

# **PROSECUTOR SEXUAL ASSAULT PROTOCOL**

## **Resource Guide for Drafting or Revising Tribal Prosecutor Protocols on Responding to Sexual Assault**

**(Including a Model Sexual Assault Protocol)**

**A Product of the Tribal Law and Policy Institute and  
Southwest Center for Law and Policy**

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## INTRODUCTION

This publication was made possible through a cooperative agreement between the Office on Violence Against Women (OVW) and the Tribal Law and Policy Institute (TLPI). TLPI entered into a series of partnership agreements with the Southwest Center for Law and Policy (SWCLAP) to author two of four comprehensive publications on tribal response to sexual assault.

The four publications include:

### **1. SEXUAL ASSAULT CODE DEVELOPMENT RESOURCE GUIDE**

*A strong response to sexual assault starts with strong laws. This publication is designed to help your tribe draft (or revise) criminal laws and sex offender registration laws. We recommend you start with this publication.*

### **2. LAW ENFORCEMENT SEXUAL ASSAULT PROTOCOL**

*Once your tribal government has strong laws in place, this publication will help you create policies and protocols for your law enforcement agency to enforce your laws.*

### **3. PROSECUTOR SEXUAL ASSAULT PROTOCOL**

*Holding offenders accountable for their actions is a key part of making your community safe. This publication is designed to help your prosecutor's office ensure consistency and compassion for all survivors.*

### **4. TRIBAL SEXUAL ASSAULT RESPONSE TEAM PROTOCOL**

*Victims of sexual assault deserve a coordinated, comprehensive response from a variety of community agencies. The Sexual Assault Response Team (SART) publication is a guide to creating cohesive policies between tribal agencies.*

TLPI is extremely grateful to the Southwest Center on Law and Policy for their dedication to the safety of Native women – and their pioneering work to create model protocols for tribal justice officials.

This project would not have been possible without the leadership of Hallie Bongar White and her staff at SWCLAP.

## OVERVIEW

American Indian/Alaska Native women experience the highest rate of sexual assault of any population in the country. Statistics compiled by the United States Department of Justice indicate that Native women are raped at more than two and a half times the rate of all other women. The prevalence of sexual assault against Native women may actually be even higher because of significant underreporting.

This guide focuses on the development of an internal protocol for use by tribal prosecutors. Tribal prosecutors play an important role in securing safety and justice for Native survivors of sexual assault. By enacting effective, victim centered policies and procedures, prosecutors can increase the likelihood of victim cooperation throughout the criminal justice process.

The time invested in developing a sexual assault protocol will produce very real, tangible benefits for both the office of the prosecutor and for the community. Protocols can serve as a guide to ensure that only the highest standards for prosecution are followed. This can increase accountability for perpetrators of sexual assault crimes and result in an increase in convictions.

A protocol can also be used as a training tool for new prosecutors. The policies and procedures memorialized in the protocol can then become “institutionalized knowledge” not dependent upon the retention of any one person.

***Point of Discussion: What else will you need to form an effective, comprehensive response to sexual violence in your community?***

- Strong tribal laws on sexual assault
- Guidelines and/or protocols for tribal law enforcement
- Sexual Assault Response Team (SART) protocols

*Tribal Sexual Assault Response Teams (SARTs) are teams of professionals working together to effectively and comprehensively address sexual assault crimes within their community. Tribal SART teams are commonly comprised of law enforcement officers, prosecutors, sexual assault victim advocates, social services, and specially trained health care professionals (such as sexual assault nurse examiners) or other medical professionals. Often these teams include representatives from federal and state jurisdictions and service providers who work closely with the tribe.*

*Development and implementation of a SART in your community has the benefit of increasing victim reporting of sexual assault crimes, increasing victim cooperation with law enforcement and prosecutors, and improving victim access to comprehensive medical and other support services. A SART can also provide an important opportunity for prosecutors to build positive, collaborative relationships with other criminal justice, advocacy, social services, and medical professionals within and across jurisdictions.*

The Tribal Law and Policy Institute and Southwest Center for Law and Policy have developed publications and training materials on these issues.

## The Crime of Sexual Assault

Sexual assault is unlike any other violent crime. It harms a woman's body, mind, emotions, and spirit. The devastation caused by the crime of sexual assault affects not only the individual woman, but also her family and her community.

Sexual assault survivors often experience a profound sense of shame and violation. Family and community members may believe common myths about sexual violence and falsely assign blame to the victim for putting herself in a position or in a location where the sexual assault occurred. Sexual assault crimes in tribal communities may go unreported because of a victim's embarrassment, shame, or lack of confidence in the justice system.

There is no "typical" victim of sexual assault. A survivor can be a mother, sister, grandmother, niece, or daughter. Native women who are young or old, married or single, disabled or able bodied can be sexually assaulted. No woman asks for or deserves to be sexually assaulted.

Tribal prosecutors face several significant challenges in prosecuting sexual assault crimes. Many tribes lack sexual assault codes. Although the majority of sexual assault crimes against Native women are committed by non-Indians, lack of subject matter jurisdiction prohibits tribal prosecutors from criminally prosecuting these non-Indian perpetrators. Additionally, tribal prosecutors may not have meaningful access to forensic medical examination evidence (such as DNA) or other scientific and forensic evidence for use at trial.

Even where no tribal sexual assault code exists, tribal prosecutors can prosecute Indian perpetrators for the commission of other related or incorporated crimes currently contained in their tribal code. Tribal prosecutors can also play an important part in any related federal prosecution of the sexual assault crime committed on tribal lands.

Tribal prosecutors are instrumental in securing safety and justice for Native survivors of sexual assault. They can increase the probability of securing convictions and of holding perpetrators accountable by implementing fair and effective case acceptance procedures, maintaining excellent communication with victims, vigorously prosecuting sexual assault and related crimes in tribal courts, and collaborating with federal criminal justice professionals.

## HOW TO USE THIS RESOURCE GUIDE

There are five main sections:

### **Introduction**

This section provides helpful information on use of the guide and general information on protocol development.

### **Background Information**

This section provides extensive information on sexual assault, jurisdiction and many other issues that are important in tribal prosecutor protocol development.

### **Model Protocol**

The model protocol presents the “best practices” for tribal prosecutors responding to sexual assault crimes. The model protocol was designed and developed by the Southwest Center for Law and Policy in consultation with Indian Country prosecutors and criminal justice experts from across the country.

### **Workbook**

This section leads you through a number of exercises and questions. You can use a combination of brainstorming and discussion on each of the exercises to develop your specific protocol language.

### **Appendices**

This section contains examples of protocols used by state and tribal jurisdictions. These protocols can be used as an additional reference and resource.

#### ***Point of Discussion: Who should be involved in the development and drafting of your internal agency protocol?***

Input from community members, allied criminal justice professionals, victim advocates, and others can assist your office in crafting an effective, user friendly, professional protocol. However, it is important to remember that prosecutors maintain broad discretion in any decision to bring criminal charges against a defendant. Each and every prosecutor is also bound by the applicable rules of professional responsibility and ethics.

Many offices will consider their prosecution protocol as work product and not subject to disclosure. Others may choose to widely disseminate their protocol to build confidence in the office and as a tool to increase community outreach and multi-disciplinary collaboration. In either case, one of the first steps in developing your protocol should be to decide whether the document will ultimately remain internal or whether it will be disclosed to the public.

## WHAT IS A PROTOCOL?

For purposes of this resource guide, a prosecution protocol is a written set of procedures to be followed by tribal prosecutors throughout the criminal justice process.

A prosecution protocol often includes the following basic components:

- Purpose
- General Principles
- General Duties
- Initial Appearance
- Discovery
- Plea Agreements
- Sentencing
- Post-conviction

Depending on your office's needs or resources, there may be additional topics covered in your protocol.

***Point of Discussion: Are there other specific issues your office needs to address in a protocol?***

- Your office's philosophy on or overall approach to responding to sexual assault crimes within your community?
- Other specific issues?

## **WHY SHOULD YOUR PROSECUTOR'S OFFICE HAVE A SEXUAL ASSAULT PROTOCOL?**

A protocol can improve your office and the community in the following ways:

- Ensure that all cases are handled professionally and that objective, uniform standards are consistently followed;
- Improve the overall investigation and prosecution of sexual assault crimes resulting in increased accountability for perpetrators;
- Increase safety for victims of sexual assault;
- Reduce trauma to victims by improving interagency coordination and minimizing the number of times a victim has to tell her account of the crime;
- Improve the opportunity for the victim to heal from trauma by encouraging all systems to be sensitive, responsive and accountable;
- Delineate professional roles and responsibilities;
- Establish standards for points of contact, methods of contact, and purpose of contact among agencies;
- Strengthen and clarify relationships among agencies;
- Improve the credibility and accountability of the agencies and offices involved;
- Increase community confidence in and support of the criminal justice response to sexual assault;
- Increase reporting of sexual assault crimes by adhering to a victim-centered response;
- Increase victim and witness cooperation with the investigation and prosecution of sexual assault crimes;
- Improve training of office personnel;
- Institutionalize best practices within the office of the prosecutor.

***Point of Discussion: Are there any other ways that your office would benefit from the development and implementation of a sexual assault protocol?***

## BACKGROUND INFORMATION

### Native Women and Sexual Assault

Native women are sexually assaulted at more than twice the rate of other women in the United States. They are also more likely:

- to be sexually assaulted by a man of another race
- to be sexually assaulted by multiple perpetrators
- to be sexually assaulted in a public space
- to be sexually assaulted with a weapon used in the commission of the crime
- to suffer injuries as a result of the sexual assault

Some scholars and legal experts in Indian Country believe that there are perpetrators who specifically target Native women for sexual assault *because* the victim is Native. Sexual assault against Native women can be both a crime of sexual violence as well as a hate crime.

Historically, sexual violence against Native women has been used as a tool of colonialism. Native women throughout the history of the Americas have been raped, kidnapped, mutilated, and murdered by the colonizers as a means to gain Native lands and to destroy Native peoples. The perception and experience of many Native women today is that they continue to be dehumanized, devalued, and marginalized by the dominant culture. Because of the history of Native people in this country, there is often widespread mistrust of law enforcement and of the criminal justice system.

Tribal prosecutors face additional professional challenges in investigating and prosecuting sexual assault crimes committed against Native women:

- Many tribal communities suffer from high rates of poverty, unemployment, and poor access to telephones, transportation and health care.
- The majority of tribes lack sexual assault codes.
- There is a widespread shortage of tribal law enforcement officers, tribal prosecutors, 911 systems, and tribal jails.
- Often, tribal law enforcement officers must patrol large geographic areas alone.

- Tribal prosecutors often carry extremely high caseloads.
- Tribal law enforcement officers and prosecutors have limited access to advanced training on sexual assault.
- There is a shortage of sexual assault nurse examiners in Indian Country that creates challenges in obtaining forensic medical evidence.
- The complex maze of criminal jurisdiction in Indian Country challenges tribal law enforcement and prosecutors to develop effective collaborations with their state and federal counterparts.
- Some perpetrators of sexual assault may go free because of the complexities of criminal jurisdiction in Indian Country.

The above factors may also contribute to the epidemic of sexual assault against Native women, particularly those sexual assaults committed by non-Native men.

***Point of Discussion***

What are the unique barriers and challenges facing tribal prosecutors?

## What is Sexual Assault?

*NOTE: If your community does not already have strong laws in place to address sexual assault, it is recommended that you begin with the publication in the series – A Resource Guide for Drafting or Revision of Tribal Laws Against Sexual Violence.*

Sexual assault is often defined as any “non-consensual sexual contact.” “Non-consensual sexual contact” is defined by the laws of each jurisdiction. Many jurisdictions criminalize *any* non-consensual sexual contact against women that includes one or more of the following types of conduct:

- Contact, touching, or penetration of a victim’s vulva or vagina by a penis, finger, mouth, or foreign object.
- Contact, touching, or penetration of a victim’s anus by a penis, finger, mouth, or foreign object.
- Oral contact with a victim’s vulva, vagina, or anus.
- Contact or touching of a victim’s breast by a finger, hand, mouth, or foreign object.

It is important to remember that sexual assault need not include penile-vaginal penetration. Perpetrators of sexual assault often use foreign objects in the commission of the crime. Foreign objects commonly include firearms, tools, and bottles.

Victims of sexual assault do not need to be unclothed during the assault. Over-the-clothes contact with a victim’s breast, vagina, or anus may also constitute sexual assault under the laws of many jurisdictions.

### **Non-Consensual Contact: “No Means No”**

The crime of sexual assault includes any “non-consensual” sexual contact. A person must possess the legal capacity to form consent to the sexual contact at the time of the sexual contact. It is important to recognize that a woman who is intoxicated or who has severe cognitive disabilities (developmentally disabled, an elder with dementia, etc.) may not have the

legal capacity to consent to the sexual contact. Minors do not have the legal capacity to consent to sexual contact in many jurisdictions.

A woman may withdraw her consent from the sexual contact at any time. Any continued, non-consensual sexual contact constitutes the crime of sexual assault.

Sexual assault can be accomplished by the use of force, by the threat of force, by coercion, or by fraud (e.g. posing as a medical doctor). It is important to note that a victim is not required to fight or resist her attacker. Under the laws of most jurisdictions, a conviction for sexual assault can be secured if there is sufficient evidence that sexual contact occurred and that the contact was non-consensual.

### **Spousal or Marital Rape**

Marriage is not a defense to the crime of sexual assault in many jurisdictions. In these jurisdictions, a spouse may be criminally prosecuted for the crime of sexual assault for any non-consensual sexual contact with his wife.

Tribal prosecutors should litigate crimes of sexual assault when the victim and perpetrator are legally married as seriously, thoroughly and professionally as in cases where the crime was committed outside the bounds of a legal marriage.

### **Stalking and Sexual Assault**

Many perpetrators stalk their victims before sexually assaulting them. Native women are stalked more than any other population in the United States. Prosecutors may be able to prevent sexual assaults in their communities by effectively and aggressively responding to reports of stalking.

Evidence of stalking can also serve as a useful tool for tribal, state, and federal prosecutors in sexual assault cases. Prosecutors can often introduce evidence of stalking in a sexual assault case as “404(b)” evidence (also known as “prior bad acts” or “other bad acts” evidence) to prove:

- Motive
- Opportunity
- Intent
- Preparation
- Plan
- Knowledge
- Identity
- Absence of Mistake or Accident

Utilizing evidence of a sexual assault perpetrator’s prior stalking of the victim can also successfully rebut many of the perpetrator’s defenses at trial and can increase the odds of securing a conviction.

## **Native Survivors With Disabilities**

Native women with disabilities are often specifically targeted for sexual assault. An overwhelming majority of perpetrators of sexual assault against women with disabilities are known to the victim. Women with disabilities may also be repeatedly victimized by the same perpetrator.

Native women with disabilities may be dependent upon caretakers who are the perpetrators of sexual violence against them. Women with disabilities are at risk for sexual assault whether they reside in an institutional setting (such as an assisted living facility), in their own home, or with relatives or other caretakers.

It can be difficult for Native women with disabilities to initiate contact with law enforcement to report sexual assault crimes. Inaccessible buildings and communication systems and a lack of interpreters on tribal lands can pose significant challenges to accessing the criminal justice system.

Tribal prosecutors can assist Native victims with disabilities by:

- Treating victims with dignity and respect.
- Remembering that victims may not have the legal capacity to form consent to sexual acts because of the nature of their disability but do not assume that the victim cannot consent simply because he or she has a disability.
- Always using an outside interpreter because family members or caretakers may be the perpetrator of the sexual assault.
- Providing copies of police reports and other victim rights information in alternative formats.
- Understanding the power imbalance between a caregiver and a woman with a disability which may affect the ability and willingness of a victim to report the crime and cooperate with the investigation and prosecution.
- Utilizing formats and communication styles that ensure that the victim understands the criminal justice process and investigation.
- Understand that not all persons with disabilities have guardians.
- Ensure that the victim has time, support, and resources to understand legal proceedings.

It is important that sexual violence against Native women with disabilities be treated as a crime and not solely handled as a tribal court civil matter (e.g. moving the victim to another care-giving facility or appointing a new guardian for the victim).

## **Sexual Assault Against Elders**

Native communities traditionally hold elder women in extremely high regard. Native elders are respected for their knowledge and life experience and are often viewed as an important link in the chain of the people. Unfortunately, Native elders can still become victims of sexual assault.

There are few statistics addressing the prevalence of sexual violence against older Native women. Reporting may be low because of a heightened sense of shame, fear of the criminal justice system, language barriers, dependency on the caretaker/perpetrator, or a desire not to “air the family’s dirty laundry” in closely knit tribal communities.

Tribal law enforcement and prosecutors can assist tribal elders who are victims of sexual assault by:

- Being respectful of the elder at all times and allowing the elder to retain her dignity and privacy throughout the investigation.
- Recognizing that perpetrators may be family members, acquaintances, or caregivers.
- Being aware that some elders may have disabilities that prevent them from having the legal capacity to form consent to sexual acts (e.g. dementia, etc.).
- Recognizing that family members or caretakers who serve as language interpreters for elders who do not speak English may be the perpetrators of the sexual assault always use an outside interpreter.
- Understanding that elders may be completely dependent upon their caregivers and that this power imbalance may make it more difficult for her to report the crime and to cooperate with the investigation and prosecution.
- Utilizing formats and communication styles that ensure that the victim understands the criminal justice process and investigation.

## **Sexual Assault Victim Advocates:**

Victim advocates provide essential support to victims of sexual assault and should be used in each and every sexual assault investigation and prosecution. They are trained to assess victim needs and to provide counseling, advocacy, information, referrals, and support. Additionally, they serve as important liaisons with law enforcement and prosecution throughout the entire criminal justice process.

Victim advocates, if available, can be an important resource for explaining victim's rights. They can also assist in assessing ongoing victim safety issues and in providing medical, counseling, social services, and other referrals for victims. Advocates can assist prosecutors in obtaining information about the case, identifying expert witnesses in the community, and assisting the victim in court.

## **Reporting Issues**

Delayed reporting of sexual assault crimes is common and should never be used as a barrier to criminal prosecution. It is common for victims to report sexual assaults only after they have arrived at a safe location and/or after they have received the support of sexual assault advocates, family, clergy, or friends.

Victims may also delay reporting or fail to report the crime of sexual assault because of:

- mistrust or fear of the criminal justice system
- shame
- confidentiality concerns in tight knit tribal communities
- fear of retaliation by the perpetrator or his family
- fear that she will be arrested on unrelated criminal matters (e.g. public intoxication, outstanding warrants, etc.)
- difficulty discussing sexual contact or attempted sexual contact with others

Victims reporting sexual assault crimes should be assured that delayed reporting will not affect the commitment of prosecutors to seek justice in their case. Although the reality is that some evidence may have been lost because of the delay, prosecutors may still be able to secure convictions based upon the remaining, available evidence.

Under almost all circumstances, tribal prosecutors should refrain from prosecuting a victim reporting sexual assault for outstanding or unrelated criminal charges. A victim with an outstanding warrant for failure to appear will be reluctant to come forward to report her sexual assault. Similarly, a victim who consumed alcohol at the time of her sexual assault may be reluctant to report in jurisdictions where consumption and possession of alcohol are crimes. Prosecutors and law enforcement can encourage victims to report by instituting policies that victims will not be arrested and prosecuted when they do come forward.

## **Community Education and Outreach**

Community education and outreach can raise community awareness, increase reporting of sexual assault, and improve community cooperation with tribal police and prosecutors. Effective community outreach and education programs by tribal police with the involvement of prosecutors can:

- Dispel common myths about sexual assault.
- Reduce the stigma sometimes associated with being a survivor of sexual violence.
- Sensitize the community to victim safety and needs.
- Educate the community about available resources for survivors of sexual assault.
- Demystify the criminal justice system's response to sexual violence.
- Demonstrate that sexual assault crimes will be taken seriously by tribal law enforcement and tribal prosecutors.

Tribal prosecutors serve as leaders and role models for the communities in which they serve. It is important for tribal prosecutors to model respectful behavior towards women at all times and in all interactions. Prosecutors should display zero tolerance for behavior that belittles women or that is disrespectful towards them. As leaders in the community, prosecutors have an obligation to speak out about sexual violence and to let the community know that there is no place for sexual violence in their community.

## **The Jurisdictional Maze**

### **Basic Criminal Jurisdiction Over Sexual Assault Crimes in Indian Country**

Criminal jurisdiction in Indian Country can be extremely complex. In general, tribal courts have criminal jurisdiction over any crime committed by a member of a federally recognized tribe that takes place in Indian Country.

“Indian Country” is a legal term that encompasses:

- All lands within the limits of any Indian reservation
- Allotted land in trust
- Rights-of-way running through a reservation
- All dependant Indian communities (such as a Pueblo) within the borders of the United States

Tribes can prosecute Indians for sexual assault crimes committed in Indian Country regardless of whether the victim is Indian or non-Indian. Federal prosecution of a sexual assault crime does not preclude a parallel or concurrent prosecution of the same crime in tribal court.

### **Checkerboard Reservations**

Tribal courts maintain criminal jurisdiction over any crime committed by an Indian on fee simple land that is owned by a non-Indian as long as that land is within the exterior boundaries of an Indian reservation. Thus, even on “checkerboard reservations” tribal prosecutors may prosecute Indian perpetrators of sexual assault when the crime was committed within the exterior boundaries of the reservation.

## **State Criminal Jurisdiction Over Sexual Assault Crimes Committed In Indian Country**

All state courts have criminal jurisdiction over sexual assault crimes committed by non-Indians against non-Indian victims in Indian Country. A federal law known as Public Law 83-280 (also known as “PL280”) confers additional state court criminal jurisdiction in select jurisdictions.

PL280 jurisdiction is extremely complicated (and often confusing). There are various categories of PL280 status that affect the ability of a tribe to investigate and prosecute crimes of sexual assault. Continuing intensive, focused collaborative efforts between tribal and state jurisdictions are often required to ensure safety and justice for tribal communities located within PL280 states.

In select PL280 jurisdictions, state courts have *concurrent* criminal jurisdiction with tribes over Indian perpetrators of sexual assault crimes. In these select PL280 jurisdictions, states also have *exclusive* jurisdiction over non-Indians who commit sexual assault crimes in Indian Country.

In the six “mandatory” PL280 jurisdictions listed below, the states have criminal jurisdiction over all crimes committed in Indian Country except for those crimes of general national applicability (e.g. violation of the RICO Act, commission of an inter-state crime under the Violence Against Women Act, theft from the United States mail, treason, violation of federal immigration law, etc.). It is important to note that some of the below listed states have also “retroceded” jurisdiction to the federal government. Retrocession is a state’s return to the federal government of some or all of the criminal and/or civil jurisdiction that was previously granted to the state under PL280.

The six “mandatory” PL280 states are:

- Alaska (except the Annette Islands with regard to the Metlakatla Indians)
- California
- Minnesota (except for the Red Lake reservation)
- Nebraska
- Oregon (except for the Warm Springs reservation)
- Wisconsin

Some states are considered to be “optional PL 280 states.” These “optional” states have adopted all or part of PL280 jurisdiction over Indian Country. It is also important to note that additional federal legislation exists that transfers jurisdiction from tribes to particular states.

Before you begin, it is strongly recommended that you consult with legal experts to determine the parameters of criminal jurisdiction within your community. Consultation with federal and state criminal justice partners can also be useful before commencing your protocol.

### **Federal Prosecution of Indian Offenders for “Major Crimes”**

In 1885 Congress enacted the Major Crimes Act, 18 U.S.C. § 1153. The Major Crimes Act allows for federal prosecution of Indians for the commission of any of the following crimes in Indian Country:

- Murder
- Manslaughter
- Kidnapping
- Maiming
- Aggravated Sexual Abuse or Sexual Abuse (aka “rape” or “sexual assault”)
- Incest
- Assault With Intent To Commit Murder
- Assault With A Dangerous Weapon
- Assault Resulting In Serious Bodily Injury
- Assault Against A Person Under Sixteen
- Felony Child Abuse or Neglect
- Arson
- Burglary
- Robbery
- Felony Theft

The Major Crimes Act applies to crimes committed by Indians in Indian Country regardless of whether the victim of the crime is Indian or non-Indian. It does not preclude parallel or concurrent tribal court prosecution for any of the above listed crimes.

## **Federal Investigation and Prosecution**

Crimes of sexual assault may potentially be prosecuted in both tribal and federal courts without the threat of double jeopardy. It is possible to prosecute and convict a perpetrator of sexual assault in two separate jurisdictions and to impose two separate criminal penalties for the crime. Coordination of the tribal sexual assault investigation with federal authorities is important to ensure successful dual prosecution of a perpetrator in both tribal and federal courts.

Communication, collaboration, cooperation, and mutual respect are the hallmarks of a productive, successful working relationship between tribal and federal criminal justice professionals. There is a greater likelihood of securing sexual assault convictions when tribal and federal agencies have established solid, collaborative working relationships.

Tribal criminal justice professionals should meet regularly with their federal counterparts to clarify each jurisdiction's roles and responsibilities in the investigation and prosecution of sexual assault crimes. Formal protocols or clearly defined informal agreements can reduce the confusion and overlap that sometimes occur when multiple jurisdictions are investigating and prosecuting the same criminal acts. These protocols or informal agreements can address such important issues as:

- Which jurisdiction will issue a search and/or arrest warrant? (Note that many federal districts will not accept evidence secured by a tribal search warrant.)
- Which agency will coordinate victim interviews to reduce the number of times and persons interviewing a victim?
- Which agency will maintain evidence and the chain of custody over evidence?

Although the federal definition of sexual assault may differ from the definition of sexual assault contained in a tribal code, federal and tribal prosecutors will often be utilizing the same evidence, witnesses, and arguments at trial. It is important to coordinate access to evidence and witnesses so that they will be available for trial in each and every jurisdiction where the perpetrator can be prosecuted.

Multi-disciplinary teams (“MDT’s”) have been formed in many tribal communities to respond to child sexual assault and abuse. These federally mandated multi-disciplinary teams can provide an ideal opportunity for tribal prosecutor to network with their state and federal counterparts who may also investigate and prosecute sexual assaults against adult Native women.

Prosecutors may also find it useful to network with social services, medical, advocacy, and tribal government professionals who participate as multi-disciplinary team members. MDT meetings can often serve as a spring board for the development of a coordinated community response to sexual assault against adult Native women.

Similarly, many tribal communities have formed Coordinated Community Response teams (“CCR’s”) to address other violence against women issues such as domestic violence. Participation and coordination with these types of CCR’s can also be helpful in developing the relationships necessary to secure federal and tribal sexual assault convictions.

### **Tribal Law Enforcement: Arrest and Detention**

Tribal law enforcement officers have the authority to arrest and detain both Indians and non-Indians for sexual assault crimes committed in Indian Country under the following circumstances and conditions:

- When there is probable cause to believe that an Indian has committed the crime of sexual assault against another Indian.
- When there is probable cause to believe that an Indian has committed the crime of sexual assault against a non-Indian.
- Cross-deputized tribal law enforcement officers may arrest and detain both Indians and non-Indians on behalf of the certifying agency.
- Tribal law enforcement officers can detain non-Indians for a reasonable amount of time until the appropriate state or federal law enforcement officers arrive.

Tribal law enforcement officers may arrest and detain Indian suspects outside of Indian Country when they are in hot pursuit of the suspect. Similarly, tribal law enforcement officers may detain non-Indian suspects outside of Indian Country when they are in hot pursuit of the suspect.

Tribal law enforcement and prosecutors should work closely with their federal and state criminal justice counterparts to coordinate the transfer of suspects not able to be criminally prosecuted under tribal law.

## **Firearms**

Tribal law enforcement officers maintain broad powers to seize firearms from both Indians and non-Indians who have committed sexual assault crimes in Indian Country. Firearms and ammunition should be seized from all sexual assault suspects upon their arrest or detention.

Possession of a firearm or ammunition by Indians or non-Indians may also constitute a crime separate from the sexual assault. Under federal law it is a crime for certain enumerated persons to possess any firearms or ammunition. Conviction under these federal “prohibited possessor” statutes carry a maximum penalty of up to 10 years of incarceration.

Some examples of persons who are prohibited possessors under federal law include:

- Convicted felons and persons under indictment for felonies
- Persons subject to qualifying orders of protection
- Persons who have been convicted of misdemeanor crimes of domestic violence
- Persons who have been dishonorably discharged from the military
- Fugitives from justice
- Persons who have been adjudicated as a mental defective or committed to a mental institution.

It is also important to remember that possession of a firearm or weapon during the commission of the crime of sexual assault can result in enhanced or additional criminal penalties in many jurisdictions.

Tribal courts have the power to restrict possession of firearms and ammunition in both civil and criminal proceedings, even in the absence of formal tribal firearms codes. Possession of a firearm or ammunition in

violation of a court order can result in additional criminal or civil penalties against the perpetrator.

Tribal courts can issue orders restricting possession of firearms and ammunition against both Indians and non-Indians in civil cases. Examples of civil tribal court orders restricting possession are:

- Protection orders
- Child custody orders
- Child visitation orders

Tribal courts can issue orders prohibiting possession of firearms and ammunition against Indians in criminal cases. Examples of criminal tribal court orders restricting possession are:

- Conditions of release
- Sentencing conditions
- Conditions of probation

Sexual assault perpetrators who possess firearms or ammunition in violation of civil or criminal court orders may face additional criminal and civil penalties in addition to the sexual assault charges. These can include:

- Civil contempt of court
- Criminal contempt of court
- Criminal charges for violation of a protection order or violation of a valid court order
- Criminal charges as a “prohibited possessor” under federal, tribal, or state laws

Tribal criminal justice professionals should work closely to forge relationships with their federal counterparts in the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and the United States Attorney’s Office to address the unlawful possession, use, or attempted use of firearms in Indian Country.

## **Investigating and Prosecuting Sexual Assault Crimes When No Tribal Sexual Assault Code Exists**

The federal Major Crimes Act does not preclude tribes from enacting their own sexual assault codes and from punishing Indian offenders. Indeed, many tribes have already adopted sexual assault codes or are actively working towards adoption of these codes.

The Tribal Law and Policy Institute has developed a Resource Guide for Drafting or Revising Tribal Criminal Laws Against Sexual Assault, which could be helpful in drafting or revising a tribal sexual assault code.

Even where no tribal sexual assault code exists, tribal criminal justice professionals can work collaboratively with federal criminal justice professionals to ensure a successful federal prosecution and conviction of the offender. Tribal prosecutors may also be able to charge an Indian perpetrator of sexual assault for the commission of some of the following crimes under their current tribal codes:

- Assault or Aggravated Assault
- Indecent Exposure
- Trespassing
- Burglary
- Kidnapping
- False Imprisonment
- Elder Abuse
- Child Abuse
- Disorderly Conduct
- Threats and Intimidation
- Harassment
- Stalking
- “Peeping Tom”/Window Peeping
- Disturbing the Peace
- Criminal Damage/Malicious Mischief
- Loitering
- Violation of a Protection Order
- Violation of a Court Order
- Incest

Many of the above listed crimes can also be used when a tribal sexual assault code has been enacted, but tribal prosecutors can not meet their burden of proof in proving each and every element of that crime.

It is important to note that Indian perpetrators can be convicted in tribal court of both sexual assault and of any other crimes committed during the course of the sexual assault. The maximum sentence an Indian defendant can receive in tribal court for any single crime committed in Indian Country is up to one year of imprisonment and a \$5,000 fine. Tribal prosecutors may be able to utilize the above listed crimes to “max and stack” criminal charges and sentences against Indian defendants in tribal courts. This can result in significantly more jail time for Indian perpetrators than in cases where the perpetrator of the crime of sexual assault was charged solely with the sexual assault crime.

*The Tribal Law and Policy Institute has developed a Resource Guide for Drafting or Revising Criminal Tribal Laws Against Sexual Assault, which may be helpful in drafting or revising a tribal sexual assault code.*

# TRIBAL PROSECUTOR SEXUAL ASSAULT MODEL PROTOCOL<sup>1</sup>

## I PURPOSE

This protocol is designed to establish general guidelines for tribal prosecutors in sexual assault crimes committed against adult Native women in Indian Country.

Tribal prosecutors must carefully balance their duty to represent the interests of their tribal community with the needs of Native sexual assault victims to remain safe, to be treated with dignity and respect at all times, and to be kept informed during each and every phase of the criminal justice process.

This protocol is not intended to alter the inherent discretion entrusted to prosecutors in sexual assault cases. However, this protocol does encourage tribal prosecutors to employ a victim-centered approach to the prosecution of sexual assault crimes in Indian Country to promote survivor participation in the legal process, to maintain clear and open lines of communication with victims, to enhance offender accountability, and to ensure that the survivor is treated with understanding, compassion and respect.

## II GENERAL PRINCIPLES

- A. On-Call Prosecutors: Whenever possible, one or more prosecutors should be available around the clock to assist in the investigation of reports of sexual assault. An on-call prosecutor should:

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<sup>1</sup> This model protocol contains the best practices in prosecutor sexual assault response as identified and researched by the Southwest Center on Law and Policy in consultation with Indian Country prosecutors and criminal justice experts from across the country. This is not intended as a recommendation of this particular protocol, but only suggestions of the types of provisions that may be included in a prosecution protocol. Tribes should collaborate with others such as prosecutors and advocates to develop protocols. See the SART Guidebook for more suggestions regarding collaboration.

1. Visit the scene;
2. Answer legal inquiries from law enforcement;
3. Attend the suspect's initial appearance;
4. Observe interviews of the victim, witnesses and the suspect.

B. Prosecutor Continuity: Whenever practicable, a prosecutor's office should assign one prosecutor who will handle the case from its inception through disposition, as well as through any appellate process. This is intended to:

1. Increase victim trust and confidence;
2. Foster stability in the prosecution of the case;
3. Provide at least one prosecutor with complete knowledge of the facts and circumstances of the case.

C. Team Approach: The prosecutor's office should strive for a team approach to the prosecution of sexual assault cases. At a minimum, the prosecution team should include the:

1. Victim
2. Victim Advocate or Assistant
  - a. To assist the victim in obtaining necessary services.
  - b. To help explain the legal process and victim rights during the criminal justice process.
  - c. To serve as a liaison between the prosecutor's office and the victim.
3. Assigned tribal detective(s)/Lead Case Officer
4. A designated prosecutor assigned to the case who maintains communication with the victim from the inception of the case through final disposition and the appellate process.

D. Collaboration and Cooperation with Federal Criminal Justice Professionals

1. Prosecutors should seek and establish appropriate, collaborative relationships with federal criminal justice professionals to promote the effective investigation and prosecution of sexual assault crimes in Indian Country.
2. Prosecutors should regularly confer with their federal criminal justice counterparts about the facts, evidence, and witnesses of Indian Country sexual assault cases.

3. Prosecutors should assist in facilitating any necessary follow-up investigation on tribal lands as requested by their federal criminal justice counterparts or as deemed necessary.
4. Prosecutors should coordinate victim interviews with their federal criminal justice counterparts to ensure that victims will be subjected to the minimum number of interviews necessary.
5. Prosecutors should coordinate the availability of witnesses and evidence with their federal counterparts when the sexual assault crime will be prosecuted by both jurisdictions.

E. Collaboration and Cooperation with the Victim's Civil Legal Representation

1. Prosecutors should maintain professional, appropriate relationships with any civil legal representatives representing the victim in parallel civil legal proceedings against the suspect and/or who may be providing victim's rights representation during the criminal justice process.

### **III GENERAL DUTIES OF THE PROSECUTOR**

- A. Meet with the victim as early as possible to:
1. Establish a working relationship and rapport with the victim firmly rooted in professionalism and respect.
  2. Review the rights of victims in the tribal jurisdiction.
  3. Review the role of the victim, prosecutor, law enforcement, courts, and other professionals in the tribal criminal justice system.
  4. Establish if there is any immediate threat to the victim or her family from the suspect and encourage the victim to report to the prosecutor and/or law enforcement any and all threats, intimidation, or harassment by the suspect or by agents of the suspect such as family members or other third parties.
  5. Obtain the necessary victim contact information to ensure that the victim will be informed of all court appearances, hearings, trials, and appellate matters in the case and encourage the victim to keep the contact information current.
  6. Obtain the victim's input as to any conditions of release for the suspect.

7. Review with the victim that, unless there is a recognized victim-advocate privilege in the jurisdiction, any communication between the victim and an advocate may be discoverable. Regardless of victim-advocate privilege, any communication between the advocate and victim in front of the prosecutor or between the advocate and prosecutor is not privileged and would be discoverable. There is no privilege between the prosecutor and the victim.
8. Explain appropriate dress and conduct for the courtroom.

B. Determine whether or not sexual assault charges will be filed:

**1. Sexual assault charges will be filed**

- a. File formal charges by complaint and amend any existing complaint to conform to the evidence or to add additional charges.
- b. Contact law enforcement (e.g. assigned detective) to inform that charges have or will be filed or that further investigation is necessary before charges are filed.
- c. Inform the victim as to the status of formal charging and what offense(s) will be charged.

**2. No sexual assault charges to be filed**

- a. Confer with supervising or other prosecutor, if practicable, to establish consensus within the office that no sexual assault charges are appropriate, at least at the current time.
- b. Re-evaluate the evidence to determine whether the suspect can be charged with any other crimes under the tribal criminal code.
- c. Inform the victim of the decision not to charge and provide the victim with an opportunity to discuss the decision with the prosecutor.
- d. Inform the victim that she/he may have civil legal options regarding the suspect. She should consult a civil attorney to understand the specifics of what those options may be.
- e. Note any applicable statute of limitations and be prepared to file charges within the statute of limitations should sufficient evidence and information become available in the future to allow charging of the suspect.

- f. Delayed reporting of the sexual assault crime by the victim should not unduly influence a prosecutor's decision to file charges.

#### **IV INITIAL APPEARANCE/ARRAIGNMENT**

A. Initial Appearance: Prosecutors should attend the initial appearance in a sexual assault case to:

1. Ensure that the government's and the victim's views concerning conditions of release of the suspect are appropriately voiced to the court.
2. Request orders from the court that the suspect:
  - a. Not leave the jurisdiction of the court without prior court order.
  - b. Have no contact with the victim and any other designated witnesses or persons (e.g. the victim's children).
  - c. Refrain from committing any criminal offenses.
  - d. Have no possession of firearms, ammunition, explosives, or weapons.
  - e. Assert any other conditions of release for the protection of the community, the victim, and any witnesses.

B. Arraignment:

1. Confer with the victim, preferably with the assistance of a victim advocate, and communicate the following information:
  - a. Apprise victim of any changes in the charges filed since the suspect's initial court appearance.
  - b. Reaffirm the victim's right to attend the arraignment.
  - c. Receive victim's input as to conditions of release of suspect.
  - d. Determine whether the suspect has violated any previously ordered conditions of release or other court orders concerning the victim (e.g. protection orders).
  - e. Review the process of prosecuting a sexual assault crime in tribal court with the victim.
  - f. Ask for victim's views concerning potential disposition of the case.

2. Formally read the charges against the defendant if requested by the court, by the defendant, or if it is customary or required under court rules.
3. Reaffirm conditions of release with the court.
4. Set future hearing dates and trial dates within the required legal limits of the jurisdiction and notify the court of the victim's availability for the trial and hearings.
5. If the defendant pleads guilty to the charges at the arraignment, ensure that an appropriate record is made that:
  - a. the plea was entered in to knowingly and voluntarily and not under duress or under the influence of drugs or alcohol or any other substance;
  - b. that the defendant was advised of his rights under the Indian Civil Rights Act and under the tribal code prior to entering a guilty plea;
  - c. that the defendant was competent to enter into the plea
  - d. that, if the defendant was not represented by counsel at the time of entering in to the plea, waiver of counsel was knowingly and intelligently made
  - e. that the defendant was advised as to all of the legal consequences of entering a plea of guilty including a possible sentence of incarceration, mandatory sex offender registration and community notification, and any other legal consequences.

## **V DISCOVERY**

- A. Prosecutors shall carefully abide by the rules of discovery to avoid dismissal of the case by the court.
- B. Prosecutors shall seek compliance by opposing counsel or by self represented suspects of the reciprocal rules of discovery, where applicable.
- C. In the event the suspect or the suspect's representative requests a pre-trial victim interview, the prosecutor shall consult with the victim concerning the interview and, where applicable under tribal code, the victim's right to refuse an interview.

- D. Prosecutors should be present during any interviews of the victim or interviews of other prosecution witnesses conducted by the suspect or by the suspect's counsel or representative.

## **VI PLEA AGREEMENTS AND TRIAL**

### **A. Plea Agreements:**

1. Before offering a plea agreement to the suspect, the prosecutor should confer with the victim, preferably with the assistance of a victim advocate, concerning:
  - a. The victim's views concerning potential disposition of the case.
  - b. The reasons behind the initial charging decisions and the reasons why a plea agreement is being considered.
  - c. Any perceived weakness(es) in the evidence that may result in an acquittal of some or all of the charges at trial.
  - d. Explain thoroughly that the defendant's acceptance of the proposed plea agreement may result in a lesser sentence or may lessen other legal consequences of conviction.
  - e. The advantages and disadvantages of a plea agreement including:
    - i. The "certainty" of conviction if the suspect enters into a plea agreement.
    - ii. The elimination of the need for the victim or any other witness to testify at trial if a plea agreement is entered in to by the suspect.
    - iii. A plea may eliminate the suspect's right to appeal.
    - iv. Reaffirm with the victim that she has the right to attend all future hearings in the case, including the plea agreement hearing and the sentencing hearing.
    - v. Explain that if the victim does not approve of the proposed plea agreement she may voice her disapproval to the court at the plea agreement hearing and that the judge may reject the plea agreement based upon her concerns.
    - vi. Explain that at the sentencing hearing, the victim will have an opportunity to speak to the court about the impact of the sexual assault on her life and on the lives of her family.

2. In any proposed plea offer, prosecutors should, whenever possible:
  - a. Offer a plea agreement only to a sex offense which will require the suspect to register as a sex offender
  - b. Offer a plea agreement in intimate partner or former intimate partner sexual assaults which includes a designation that the crime committed was an act of domestic violence in addition to the underlying crime, if applicable.
  - c. If the plea offer is to a non-sexual offense, require that the offense be designated or that the record reflect, that the crime was sexually motivated, if applicable.
  - d. Include in the plea offer a requirement that restitution to the victim be paid for total losses suffered as a result of any offenses included in the charging document, even if dismissed pursuant to the plea agreement, such as:
    - i. Expenses for medical and psychological services
    - ii. Lost wages
    - iii. Necessary child care
    - iv. Transportation and other expenses related to the criminal case.
    - v. Require the suspect to submit to DNA testing if testing has not already been performed in the case.
  - e. Require the suspect to complete testing for sexually transmitted diseases.
  - f. Require the suspect to complete testing for HIV/AIDS
  - g. Strive to obtain a guilty plea unless the circumstances otherwise warrant a no-contest or Alford plea.

#### B. Case Continuances

1. If the case cannot be disposed of by plea agreement, the prosecutor should be aware that the victim may experience significant apprehension of the criminal trial which may be caused by:
  - a. Unfamiliarity with the legal process.
  - b. Uncertainty as to whether the victim may ultimately be required to testify at the trial.
  - c. Shame and embarrassment of having to testify as to intimate details surrounding the sexual assault before a public forum.

- d. Fear of being in close proximity to the suspect and the suspect's family.
2. The following may assist in alleviating the victim's fear or apprehension of trial:
    - a. Discuss the victim's potential trial testimony and share any anticipated subject areas and types of questions that are expected on cross-examination.
    - b. If at all possible, the prosecutor and/or victim advocate should familiarize the victim with the courtroom setting and procedures (e.g. where the victim may await her testimony, the location of the witness stand and counsel tables, etc.)
    - c. Review courtroom victim safety procedures.

C. Pre-Trial Motions: Sexual assault cases commonly require the filing of the following pre-trial motions under any applicable tribal rules of criminal procedure:

1. Admission of prior or other crimes, wrongs or acts of the suspect. (FRE 404 (b) is the federal equivalent of this rule of evidence.)
2. Admission of Evidence of Similar Sex Crimes by Suspect. (FRE 413 is the federal equivalent of this rule of evidence.)
3. Exclusion of Evidence of Victim's Past Sexual Behavior or Alleged Sexual Predisposition. (FRE 412 is the federal equivalent of this rule of evidence).

D. Expert Witnesses at Trial: Sexual assault cases frequently require the testimony of expert witnesses.

1. Expert witnesses in sexual assault cases commonly include experts able to provide testimony in the following areas:
  - a. Rape Trauma Syndrome/Post-traumatic Stress Disorder
  - b. Dynamics of domestic violence
  - c. Spousal rape
  - d. DNA evidence
  - e. Criminalist (serology, fingerprints, etc.)
  - f. Sexual Assault Nurse Examiner ("SANE")
  - g. Physician
2. Comply with the jurisdiction's rules of disclosure regarding expert witness testimony.

- E. Sidebars and In-Chamber Proceedings: A prosecutor should not leave the victim on the witness stand during lengthy sidebars or during proceedings conducted in chambers. Rather, she should request that the court excuse the victim during these proceedings while remaining under the court's admonition and oath.
  
- F. Jury Verdicts: The prosecutor or victim advocate should inform the victim of her right to be present at the reading of the verdict at the conclusion of a jury trial or at the reading of the judgment of the court at the conclusion of a bench trial. Additionally, the victim should be:
  - 1. Instructed as to any potential consequences for her or her support network if the court makes a determination that the victim or others exhibited any improper demeanor or conduct during the reading of the verdict or the judgment of the court.
  - 2. Advised that in the event that a jury cannot reach a unanimous verdict ("hung jury"), she will be consulted as to whether she would prefer a request for a retrial or some other disposition.

## **VII SENTENCING**

- A. Regardless of whether a conviction is obtained pursuant to a plea agreement or after conviction at trial, the prosecutor should thoroughly prepare the victim for the sentencing hearing and advise her of her role at the hearing.
  
- B. The prosecutor should inform the victim of the importance of a victim-impact statement and the potential effect of a victim impact statement on the sentence ultimately imposed by the court.
  
- C. The prosecutor should discuss the variety of methods available to the victim to discuss the impact of the sexual assault on her life including:
  - 1. Orally addressing the court
  - 2. Writing a letter to the court
  - 3. Garnering the support of family, friends and community members to address the court in writing or orally
  - 4. Cooperating with the probation officer or other court appointed author of any pre-sentence report to be written

- D. At the sentencing hearing, the prosecutor should be prepared to introduce evidence of aggravating factors, such as:
1. Use or threatened use of weapon
  2. Serious physical injury to the victim
  3. Suspect's criminal history
  4. Domestic violence
  5. Stalking
  6. Any other acts, whether charged or not, tending to demonstrate the suspect's propensity toward sexual deviancy or sexual violence.
  7. Any other factors which make the crime(s) particularly repugnant to the community
- E. If the defendant is probation eligible, request that the defendant serve at least some time in jail before being released on probation.
- F. Request that the defendant be required to register as a sex-offender.
- G. Request restitution to the victim or to anyone else who suffered loss as a proximate result of the defendant's criminal conduct.
- H. Request counseling or therapy for the defendant.
- I. Seek input from law enforcement, victims, psychologists, therapists, traditional members of the community, and elders for sentencing recommendations. Prosecutors should also consider the victim's input, review the defendant's criminal history, and consider the facts of the case.
- J. Seek fines except for circumstance which may negatively impact the victim (e.g. when the convicted defendant maintains a continuing obligation to pay child support to the victim and the victim believes that a significant fine would negatively impact her ability to collect child support.)
- K. Request no contact with the victim, her children, and others during the term of incarceration and/or probation and/or parole.
- L. Request that the convicted defendant relinquish all firearms, ammunition, and explosives in his possession or under his ownership

- to the court, law enforcement, or other appropriate agency for the duration of his incarceration and/or probation and/or parole.
- M. Request that the convicted defendant be prohibited from possession of firearms, ammunition, and explosives for the duration of his incarceration and/or probation and/or parole.
  - N. Request that the victim be notified of the defendant's release from incarceration.

## **VIII POST CONVICTION AND APPEALS**

- A. Prosecutors and/or victim advocates should explain to the victim the defendant's post-conviction rights including the availability of appeals or other forms of post-conviction relief.
- B. If practicable, the prosecutor who conducted the actual prosecution of the case should be assigned to handle any post-conviction matters.
- C. The victim should be notified of all post-conviction matters including hearings.

# SEXUAL ASSAULT PROTOCOL WORKBOOK

This guide provides step-by-step exercises for developing a sexual assault protocol for use by tribal prosecutor offices. You may use this protocol to develop an internal office protocol or to modify an existing sexual assault protocol.

The model protocol contained within this resource guide contains the “best practices” as defined by national experts. Other examples have been included in Appendix to illustrate other prosecutorial approaches to the crime of sexual assault. You may find that using the examples provided and following the exercises included in this section will be helpful in developing your protocol. The questions below are designed to ensure discussion of important issues. However, it is important to note that not all questions may apply to **your** department.

## **Getting Started:**

- Identify the people who should be involved in drafting the protocol.
- Establish a time-line for developing the protocol.
- Review any existing protocols (law enforcement, prosecution, SART, or others) for responding to the crime of sexual assault.

Each exercise in this section provides a series of discussion questions that correspond with a section of the protocol. These questions are designed to help clarify what is needed, but are by no means the only questions that should be asked or answered. You can use a combination of brainstorming and discussion on each of the exercises to develop your specific protocol language.

It is common for one or two members of a prosecutor’s office to spearhead the project of developing a protocol. Often, these individuals are tasked

with the responsibility of scheduling protocol development meetings, notifying protocol development task force participants of the meetings, and keeping track of the protocol drafts as they are developed.

It is important to determine which individuals within your office are ultimately responsible for developing and completing the protocol. The appointment of two or more “co-chairs” of the protocol development task force can lessen the negative impact of employee turnover on the creation and completion of a final product.

It can be helpful to keep track of all protocol drafts in a central file or notebook. Maintaining an electronic copy of all drafts on a disk as well as on a computer hard drive can lessen the probability of loss of your work product.

To prevent confusion, you should place a “DRAFT” mark on each version of your protocol and clearly indicate the date of each draft on every page of the document. Distribution of hard copies of the most recent drafts at each protocol development meeting can also be helpful.

## **PRELIMINARY MATTERS**

### **Define Terms:**

- How is sexual assault defined by your tribal code?
- How does the federal or state sexual assault code apply to tribal territory?
- What terms will you use in your protocol? (e.g. sexual assault, sexual abuse, rape)?

### **Clarify Jurisdiction Questions:**

- What are the key jurisdictional issues to keep in mind when developing this protocol?
- What are the specific challenges your office faces in partnering with other prosecutors' offices?
- Are there any existing agreements between jurisdictions which affect this protocol?
- Are any new agreements needed?

### **Consult With Sexual Assault Victim Advocates:**

During the development of your protocol you may find it particularly helpful to consult with sexual assault victim advocates, shelters, or other grassroots organizations dedicated to supporting Native women who are victims of sexual assault. Because of their unique role, advocates have considerable insight into which specific prosecution responses, policies, and procedures may be helpful to victims. Incorporating their suggestions into your protocol may yield significantly improved victim collaboration with the investigation and prosecution of sexual assault crimes.

## **STEP 1: PURPOSE, POLICY, OR MISSION STATEMENT**

Your policy on sexual assault should be placed at the beginning of the protocol. The policy statement or purpose statement is often viewed as the foundation for entire protocol.

### **Questions:**

1. What is the goal of the protocol?
2. What is your prosecutor office's policy toward sexual assault victims?
3. Why does your office need a written set of guidelines about how to handle sexual assault cases?

## **STEP 2: GENERAL PRINCIPLES**

This section of the protocol should set basic guidelines for providing a victim-centered approach. Consider how an individual survivor might experience the “system” when you draft this section.

### **Questions:**

- 1.** Will your office have a “on-call” prosecutor for sexual assault crimes? If so, what are the expectations for a response to sexual assault?
- 2.** Will your office ensure that a single prosecutor is assigned to the case throughout the process?
- 3.** What collaboration with state and/or federal agencies and offices is necessary to ensure victim safety and to prevent multiple interviews of victims?

### **STEP 3: GENERAL DUTIES**

This section of the protocol is designed to provide victim-centered approaches to prosecutor's initial duties, including interviewing and charging. Filing formal charges against the suspect is a significant event in the process. Consideration may be given to other possible criminal charges. Consideration needs to be given to how victims and law enforcement are notified of the decision.

#### **Questions**

1. When should the prosecutor become involved in a sexual assault case?
2. When should the prosecutor have initial contact with the victim?
3. What information should be obtained at that time?
4. What information should the prosecutor relay to the victim?
5. When should the prosecutor have contact with the victim advocate?
6. Who should be involved in the decision to charge or not charge?
7. What information should the prosecutor provide to the victim if the decision is not to charge?
8. If the decision is not to charge, should there be further review?
9. When will charges on other crimes be considered? What are the possibilities under the tribal code?
10. What contact should the prosecutor have with law enforcement if the decision is not to charge? What is the purpose of the contact?
11. What contact should the tribal prosecutor have with the prosecutor from a concurrent jurisdiction? What is the purpose of the contact?

## STEP 4: INITIAL APPEARANCE/ARRAIGNMENT

### Questions:

1. When is a request that the defendant remain incarcerated pending trial appropriate?
2. What conditions of release should be requested by the prosecutor?
3. Why is it important to consult with victims about conditions of release?
4. How should prosecutors respond if a defendant attempts to plead guilty at the initial appearance?

The safety for victims and witnesses can be markedly increased when tribal prosecutors are present at the initial appearance and inform the court of the importance of setting protective conditions of release. Defendants may be held in custody pending trial or may be released from custody with explicit conditions necessary to safeguard victims and witnesses. In cases where the defendant is ordered incarcerated prior to trial, bond can be set to ensure appearance at future court dates. The court also has the option of releasing the defendant on his own recognizance release to a 3<sup>rd</sup> party. Common conditions of release for defendants charged with sexual assault crimes include:

- no contact with the victim or witnesses
- no contact with the victim or witnesses through third parties
- HIV/STD testing of the defendant
- house arrest
- DNA testing of the defendant
- restrictions on travel (e.g. “do not leave the reservation without the express written permission of the court or of the pre-trial supervision officer,” etc.)
- report to probation, pre-trial services
- maintaining full-time employment
- refraining from the use of alcohol or illegal substances
- no possession of firearms, ammunition, or weapons
- relinquish a passport to the court by a set time and date
- relinquish firearms, ammunition, and specified weapons to law enforcement by a set time and date

- no violation of tribal, state, and federal laws
- wearing of a GPS monitoring anklet

Tribal courts may also issue protection orders or injunctions against harassment within the context of a criminal case. Under 18 U.S.C. 2265, the Violence Against Women Act, these orders are entitled to the same Full Faith and Credit as protection orders issued within the civil context.

The initial appearance is an ideal time to meet with victims and to review the criminal justice process and victim rights. Victim rights normally include notification of a defendant's release from custody, the results of motion and other hearings, and the dates and times of all future court hearings.

## **STEP 5: DISCOVERY**

Defendants can abuse the criminal justice process and attempt to harass victims and/or witnesses during discovery. Rape shield laws and victims rights statutes can provide significant protection from abusive discovery requests. Work product can also be asserted by prosecutors to safeguard some information.

### **Questions**

1. What specific rules of procedure or laws in your jurisdiction can be used to protect victims from abusive discovery requests?
2. When must prosecutors release a victim's prior criminal history?
3. What arguments can be made to protect a victim's counseling or mental health records?

## **STEP 6: PLEA AGREEMENTS AND TRIAL**

Prosecutors have broad discretion in offering plea agreements. Victim input into any plea agreement can both empower the victim and result in a more just outcome that protects the entire community.

A trial can be extremely traumatizing for the victim. Often, victims may feel as though they are re-living the experience of being violated. Each victim's recovery is personal. Repeated continuances can re-traumatize the victim. She may re-live the rape each time she prepares for trial. Delays can also diminish victims cooperation with the prosecution.

### **Questions:**

1. How and when will the victim be consulted about a plea agreement?
2. What factors should be considered before offering a plea agreement?
3. What are the advantages and disadvantages of a plea agreement?
4. How will you consider sex offender registration in plea agreements?
5. How will restitution be considered in plea agreements?
6. How will DNA, HIV/AIDs, STD testing be considered in plea agreements?
7. How will you prepare the victim for trial testimony and the trial process?
8. How will you address the victim's concerns regarding trial?
9. What efforts will be made to avoid continuances?
10. What other agencies will be involved and how will they be contacted? Will any require subpoenas? When will they need to be issued?
11. Will expert witnesses be consulted?
12. Is there a process to contact the victim when the verdict is issued?

## STEP 7: SENTENCING

### Questions:

1. What should be explained to the victim about the sentencing process?
2. Will a pre-sentence investigation be conducted?
3. What are the prosecutor's duties relating to sex offender registration and notification?
4. When should exclusion from tribal lands be considered for convicted sex offenders?
5. How will the sex offender be monitored if placed on probation or after completion of a term of incarceration?

In many jurisdictions victims can provide victim impact statements to the court. These statements can be provided in writing to the court prior to sentencing or delivered orally by the victim or her representative at the sentencing hearing. Victim impact statements can help to re-focus a judge's attention on the harm caused to the victim and to the community at the time of sentencing.

Tribal court judges commonly sentence convicted sex offenders to all or some of the following conditions:

- a period of incarceration of up to one year for each crime where conviction was obtained.
- a fine of up to \$5,000 for each crime where a conviction was obtained
- restitution to compensate victims for any losses incurred as a result of the crime (e.g. lost wages, destruction of property, etc.)
- prohibited possession of firearms, ammunition, and weapons
- a period of supervised or unsupervised probation
- mandatory alcohol, mental health, substance abuse, and/or sex offender treatment
- no contact with victim
- restrictions on travel (e.g. exclusion from specific locations on the reservation or from the entire reservation, etc.)

Tribal courts can issue a protection order for the victim within a criminal sentencing order.

It is important to note that the SORNA (Sex Offender Registration and Notification Act) of the Adam Walsh Act requires the transmission of specific information to tribal and other criminal data bases for certain classes of convicted sex offenders. For more information, please see Sex Offender Registration and Notification in Indian Country [www.swclap.org/articles](http://www.swclap.org/articles).

## **STEP 8: POST-CONVICTION AND APPEALS**

A defendant appeal can trigger anxiety for the victim. Taking time to carefully explain the process and realistically explain the issues that are being appealed is important.

### **Questions:**

1. Who will litigate the appeal?
2. Who will tell the victim that an appeal has been filed and about future appellate court hearings?
3. What are the deadlines for filing and responding to an appeal in your jurisdiction?

Many tribal courts maintain a court of appeals. It is not uncommon for a convicted sex offender to challenge a conviction or any terms of sentencing in an appeal. Victims, who may initially have felt a sense of closure upon the conviction and sentencing of the perpetrator, can become unnerved when an appeal is filed. Immediate notification of the victim (and of any advocate working with the victim) upon the filing of an appeal by any party is an important prosecutorial duty. Scheduling a brief meeting with the victim to discuss the legal issues on appeal can also be helpful.

## **STEP 9: PUTTING IT ALL TOGETHER**

You can use your answers to questions contained in the previous exercises along with language from the model protocol (or from protocols contained in the Appendix of from other jurisdictions) to draft your prosecutor sexual assault protocol.

It is strongly recommended that your final draft be reviewed by legal experts within your community prior to the final acceptance and implementation.

### **Questions:**

Is your protocol compatible and consistent with other sexual assault protocols in you community?

- Your tribal law enforcement protocol?
- Your state or federal law enforcement partner's protocol?
- Your forensic medical examiner's protocol?
- Your sexual assault advocacy protocol?
- Your Sexual Assault Response Team's (SART's) protocol?

## **Evaluation and Review of the Protocol**

It is strongly recommended that the final protocol be reviewed, at a minimum, on an annual basis. This will allow your office to identify whether any changes are needed to implement best practices in the prosecution of sexual assault crimes in your community.

### **Questions:**

1. How will you evaluate whether your protocol improves case outcomes?
2. What kind of data will be collected and reviewed to evaluate the efficacy of the protocol?
3. How will changes in the code or law be reflected in protocol revisions?
4. Who must approve protocol revisions?

# APPENDIX

## EXAMPLE SEXUAL ASSAULT PROTOCOLS

### **HANNAHVILLE PROTOCOL**

**Advantages:** This protocol was developed by and for a tribal community. It contains many (but not all) of the same procedures outlined in the model protocol. You may wish to refer to this example protocol for ideas on language and approach. This protocol has generally worked well at Hannahville.

**Disadvantages:** Hannahville has a very small reservation, therefore the language may not be translatable to larger tribes with a large land base. Moreover, the protocol assumes a federal component in investigation and prosecution. Therefore, tribes impacted by Public Law 280 or other state jurisdiction may need to make adjustments to the language and scope.

### **RAMSEY COUNTY (MINNESOTA) PROTOCOL:**

**Advantages:** This protocol is considered one of the most comprehensive victim-centered protocols in the nation. It was developed over the course of several years through collaboration with a number of agencies and incorporates a wide scope of proven techniques that enhance the response to victims.

**Disadvantages:** This protocol is not tribal specific. It was designed for a largely urban setting. While much of the language in this protocol may be helpful to your community, it will be important to carefully consider the unique needs of tribal victims. Moreover, you should consider the capacity of the local health care provider to comply with this protocol.

# **Hannahville Indian Community Protocol and Procedure for Sexual Assault Prosecution<sup>2</sup>**

From commencement of the case through pre-trial proceedings and trial, it is critical for a prosecutor to consider and address the safety of the victim. Failure to assess the lethality of the suspect's violence could expose the victim to greater danger. Taking an interdisciplinary approach with law enforcement, victim advocate, medical personnel, probation department and correctional facilities, the prosecutor must consider all aspects of violence.

## A. Prosecutor Response

1. Screen all cases and charge as warranted by evidence. Consider the possible deterrent effect of prosecution in all cases. Establish clear guidelines and rationale for declining prosecution.
2. Confirm that charges reflect the crimes committed and determine whether additional charges should be filed in the immediate case. Prior uncharged violations by suspect against the same victim, if probable and within the statute of limitations, can be charged as separate counts. Do not require victim to sign a criminal complaint.
3. Determine whether a personal protection order or other restraining order was in effect at the time of the offense and charge accordingly.
4. Seek out other available information on the suspect's history and use in charging decisions. Determine whether a pre-trial mental health evaluation is appropriate.

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<sup>2</sup> This protocol excerpt is provided as an example of an effective existing tribal prosecutor protocol. We have excerpted the Prosecutor section of the Hannahville Protocol on Sexual Assault. In addition to the Prosecutor Section, it contains a lengthy definition section, a Medical Protocol, a Law Enforcement Protocol and a Victim Advocate Protocol

5. Consider Federal jurisdiction and Department of Justice prosecution policies when assessing the severity of the charges and determining the best strategy for obtaining a conviction or imposing a more severe penalty upon conviction.

6. Only under extraordinary circumstances should both parties be charged. Evaluate the circumstances and facts of the incident to determine the primary aggressor.

7. Evaluate pre-trial release options. Seek victim's input and determine her/his fear of future assaults and evaluate her/his reason for such fear. Whenever a systematic risk assessment shows that the danger posed by the suspect/defendant to the victim is significant, request incarceration of defendant, without bond, throughout court proceedings.

8. Require immediate notification to victim when defendant is released and provide victim with a copy of the conditions of the release.

## B. Court Proceedings

1. Utilize legal strategies to protect the victim and the integrity of the case (e.g., no-contact orders, personal protection orders, other restraining orders, and pre-trial motions).

2. Process each case as quickly as possible and consider any unique circumstances of case.

3. Review with the victim the strengths and weaknesses of the case, procedural considerations (i.e. pre-trial motions and hearings, trial, sentencing, etc.), and the time sequence of events, before, during and after the assault. Provide follow-up contacts for the victim.

4. Explain the role of the victim as a witness and explore her/his ability and willingness to testify in court. Explain the prosecutor's role and responsibilities to the victim. The victim's wishes are an important, but not determinative, factor in filing, prosecuting or dismissing a charge.

5. Evaluate the strength and sufficiency of the evidence to support the charge and determine whether prosecution will go forward. Going forward without victim testimony is acceptable, and sometimes preferable, in the prosecution of sexual assault and stalking cases.
6. If the decision is made not to proceed with the prosecution, notify the victim immediately and explain the reasons to her/him.
7. Do not require the victim to attend pre-trial hearings.
8. Resist continuances unless clearly justified or otherwise beneficial to the prosecution.
9. Determine whether victim's testimony is necessary for prosecution. Assess the potential for reprisals by the defendant, or by any other person, before requiring victim to testify.
10. Balance the safety of the victim and the community with the desirability of holding the offender accountable and expediting prosecution goals.

### C. Victim's Advocate Contacts

1. Be sure to address victim safety issues throughout the entire trial process. Assess the likelihood of continued violence by the suspect from the time of arrest through the conclusion of the trial.
2. Work closely with community-based victim advocacy programs to support the victim through interviews, other court procedures, and with other legal and non-legal needs.
3. Stay in contact with the victim throughout the court process, providing her/him with pertinent case information (e.g., give her/him the criminal court docket number to help her/him keep apprised of the court dates and pending motions) and making sure she/he is not being intimidated or threatened.
4. Encourage and guide the victim in collecting further evidence. Advise her/him to keep a chronology of all defendant contact and the history of abuse, if not already documented.

5. Encourage the victim to call the police if the offender violates existing court orders.
6. Establish early contact with the victim to emphasize the process and goals of prosecution

#### D. Law Enforcement Contacts

1. Obtain and review all case-related documentation and evidence available from tribal law enforcement and request further investigation as necessary.
2. Minimize the number of victim interviews by law enforcement and by the prosecutor. Coordinate with all involved law enforcement agencies to reduce the number of victim interviews. Prosecutor should only interview victim when making charging and plea decisions (if necessary) and when preparing the victim to testify. Utilize interview checklists where available and listen with “non-blaming feedback”

#### E. Post-Trial Considerations

1. If defendant is not custody upon conviction and if he/she is not sentenced immediately, request incarceration pending sentence, if appropriate.
2. If bond is requested prior to sentencing make appropriate recommendation based on the nature of the crime, the danger to the victim, the potential for danger to the community, the defendant’s criminal history, his contacts with the community, and his potential for maintaining contact with his attorney ant the court.
3. Obtain victim input for sentencing, either orally or by written impact statement, as appropriate.

# **Ramsey County (Minnesota) Adult Sexual Assault Response Protocol Prosecutors<sup>3</sup>**

- ❖ Review reports submitted by law enforcement
- ❖ Decline, charge or request further investigation.
  - If case is declined, complete a decline sheet and give to investigating officer. Investigating officer will advise the victim.
  - Either the victim or the investigator may request a second opinion on any case declined.
  - If case is charged, prosecutor will request bail and No Contact Order.
  - Further investigation may be requested (e.g. sexual assault medical exam kit or other physical evidence may be submitted for forensic testing, fresh complaint witnesses interviewed and Spreigl reports (other similar crimes committed by defendant) collected).
- ❖ Once charged
  - Victim advocate assigned.
  - Advocate notifies victim of charges.
  - Investigating officer notified of charges.
- ❖ First appearance in District Court
  - Bail set.
  - No Contact Order issued – victim identified by initials only if unknown by defendant.
  - If DNA testing is required, serve defense with appropriate motion and obtain court order referring to the taking of saliva sample (buccal swab).
  - Next hearing is scheduled.

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<sup>3</sup> This prosecutor protocol is provided as an example of one of the best non-tribal protocols in the nation.

- ❖ Following First Appearance
  - Copy of No Contact Order sent to victim and police jurisdiction in which victim resides.
  - Victim input sought regarding resolution of case.
  - Victim advised by advocate of next hearing date.
  - Victim is provided with appropriate services as needed, e.g. interpreter, transportation, etc. (ongoing throughout pendency of case).
  - Victim is provided with victim's rights information and community referrals.
  - Whenever possible, the advocate will contact the victim by phone or in person regarding these items.
  
- ❖ Arraignment (usually two weeks after first appearance)
  - Probably cause found.
  - Special motions may be filed (DNA testing, etc.)
  - If defendant pleads guilty sentencing date set and victim notified; victim given pre-sentence investigation information.
  - If defendant pleads not guilty, pretrial and trial date set.
  
- ❖ If Not Guilty Plea Entered
  - Case assigned to trial attorney.
  - Advocate notifies victim of pretrial and trial dates.
  - Prosecutor will assess facts of case, offender's history, aggravating/mitigating factors, strengths and weaknesses of the case as well as victim and public safety.
  - Victim, trial attorney and advocate meet to discuss settlement options and further evidentiary detail; amended complaint filed if appropriate.
  - Prosecutor will seek victim's input before making plea offer.
  
- ❖ Trial Preparation
  - All investigative reports are disclosed.
  - All witness statements and physical evidence reviewed and necessary follow-up investigation requested.
  - Witnesses are subpoenaed.
  - Trial motions prepared (e.g. Spreigl).
  - Discuss sexual assault medical exam with SANE nurse for additional evidentiary detail.
  - Victim and witnesses prepared for trial. Inform medical and scientific witnesses of when they will be needed or if they are no longer needed.

- Case status updates provided to advocate and other witnesses.  
Advocate will notify victim.
  - Advocate will coordinate services with community-based advocate, if involved.
  - Advocate provides support to victim before and during trial.
  - If plea offer is made, notify advocate and seek input from victim.  
Notify victim of right to attend plea hearing.
- ❖ Trial
- Witnesses sequestered.
  - Advocate will notify victim of trial outcome.
  - If found guilty, sentencing date set and victim notified; victim given pre-sentence investigation information.
  - Trial attorney files sentencing departure motion when appropriate.
- ❖ Sentencing
- Trial attorney attends sentencing if possible, especially if departure motion made or complex sentencing conditions.
  - Court advised if victim wishes to make oral impact statement or have it read.
  - Advocate attends if victim is present.
  - All relevant sentencing requests presented on behalf of victim.
- ❖ Post-sentencing
- Victim notified of sentence, including No Contact Order if applicable.
  - Property return arranged if applicable.
  - Advocate advises victim of inmate release notification rights.
  - Victim-witness secretary forwards copy of any probation No Contact Order or cancellation of No Contact Order to law enforcement.
  - Advocate provides victim with counseling information and/or community resources as requested.
  - Victim notified if defendant files an appeal; notified of appeal result.

## ADDITIONAL RESOURCES

### BOOKS:

Deer, Sarah et al, Eds., *Sharing Our Stories of Survival: Native Women Surviving Violence* (AltaMira Press 2007).

Garrow, Carrie E. and Sarah Deer, *Tribal Criminal Law and Procedure* (AltaMira Press 2004).

Jessup Newton, Nell, Ed., *Cohen's Handbook of Federal Indian Law 2005 Edition* (Lexis-Nexis 2005).

Richland, Justin R. and Sarah Deer, *Introduction to Tribal Legal Studies* (AltaMira Press 2004).

### ARTICLES:

Deer, Sarah, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 *Suffolk U. L. Rev.* 455 (2005).

Deer, Sarah, *Toward an Indigenous Jurisprudence of Rape*, 14 *Kan. J. L. & Pub. Pol'y* 121 (2004).

### DOCUMENTS:

U.S. Department of Justice, *A National Protocol for Sexual Assault Medical Forensic Examinations* (2004).

<http://www.ncjrs.gov/pdffiles1/ovw/206554.pdf>

International Association of Chiefs of Police, *Promising Practices for Improving Safety in Indian Country* (2006).

[http://www.theiacp.org/div\\_sec\\_com/sections/Indian/IndianCountryReport2006.pdf](http://www.theiacp.org/div_sec_com/sections/Indian/IndianCountryReport2006.pdf)

U.S. Department of Justice, *Victim Services: Promising Practices in Indian Country* (2004).

[http://www.ovc.gov/publications/infores/victimsrvsindian\\_country2004/729404.pdf](http://www.ovc.gov/publications/infores/victimsrvsindian_country2004/729404.pdf)