *Witness Preparation: Regulating the Profession's Dirty Little Secret*, 38 Hastings Const. L.Q. 1007 (2018).
[13] Vasiliev (ibid) at p. 52.

United Kingdom

19. In the United Kingdom, two leading cases on the permissible bounds of witness preparation are *R* v *Salisbury*[14] and *R* v *Momodou*[15]. In *Salisbury*, a nurse was convicted of attempting to murder patients in her care. The prosecution had called a number of witnesses who had attended a witness training course arranged by their employer, the mid-Cheshire NSH Hospital Trust. The trial judge (who was upheld by the Court of Appeal) allowed the witnesses' evidence, finding the training to be unobjectionable:[16]

> True it is that witnesses would have undergone a process of familiarisation with the pitfalls of giving evidence and were instructed how best to prepare for the ordeal. This, it seems to me, was an exercise any witness should be entitled to enjoy. What was taking place was no more than preparation for the exercise of giving evidence.
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> … The [witness familiarisation] course was delivered by a member of the Bar I judge to have been well aware of the implications. She took pains to ensure that any witnesses who attended her courses knew of the possible consequences of collusion and she forbade it. No attempt was made to indulge in application of the facts of this case, or anything remotely resembling them.

20. The prosecutions in *Momodou* were for violent disorder arising from a notorious disturbance at an immigration centre in 2002. The centre was run by staff of a team known as Group 4 who, in addition to giving evidence in the prosecution of those charged with the rioting, were investigated for potential workplace safety criminal liability and faced potential civil liability. In the aftermath, Group 4 managers arranged for immediate group trauma counselling for affected staff members and engaged an external trainer to provide witness training for their witnesses. On appeal, the defendants challenged the training for being an abuse of process.

21. The English and Wales Court of Appeal held that, while rehearsal of testimony and similar content-based training risked contaminating evidence and should not be allowed,[17] the same concerns did not apply to all pre-trial familiarisation. It said:[18]

> The principle [that coaching is prohibited] does not preclude pre-trial arrangements to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed, such arrangements …are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise by the way it works…Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible…The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process…

[14] *R v Salisbury* [2005] EWCA Crim 3107.
[15] *R v Momodou* [2005] EWCA Crim 177; [2005] 2 All ER 571.
[16] *R* v *Salisbury* (supra, note 14) at [60], where the Court of Appeal quoted Mr. Justice Pitchford and upheld his ruling.
[17] *R* v Momodou (supra, note 15) at [61].
[18] *R* v *Momodou* (supra, note 15) at [62].

22. The U.K. Bar Council, as a result of the *Momodou* and *Salisbury* decisions, produced a: Guidance on Witness Preparation (since retitled '*Witness Preparation*'), to assist barristers on matters of professional conduct and ethics.[19]

23. The ethical rules around witness familiarisation in criminal trials as set out in *Momodou* and developed by the Bar Council include:

    (a) Witness familiarisation must not be arranged in the context of nor related to any forthcoming trial.

    (b) The process should normally be supervised or conducted by a lawyer or someone responsible to a lawyer with experience of the criminal justice process.

    (c) None of those involved should have any personal knowledge of the matters in issue.

    (d) Where witness familiarisation is undertaken by external agencies in the context of an anticipated criminal trial, prosecutors should be informed in advance of any proposal (in writing) and should direct changes to the proposal if it risks breaching the permitted limits.

    (e) Records should be retained of all those present and those responsible for the programme, together with all written material used during the sessions.

    (f) There should be express warnings given about the danger of evidence contamination and the risk that the course of justice may be perverted. If discussion of the live criminal proceedings starts, it must be stopped immediately and all those involved advised of the reasons.

    (g) Defence Counsel should advise the trial Judge of any familiarisation process organised by the defence.

    (h) The trainer can take witnesses through a mock examination-in-chief, cross-examination or re-examination, the purpose of which is to give a witness greater familiarity with and confidence in the process of giving oral evidence. No exercises should be based on facts which are the same as or similar to those of any current or impending trial, hearing or proceedings at which a participant is or is likely to be a witness and, in conducting any such mock exercise, witnesses must not be rehearsed, practised or coached in relation to their evidence.

24. This guidance, however, does not necessarily reflect the scope of witness familiarisation services on offer in the UK - at least in criminal matters. Although both *Momodou* and *Salisbury* were prosecutions, they involved private training providers who were independently engaged by or on behalf of the witnesses. Private training is not an option that is typically available to victims of crime, with most prosecution witnesses reliant on public services.

25. The English and Wales courts provide a witness service, run by Victim Support, which can offer pre-court familiarisation visits and explain what might happen at court. But victim support advisers are not permitted to discuss the details of the case.

[19] The Bar Council of England and Wales' *Guidance on Witness Preparation*, originally issued: October 2005, last reviewed: November 2019) https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Witness-preparation-guidance-2019.pdf.

26. The Crown Prosecution Service (CPS) holds prosecutors responsible for ensuring that witnesses give their best evidence:[20] However, prosecutors are not generally permitted to discuss the facts of the case with the witness and cannot rehearse the testimony and the recommended preparation does not extend to mock cross examination or role play sessions. The CPS' rape prosecutions policy also does not refer to a dedicated witness familiarisation programme.[21]

27. Professors Ellison and Wheatcroft have been particularly critical of the absence in the U.K. of specific services designed to prepare sexual violence complainants for court.[22] In 2007, Professor Ellison (then a senior law lecturer) compared the witness preparation of rape complainants in the United States with those in the United Kingdom. Measuring both models against the Court of Appeal's guidance in *R* v *Momodou*, she opined that, provided programmes steered clear of discussing or rehearsing the witness' testimony, there was considerably greater scope for U.K. prosecutors to prepare complainants for the process of giving evidence:[23]

> In England and Wales, rape complainants enter court with the barest pre-trial preparation and are consequently poorly placed to cope with the heavy demands made of witnesses within an adversarial system. Until this issue is addressed, the potential impact of other initiatives, however worthy and well-motivated, is likely to be remain limited.

Australia

28. Courts in New South Wales[24] and Victoria[25] have been critical of witness preparation practices in civil matters that risked influencing witness testimony and contaminating evidence. In 2013, in the case of *Majinski* v *the State of Western Australia*, the Court of Appeal of Western Australia considered witness preparation in the context of a prosecution for indecent assault.[26] Mr Majinski (M) was charged with indecently dealing with a child under the age of 13. Before the trial, the prosecutor met the complainant, showed him a number of photographs and recorded his responses. Upon seeing a photo of M the complainant apparently said, "*that's him*." This fact was included in a general discovery letter to M's lawyer. Following receipt of the letter, M's counsel then brought an application for a permanent stay of proceedings, claiming that the complainant had been coached by the prosecutor. During the course of his evidence, the complainant testified that at no point during the proofing session did the prosecutor tell him what to say, and that the prosecutor let him answer the questions by himself. Nevertheless, the trial Judge was critical of the prosecutor. He inferred from the wide-ranging nature of the discussion which took place between the prosecutor and the complainant that the prosecutor's purpose was to prepare the complainant for cross-examination. He characterised what had occurred as "coaching". However, he also concluded that nothing done by the prosecutor had in fact tainted the evidence given by the complainant. M was subsequently convicted. The Western Australia Court of Appeal subsequently disagreed with the trial judge as to the propriety of what had

[20] CPS policy on Speaking to Witnesses at Court (revised March 2018) https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court
[21] Crown Prosecution Service (CPS) *Policy for Prosecuting Cases of Rape* (revised 2012).
[22] L Ellison (supra, note 5) at p.184; J.M. Wheatcroft (supra, note 10) at p.163.
[23] L Ellison (supra, note 5) at p.187.
[24] *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110 (2005) 62 NSWLR 751; *Day v Perisher Blue Pty Ltd (no 2)* [2005] NSWCA 110.
[25] *Roads Corporation* v *Love* [2010] VSC 253.
[26] *Majinski* v *the State of Western Australia* [2013] WASCA 10.

occurred. It proceeded to set out guidelines for witness preparation that broadly follow those established by the English and Wales Court of Appeal in *Momodou*.

Aotearoa New Zealand

29. Unlike in the United Kingdom and Australia, no New Zealand cases have directly considered the permissible bounds of witness preparation.

30. In *Herewini* v *Ministry of Transport*[27], Fisher J distinguished impermissible witness coaching from witness briefing:

> [One] gathers that under the present system the prosecutor will have as keen an interest as anyone else in hearing for the first time what his own witnesses will say in Court. In Harvey , for example, we learn at p 244 that the prosecuting sergeant "*did not know exactly what evidence his traffic officers would give*", "*did not wish to 'tie down' his traffic officers in giving their evidence*", "*wanted them to think for themselves in the witness box*" and "*did not want it thought that the witnesses had been 'briefed' or 'rehearsed' in what they had to say*". While the refusal to coach witnesses is laudable, briefing them is another matter. The latter is the purely passive exercise of finding out in advance what they know. Only then can the right questions be put during the hearing. Only then can their evidence be elicited in a manner which is chronological, relevant, and admissible. Centuries of experience has shown that an unbriefed witness is simply likely to produce evidence which is protracted, unchronological, irrelevant, incoherent, inadmissible, and incomplete.

31. In *Malofie* v *R*[28], the Court of Appeal considered, but did not comment on, evidence that the defendant had been through several extensive mock cross-examination sessions on the specific issues to be tried. The position may have been different had the sessions involved prosecution witnesses.

32. Were the issue to be raised squarely in New Zealand courts, overseas experience suggests that some practices are more controversial and liable for scrutiny than others:[29]

> A growing consensus is emerging among commentators on the kind of preparation methods that raise such a risk. In addition to joint preparation of witnesses, these include, at least, the use of suggestive questioning on matters that are not included in the original witness recollection; untimely lectures on the applicable law; pointing out other evidence on matters that are outside the witness's personal knowledge; and, finally, rehearsals and mock examinations on the same or similar facts as in the case sub judice.

33. Under new guidelines for prosecuting sexual offences[30] prosecutors are directed to meet witnesses before the trial and thoroughly prepare them for court. While "preparation must not extend to coaching", the guidelines stipulate that preparation should include: [31]

> 7.14.1 Confirmation that, when giving evidence, the most important thing is to tell the truth.

[27] *Herewini* v *Ministry of Transport* [1992] 3 NZLR 482, at 497.

[28] *Malofie* v *R* [2014] NZCA 419.

[29] Vasiliev (supra, note 12) at p.66.

[30] Solicitor-General's Guidelines (supra, note 2).

[31] Solicitor-General's Guidelines (supra, note 2) at [7.14] – [7.15].

7.14.2 Reassurance that all that is otherwise expected of a witness is that they be themselves.

7.14.3 An explanation as to what to expect in evidence in chief, cross-examination and re-examination, and judicial questions (and what those terms mean). Regardless of who is asking the question, the witness should listen carefully and, if they do not understand the question or need clarification, it is important to ask for the question to be repeated or rephrased.

7.14.4 In some cases it may be appropriate to tell the witness of any specific topics on which it is expected they will be challenged (but obviously without suggesting possible answers, which would stray into coaching).
For example, the prosecutor may consider it appropriate to tell the witness if they are likely to be accused of lying, or questioned about sensitive issues (including previous sexual experience if leave has been granted under s 44 of the Evidence Act 2006, or previous criminal convictions). Similarly, it may be appropriate to warn the witness that they may be confronted with sensitive material such as photographs or text messages.

7.14.5 Showing the witness exhibits about which they might be asked questions, particularly where the exhibit is potentially confusing (such as spreadsheets of phone data, or floor plans of an address), so that they can orient themselves to the material ahead of time. This may save time at trial and assist the witness to feel more confident when giving evidence.

7.14.6 Advice that cross-examination is not a personal attack, but a professional task and part of defence counsel's duty to their client.
In particular, witnesses should be warned that they may not always understand the relevance of a question that is asked, or wish to answer some questions, but that they must do their best to answer in any event. Appropriate techniques if they are having difficulty include pausing before answering (at which point the prosecutor may object to an improper question), asking for a break or asking for clarification.

7.15 At some stage prior to trial, complainants and other witnesses should be provided with courtroom education. It is a matter for the prosecutor to determine whether he or she should undertake this personally, together with the officer in charge, or whether it should be undertaken by a Victim Advisor. If a communication assistant is being used, they should also attend the courtroom visit if practicable.

34. These prosecution guidelines are new and remain untested. They also risk compromising the independence of prosecutors in ways that could invite challenge by defendants. In their 2018 research, Gravitas reported mixed views on the extent to which prosecutors could effectively prepare witnesses for court without creating the perception of undue 'coaching' and thereby risking a mistrial.[32] They also found that, even with very little pre-trial contact, numerous victims misunderstood the role of the Crown prosecutor and believed them to be 'their lawyer'.[33] These issues would be less problematic were the courtroom and evidence preparation carried out by experienced lawyers who are independent of the prosecution.

[32] Gravitas (supra, note 3) at 57.
[33] Gravitas (supra, note 3) at 63.

DESIGNING A BESPOKE WITNESS FAMILIARISATION PROGRAMME

35. An independent witness familiarisation programme could be developed for complainants in sexual violence cases and carried out as part of a pilot; the programme to be broadly structured as follows:

    (a) The practice, procedures and etiquette of giving evidence

    (b) How the adversarial system works

    (c) The layout of the courtroom and roles of various people at the hearing

    (d) What to expect when giving evidence

    (e) Personal preparation

    (f) Techniques lawyers use in cross-examination

    (g) Problems that can arise in cross-examination and how to handle them

    (h) Practical strategies to help give coherent, sequential testimony under difficult cross-examination

36. The programme would also include mock cross examination exercises using unrelated, fictitious, case scenarios. As it is likely that, were the issue to be raised directly, the New Zealand courts would affirm the decision in *R* v *Momodou* and give similar guidance as to the permissible bounds of witness familiarisation, the U.K. rules should govern the delivery of any such programme. [34]

37. Ideally, for comparative purposes, the study would include an equivalent number of witnesses inside and outside of the pilot. Results are capable of being measured both quantitative and qualitatively.

    (a) *Quantitative* - by reference to trial transcripts, measures could include:

        (i) Answers – yes/no or correct/incorrect

        (ii) Number of times a witness asks for questions to be repeated or clarified

        (iii) Elaborated on an answer in a way that was consistent with the question asked.

        (iv) Answered economically (did not go off on tangents or have a tendency to ramble)

    (b) *Qualitative* - through interviews with witnesses, counsel and trial judges.

38. Those tasked with analysing the transcript and evaluating feedback data should not know which witnesses received witness familiarisation training and which did not.

39. The pilot would also provide an opportunity to examine cultural differences and variations that may lead to the development of more targeted services.

[34] These rules are outlined at paragraph [23] above.

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