Manitoba ***Guideline No: 1:RAG:1***
Department of Justice
Prosecutions

Policy Directive ***Subject: Role of the Attorney General***
Date: August 2017

POLICY STATEMENT:

The Attorney General holds a protected constitutional role that was historically defined through practice but since the 1980s has been more specifically defined through Supreme Court jurisprudence. There are three important constitutional conventions that govern the office of the Attorney General:

- In the exercise of the prosecution function, the Attorney General acts independently of cabinet.
- In the exercise of the prosecution function, the Attorney General is independent of Parliament and the legislature.
- The police enjoy independence from the Attorney General in the investigation of individual cases and the Attorney General enjoys independence from the police in the prosecution function.

The first of these constitutional principles was most recently reaffirmed by the Supreme Court of Canada in *Krieger v. The Law Society of Alberta*, 2002 SCC 65 at para.3 where the Court unanimously concluded that:

> It is a constitutional principle in this country that the Attorneys General must act independently of partisan concerns when exercising their delegated authority to initiate, continue or terminate prosecutions.

The Court explained in *Krieger* that this constitutional doctrine requires the Attorney General to make decisions in accordance with the rule of law since adherence to the rule of law is fundamental to our Constitution and the hallmark of a free society; *Krieger* at para.32.

The second principle of independence from Parliament and the legislature is very closely related to the first and is another means in which independence is preserved. It avoids political pressure being brought on the Attorney General by allowing the Attorney General to refuse to answer any questions in the House regarding a specific prosecution

before the case is completed. The Attorney General may be called upon to explain a decision after a case is finally dealt with.

The third convention relies on two complementary principles of independence; the police enjoy independence from the Attorney General in the investigation of individual cases and the Attorney General enjoys independence from the police in the prosecution function. This convention was recognized by the Supreme Court in *R. v. Regan*, 2002 SCC 12 where LeBel, J. concluded that "the separation of police and Crown roles is a well-established principle of our criminal justice system"; *Regan* at para.71.

In order to avoid any semblance of political interference, all Attorneys General in Canada have instituted institutional safeguards to protect the integrity of prosecution decisions. While the Attorney General stands at the apex of the administration of justice, the daily exercise of prosecutorial discretion is carried out by Crown attorneys. Crown attorneys are required to exercise a quasi-judicial function and meet the obligations set out in *The Crown Attorneys Act* C.C.S.M. C330. The Assistant Deputy Attorney General is charged with the administration of the Manitoba Prosecution Service and has independent authority for the conduct and supervision of all criminal prosecutions. Crown attorneys are supervised through their management and the Attorney General usually chooses not to become involved in individual cases. However, if the Attorney General seeks to be briefed on a pending prosecution that is his or her prerogative. The Attorney General would not be accompanied by any political staff during such a briefing.

Given that the Attorney General chooses not to get involved in individual cases, the Attorney General's primary role and responsibility in criminal matters is to establish broad policy guidelines for Crown counsel to apply. These are generally supplemented by procedures and guidelines established by the department. Together, such policies, procedures and guidelines make the exercise of prosecutorial discretion more transparent and just. They support consistent decision-making which in turn furthers equal protection and equal benefit of the law.

In fulfilling this function, the Attorney General has endorsed these policies to guide the exercise of discretion by Crown attorneys employed by Manitoba Prosecutions Service. It is understood that these polices will be supplemented by procedures and guidelines developed by Prosecutions to further ensure high-quality and consistent decision-making across the department.

MISSION STATEMENT: PUBLIC PROSECUTIONS

There are several elements to the statement of mission.

1. To provide timely, effective, efficient and quality legal services on behalf of the Crown in matters involving alleged criminal activity, regulatory misconduct, and proceedings under the Fatality Inquiries Act. This includes, where appropriate, competent legal advice to police forces and agencies within the purview of Public Prosecutions, as well as a public education function. Services also include policy advice to government, and the development and promotion of policies and programs which contribute to the reduction of crime and which will contribute to the public understanding of and participation in the criminal justice system.

2. To foster respect for rights, freedoms, the law and the Constitution of Canada.

3. To support the Minister of Justice in working to ensure that Manitoba has just and law abiding communities with an accessible, efficient and fair system of justice. The overall purpose of all members of Public Prosecutions is to contribute to ensuring Manitoba has a justice system that is responsive to the community's needs as they evolve, while reflecting an adherence to openness, fairness, and democratic principles, and the value of efficiency demanded of all governments in times of increasing fiscal pressures.

4. In delivering its services, Public Prosecutions will draw on the high level of unique skills, as well as the strong commitment of all staff, the use of progressive and innovative policies, input and guidance of management staff to ensure effective and efficient operations in the administration of criminal justice.

Manitoba
Department of Justice
Prosecutions

Guideline No: 2:COM:4

Subject: Communication with the News Media
Date: January 2020

POLICY STATEMENT:

The Manitoba Prosecution Service (MPS) sees the benefit of providing information to the news media, subject to the direction provided in the Prosecution Guideline on Media Communication and the overriding duty to safeguard the fairness of the trial process. The communication of accurate, factual information to the news media can enhance public confidence in the justice system and promote greater understanding of it.

Except in rare instances, all MPS communication with the media will be through or with the assistance of the Justice Communications Coordinator. Further, Crown Attorneys should be mindful of the Code of Professional Conduct of the Law Society of Manitoba and Crown Attorneys Code of Professional Conduct in responding to any media inquiries.

RATIONALE:

The public's confidence in the justice system is determined in large part by the information that citizens receive from the news media. In this era of increasing media scrutiny of the criminal justice system, it is important that Crown Attorneys provide accurate and timely information to the public through the news media.

Manitoba ***Guideline No: 2:DIR:1***
Department of Justice
Prosecutions

Policy Directive ***Subject:*** ***Direct Indictments***
Date: ***June 2017***

POLICY STATEMENT:

Section 577 of the *Criminal Code* confirms the common law authority of the Attorney General to prefer an indictment in any circumstances including where a preliminary inquiry has not taken place or following a discharge at a preliminary inquiry. In such circumstances the *Code* requires that the indictment be preferred by the Attorney General or Deputy Attorney General and that the consent to the indictment be in writing. In keeping with the convention that the Attorney General does not become involved in individual cases, the Attorney General has sub-delegated the preferment of direct indictments to the Deputy Attorney General.

The decision to grant a direct indictment is entirely within the discretion of the Attorney General and is only reviewable on the basis that proceeding by direct indictment amounts to an abuse of process; *R. v. S.J.L.* 2009 SCC 14.

In order to ensure that the Deputy Attorney General, as the sub-delegated decision maker, can reasonably exercise discretion the department must develop guidelines regarding the materials that must accompany a request for a direct indictment.

Further, the Deputy Attorney General should seek input from defence counsel on the merits of proceeding by direct indictment or any recommendations to ameliorate any potential impacts. The Deputy Attorney General is not required to seek advance input if satisfied that this is not in the public interest to do so. In such circumstances, the Deputy Attorney General should seek input from defence counsel, following the preferment of the direct indictment, regarding any proposals to mitigate any potential impacts of proceeding in this manner.

Manitoba ***Guideline No. 2:DIS:1***
Department of Justice
Prosecutions

Policy Directive ***Subject: Disclosure***
Date: March 2008

POLICY STATEMENT:

The guiding principle with respect to Crown disclosure should be full, fair and frank disclosure of the nature and circumstances of the Crown's case, and information in furtherance of, or information that flows directly from the investigation, restricted only by the specific exceptions discussed below in this policy. Full disclosure ensures fairness in the criminal process. The fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction, but the property of the public to ensure that justice is done: *R.* v. *Stinchcombe*[1].

The rules governing the Crown's duty to disclose were clarified and consolidated by the Supreme Court in Stinchcombe. The Crown is required to make timely disclosure of all relevant information – both inculpatory and exculpatory – known to the investigator and the Crown Attorney, whether or not the Crown intends to introduce it in evidence. Relevance was assessed in relation to the charge itself and to the reasonably possible defences. Relevance was defined in terms of its usefulness to the defence. Information is relevant if it can reasonably be used by the defence either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence: *R.* v. *Egger*[2].

Thereafter, the Supreme Court in Dixon[3] reframed the basis of disclosure by stating "the threshold requirement for disclosure is set quite low… The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. This test for disclosure was affirmed by the Supreme Court in R. v. Taillefer; R. v. Duguay.[4]

In the event of doubt with respect to the disclosure of information, the Crown must err on the side of disclosure. Evidence should not be withheld simply on the basis that the Crown Attorney does not believe it to be credible. Credibility is for the trier of fact to determine after hearing the evidence.

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[1] R. v. *Stinchcombe*, [1991] 3 S.C.R. 326
[2] *R.* v. *Egger* (1993), 82 C.C.C. (3d) 193 (S.C.C.)
[3] *R.* v. *Dixon*, [1998]1 S.C.R. 244 (S.C.C.)
[4] *R.* v. *Taillefer; R.* v. *Duguay*, [2003] S.C.J. No. 75 (S.C.C.)

In exercising its disclosure obligations, the Crown must respect the rules of privilege and its duty to protect witnesses from harassment, intimidation and harm. Decisions by a Crown Attorney not to disclose are reviewable by the trial judge.

ADDITIONAL DISCLOSURE

There is no time limit on the Crown's disclosure obligation as it is a continuing obligation. Information coming to the attention of the investigator or Crown Attorney following initial disclosure, that is in furtherance of the investigation or flows directly from it in which there is a reasonable possibility that it is useful to the accused in making full answer and defence must be disclosed in accordance with this directive. The obligation continues beyond conviction and after appeals have been decided or the time for appealing has lapsed. Information coming to the attention of the investigator or Crown Attorney which the Crown believes shows an accused is innocent or which raises a doubt in regards to a conviction, must be disclosed. This point was emphasized in the Driskell Report[5], which referred to The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions[6]:

> The need to disclose extends into appeal periods following conviction. The factual finding of the Marshall Commission demonstrate clearly the need to disclose evidence that Crown counsel realizes raises a doubt about the guilt of someone who has already been convicted, no matter when such evidence comes to Crown counsel's attention…
>
> While the obligation to disclose extends throughout any appellate litigation that follows a conviction, it is not tied to the currency of any appeal period. In a number of recent cases, the disclosure of evidence, whether fresh or otherwise, sometimes even years after all appeal routes had been exhausted and convictions upheld, has led to new trials being ordered, or convictions quashed outright.

WHAT MUST BE DISCLOSED

Upon a request from the defence for disclosure, defence counsel must be provided with the following:

(1) A copy of the charging document.

> Either the information (in Provincial Court) or the indictment (in Queen's Bench).

(2) A summary of the circumstances of the offence.

> This summary will usually be taken from the Court Brief or Police Summary provided to the Crown by the investigating Police Agency, but does not include the Police Investigation Report.

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[5] P. LeSage, *Report of the Commission of Inquiry into certain aspects of the trial and conviction of James Driskell*, January 2007 (the "Driskell Report")

[6] G. Martin, *The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, 1993 (the "Martin Committee Report")

(3) A copy of the accused's criminal record.

(4) A copy of the accused's driving record, where relevant to the specific charges before the Court.

(5) Statements of the Accused.

This includes a copy of any statement made by the accused to a person in authority and recorded in writing, in the case of verbal statements, a written summary of the statement and, in the case of electronic recordings, a copy of the recording, and transcript, when available.

(6) Written or verbal witness statements.

The accused is entitled to have the *text* of written statements made by witnesses to a person in authority, or in the absence of a written statement, a summary of the anticipated testimony of a proposed witness, of any statement made to a person in authority. In addition, copies of, or an appropriate opportunity to privately view and listen to, any audio or videotape of statements made by any witnesses, and transcripts, when available. The nature and circumstances of the case and of the witness statement will guide the Crown in determining which of these alternatives is most appropriate and the scope of any undertakings that should be obtained to protect legitimate privacy interest and/or safety concerns.

As a general rule, the names of witnesses are to be disclosed, but witnesses' addresses and telephone numbers are not to be disclosed. In all cases, the Crown Attorney will be guided by the necessity of protecting witnesses from intimidation or harassment.

(7) Police notes.

Copies of all notes made by members of the investigative agency relating to the offence and the investigation must be disclosed to the defence. Exceptions to this general rule exist with respect to those portions of police notes that would tend to prejudice an ongoing police investigation, reveal confidential investigative techniques used by the police, identify a confidential police informant or compromise a witnesses safety. Notes which contain this type of material, if not already edited by the police, should be edited by blacking out the portions containing such material. Once edited, the notes should be provided to defence counsel.

(8) Copies of forensic, laboratory and other scientific reports should be disclosed as soon as they become available. Crown Attorneys' should be mindful of section 657.3 of the *Criminal Code* which sets out the notice requirements where an expert is to be called as a witness or his/her report is to be tendered as evidence.

(9) Exhibits.

Copies of all documents, photographs, films, audio or videotapes of anything other than a statement of a person, that could reasonably be useful to the accused, where the nature of the exhibits permit, otherwise, an opportunity to inspect will be sufficient.

(10) Copies of criminal records of co-accused(s).

(11) Copy of any search warrant and the information in support, should be disclosed unless it has been sealed pursuant to a court order, and a list of any items seized pursuant to the warrant, subject to the existence of a legal privilege, or concerns regarding the safety or security of a witnesses, or to complete an investigation.

(12) Particulars of any similar fact evidence that the Crown intends to rely on at trial.

(13) Particulars respecting any identification evidence used outside of court to identify the accused, and any information that may bear on the reliability of identification evidence relied on by the Crown.

(14) Any additional information received from a Crown witness during an interview conducted by a Crown Attorney in preparation for trial, such as information that is inconsistent with any prior statements, recantations, drawings and any additional details which supplement a prior statement(s), in which there is a reasonable possibility that the information is useful to the defence.

(15) Interception of Private Communications (Wiretaps). Initial disclosure will consist of a synopsis of all intercepted communications made during the course of the authorization along with a copy of the judicial authorization or consent under which the private communications were intercepted. Additional disclosure will consist of all communications (recordings and transcripts) determined by the investigating officer, in consultation with the Crown Attorney assigned to the case, to be relevant to the case (inculpatory and exculpatory). If defence counsel wish to listen to other intercepted communications included in the synopsis but not deemed relevant and disclosed as above, defence counsel should contact the investigating officers directly to arrange an appointment to do so. If defence counsel requests copies of any such interceptions (recordings and transcripts), that request should be made to the assigned Crown Attorney who will then consider the request. If the Crown Attorney ultimately determines that the conversations are irrelevant and not considered to be reasonably useful to the defence, defence counsel would have to apply to the court to order disclosure. For further information, refer to the memorandum prepared by Gregg Lawlor, dated October 18, 2006 entitled “Interception of Private Communications (Wiretaps) – Disclosure to defence counsel”

(16) All benefits requested, discussed, or provided or intended to be provided for any central witness, at any time, in relation to that central witness, should be recorded and disclosed. This recommendation was made in the Driskell Report[7] and

[7] Supra, note 5

adopted by the Government of Manitoba. It recognizes the suspect nature of the evidence of unsavoury witnesses generally. It does *not* limit this disclosure obligation to only those involving the typical in-custody informer, but applies to any unsavoury witness, whose evidence raises similar concerns. For example, a person who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in -custody informer to falsely implicate an accused in return for benefits[8].

"Benefits" should be broadly interpreted to include any promises or undertakings, between the witness and the Crown, police or correctional authorities, including such things as, but not limited to:

- Bail accommodations
- Dropping or reducing charges
- Modification of sentence
- The point at time in which such charges will be dealt with
- Amelioration of current or future conditions of incarceration
- Financial assistance or reward - payment of monies; lump sum, monthly allowance, other expenses
- Securing employment
- The resolution of pending applications for the return of offence-related property or proceeds of crime under the *Criminal Code* or *Controlled Drugs or Substances Act*
- Receipt of a pardon in exchange for cooperation
- Special privileges while in jail or under the control of the police pursuant to section 527(7) of the *Criminal Code*
- Any other leniency or benefit, including any benefit or consideration sought, promised or conferred beyond the scope of the original agreement to provide information or testimony, whenever it occurs
- The extension of any of the above to any person connected with the witness

Copies of the notes of all police officers and corrections authorities who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by the witness, should also be disclosed.

Such information shall be disclosed, save and except any information which may tend to compromise the safety or security of the witness, by tending to reveal the witnesses identify and/or location of the witness. It would be appropriate to confer with police and correctional authorities prior to making disclosure, to ensure that the safety of the witness is not endangered if disclosure is made before authorities have attended to providing for the witnesses security.

In consideration of the continuing Crown disclosure obligation, any information, relating to such a witness, that would raise doubts in regard to a conviction, or

[8] Kaufman, The Honourable Fred, *Commission on Proceedings involving Guy Paul Morin*, (1998)

show the innocence of the accused, must be disclosed, whenever that information arises.

For further information with respect to in-custody informers, refer to the "Interim In-Custody Informer Policy," 2: INF: 1.

(17) Any other evidence that may assist the defence.

This would include, for example, advising the defence of the identity of witnesses who fail to make an eyewitness identification or of other witnesses whose evidence is generally favourable to the accused, and information that may be used to impeach the credibility of a Crown witness in respect of the facts in issue in the case.

ADDITIONAL DISCLOSURE SUBJECT TO CROWN DISCRETION

Additional material, if requested by the defence, may be disclosed at the discretion of the Crown. Such matters include the following:

(1) Copies of criminal records of witnesses.

Pursuant to section 12 of the *Canada Evidence Act*, a witness may be cross-examined in respect of convictions for offences under any federal statute[9]. Upon request, the criminal records of material Crown witnesses, if the witness' credibility is at issue, should be disclosed. A Crown Attorney has discretion, reviewable by the trial judge, to determine whether information regarding a criminal record of a proposed witness is relevant to that witness' credibility. For instance, a 10-year old criminal conviction for impaired driving would not assist in impeaching the credibility of a witness in an assault trial. On the other hand, convictions for offences of dishonesty will often be relevant, regardless of when they were entered. The balance to be struck on this issue centers around the privacy interests of the witness, as measured against the defence right to test the Crown's case and the credibility of the Crown witnesses.

Only convictions under provincial statute which involve underlying elements of deceit or dishonesty which might reasonably affect the court's assessment of credibility of that witness, need be disclosed.

Findings of guilt under federal or provincial statutes resulting in a discharge, which involves discreditable conduct by the witness that could reflect adversely on credibility, should be disclosed[10].

Concerning the criminal records of youth witnesses, note that, while s. 45.1 of the *Young Offenders Act* requires an application to a judge to

[9] *R.* v. *Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.); *R.* v. *Watkins* (1992), 70 C.C.C. (3d) 341 (Ont. C.A.)
[10] *R.* v. *Cullen* (1989), 52 C.C.C. (3d) 459 (Ont. C.A.)

disclose such information[11], section 125(2)(a) of the *Youth Criminal Justice Act* (YCJA) explicitly gives the Crown the discretion to disclose youth criminal records. Copies of criminal records of youth co-accused will normally be disclosed but will be subject to the applicable legislation (YOA or YCJA).

Pending charges under federal and provincial statutes, generally cannot be the subject of cross-examination of a witness, although it may be permitted where the defence lays a proper foundation establishing the relevance of the proposed line of questioning, such as where the defence intends to show that the witness has a motive to favour the Crown to obtain benefits respecting his/her outstanding charges. The cross-examination is limited. If the information is relevant only to credibility, it is a collateral matter and the defence is bound by the answers provided by the witness, and cannot prove the witnesses misconduct by calling witnesses to contradict that witness[12]. Disclosure of a copy of the information and brief synopsis of the allegations underlying the charge should be provided to the defence.

There are limitations on disclosure of records pertaining to community based approaches such as diversion. If however a charge was stayed or withdrawn because the offender successfully completed the alternative measures requirements, he/she would have had to admit their responsibility and the Crown satisfied that there was sufficient evidence to support the charge. If that "offence" is relevant to the credibility of that witness, information respecting the existence of the charge and the fact it was diverted should be disclosed to the defence, who can then decide to pursue an application under section 717.4(1) (d) (ii) of the *Criminal Code* for access to the information.

(2) Videotaped witness statements of sexual-abuse/child-abuse victims.

A videotaped statement of a sexual-abuse or child-abuse victim will only be disclosed if and when defence counsel completes an undertaking form. See suggested undertaking attached as Appendix 1. If defence counsel is not prepared to comply with the conditions in the undertaking, the Crown should facilitate the viewing of a copy of the videotape by defence counsel at a suitable location such as the Crown's office or a police station.

No copy of a videotaped statement of a sexual-abuse or child-abuse victim will be released to an unrepresented accused unless ordered by the Court. Instead, the Crown will facilitate the viewing of a copy of the videotape by the accused under strictly controlled circumstances at a suitable facility such as the Crown's office or a police station.

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[11] *R.* v. *Strain* (1994), 91 C.C.C. (3d) 368 (Ont.G.D.)
[12] *R.* v. *Titus* (1983), 2 C.C.C. (3d) 321 (S.C.C.); *R.* v. *Gassyt* [1998] O.J. No. 3232 (Ont. C.A.); *R.* v. *Gonzague* (1983), 4 C.C.C. (3d) 505 (Ont. C.A.)

Special disclosure procedures are in place regarding videotapes which are the subject matter of the charge itself i.e. child pornography, are facilitated through the Police Integrated Child Exploitation (ICE) Unit. Disclosure of child pornographic images is done in two forms: either defence counsel attends the ICE Unit and the images are displayed or ICE Unit delivers a locked computer with a mirrored hard drive from the accused's computer. The latter method is for a limited period of time and is delivered with a trust letter limiting the use of the computer. In neither instance can the images be copies or distributed.

EXCEPTIONS TO FULL DISCLOSURE

Notwithstanding the above, the following are not subject to disclosure:

(1) "Work product privilege" protects information or documents obtained or prepared for the purpose of litigation, either anticipated or actual, and includes but is not limited to:

(i) Interdepartmental memos between Crowns;

(ii) Correspondence to and from the police, excluding replies to Crown requests for pre-charge information;

(iii) CPIC print-outs such as those dealing with warrants, excluding those that only pertain to Court orders (e.g. the Court orders to which the accused was subject);

(iv) Crown legal briefs;

(v) Crown instructions to police; and

(vi) Crown or police opinions about the case, including opinions about the accused, witnesses or the strength of the case.

(2) Information that would tend to jeopardize the safety of a witness or third party.

(3) The identity of a confidential police informant or information that is of such a nature that it would tend to identify the informant as its source.

(4) Information that would tend to prejudice an ongoing police investigation or reveal confidential investigative techniques used by the police. Delayed disclosure may be appropriate in relation to release of such information.

(5) Anything specifically highlighted by the police as something that should *not* be disclosed.

From time to time, the police may indicate that certain information should not be disclosed. Crown Attorneys should be mindful of such warnings,

but should satisfy themselves that there is a legitimate concern justifying the withholding of information.

(6) Information, the disclosure of which would not be in the public interest, including but not limited to information that would tend to jeopardize national defence or security or that would be "injurious to international relations" (see: s. 38 of the *Canada Evidence Act*).

(7) Information that cannot lawfully be disclosed.

(8) Information protected by common-law or statutory privilege that has not been waived or the disclosure of which has not been judicially authorized.

(9) Information that is clearly irrelevant to the prosecution or defence of the given charge.

(10) Third-party reports concerning the victim or witness

(i) Reports covered by s. 278.1 to s. 278.91 of the *Criminal Code.*

These sections apply where the offence charged is sexual in nature. They deal with any record or report for which there is a reasonable expectation of privacy, such as:

- medical records (such as Sexual Assault Protocol Examination Reports);
- psychiatric records (not applicable to accused's own reports);
- therapeutic records (sex abuse counselors, Klinic reports);
- counseling records;
- educational records;
- employment records;
- child welfare, adoption, social-services records (Welfare); and
- personal diaries.

Disclosure of these records can only take place through court order or where the witness to whom the record relates waives the application of sections 278.1 to 278.91 of the *Criminal Code*. Section 278.2(3) requires the Crown to give notice that such a report exists. Even though the Crown does not provide the actual report, he or she must provide notice to the accused that the Crown has it. This can usually be accomplished through reference in the police report (i.e. "Investigators received medical report

dated X by Dr. Y and sent to Crown"). If this isn't present, it must be added, or defence counsel is advised in another manner.

Where the defence applies for disclosure, the witness should be advised that the Crown will provide independent counsel to the witness for the purpose of opposing the defence application. For further information, refer to the memo to Crown Attorneys dated 27 October 1998 and entitled "O'Connor and C-46 Applications – Production of Documents by Third Parties – Consultation with Constitutional Law Branch – Revised Protocol 98/10/26."

(ii) Reports not covered by s. 278.1 to s. 278.91 of the *Criminal Code*

Generally, offences that are not sexual in nature are not subject to sections 278.1 to 278.91. In such cases, records or reports produced by third parties are governed by the disclosure procedures set out in *R.* v. *O'Connor*[13]. For example, see Crown policy No. X relating to disclosure regarding disciplinary matters involving police misconduct.

WHEN DISCLOSURE SHOULD OCCUR

As a general rule, disclosure should occur before the accused is called upon to elect the mode of trial or to plead. As this is a continuing obligation on the Crown, any new evidence that becomes known to the Crown, that could reasonably be useful to the accused in making full answer and defence, in regards to the nature and circumstances of the Crown's case, and information in furtherance of the investigation or that flows directly from it, should be disclosed on a timely basis, without the need for additional requests, regardless when the information is received.

DISCRETION TO DELAY DISCLOSURE

The duty to disclose is generally subject to a Crown discretion to delay disclosure in appropriate cases. Disclosure may be delayed to protect the witness from harassment or injury, to enforce the privilege relating to informants or where there is a substantial risk to the fair administration of the criminal justice system. In rare cases, disclosure may be delayed to complete an investigation. Any decision to limit or delay disclosure should be reviewed by the appropriate director or supervising senior Crown Attorney. Where a Crown Attorney limits disclosure to comply with the rules of privilege, the Crown must advise the defence of the general nature of the undisclosed information, and the reasons therefore.

FORMAT OF DISCLOSURE

Unless defence counsel specifically requests disclosure in a paper form, the Crown may provide defence counsel copies of documents in either a paper format (photocopies) or an electronic format (e.g. by CD-ROM). Where the accused is unrepresented, the Crown Attorney should generally provide copies of such documents in a paper format.

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[13] *R.* v. *O'Connor*, [1995] 4 S.C.R. 411

DISCLOSURE OF EVIDENCE TO AN UNREPRESENTED ACCUSED

If the accused is not represented by counsel, a Crown Attorney should inform the accused that disclosure is available under this policy.

An unrepresented accused is entitled to the same disclosure as a represented accused. However, the precise means by which disclosure is provided to an unrepresented accused is left to the discretion of Crown based on the facts of the case. For instance, if there are reasonable grounds for concern that leaving disclosure materials with an unrepresented accused would jeopardize the safety and/or privacy interests of any person, the Crown may provide disclosure by means of controlled and supervised, yet adequate and private, *access* to the disclosure materials. Special care may also be required where an unrepresented accused personally seeks access to evidence where the integrity of that evidence may be placed in issue at trial, e.g. taped private communications, exhibits that could be easily and quickly altered and destroyed.

There should be an endorsement placed on the file concerning the nature, extent and timing of disclosure to an unrepresented accused.

GUILTY PLEA WITHOUT DISCLOSURE

Nothing stated in this policy serves to preclude a guilty plea without disclosure, including situations where the accused simply wishes to dispose of the charge as quickly as possible. Disclosure is not a condition precedent to the entering of a guilty plea. However, an unrepresented accused must clearly indicate that he or she does not wish disclosure before a guilty plea is entered.

INDEXING OF DISCLOSED MATERIALS

Because of the importance of disclosure and the consequences of non-disclosure (in terms, for example of *Charter* relief), it is essential that the Crown develop the necessary tools for ascertaining at any given time what it has or has not received from law enforcement agencies, and what it has or has not disclosed to the accused. Checklists or indexes should be used to monitor the timing and content of disclosure. The Crown should provide a complete and accurate index of the contents of disclosed materials to defence counsel and a copy of the document retained on the Crown file. The Crown also has discretion to require of the defence a written acknowledgement or other appropriate confirmation of the disclosure materials provided. This is important given the possibility of a *Stinchcombe* review of the decisions made by the Crown Attorney on the issue of disclosure.

As the volume of information increases in relation to the complexity of the case, the disclosure process can become cumbersome, particularly in regards to “mega cases”, therefore, it is advisable to review the disclosure obligation with the investigative agency, to establish a disclosure protocol between the law enforcement agency and within the prosecution team, to ensure that effective and efficient management of disclosure occurs.

FLEXIBILITY IN APPLICATION OF DIRECTIVES

Generally, it is recognized that the precise mechanics or procedures for providing disclosure will vary throughout the province and will generally be determined by the local Crown Attorney, in accordance with available resources and the needs of the local defence bar. The directives set forth here are in no way intended to be exhaustive and the withholding or release of additional information in possession of the Crown should be determined based on relevancy and privilege on a case-by-case basis. Changes in legislation or police reporting/investigative procedures may require ongoing revision and adding or subtracting from the lists provided herein. If something appears in a Crown file that is new or different, the best advice is always to consult with a supervising senior Crown Attorney about its disclosure.

RATIONALE:

The purpose of disclosure by the Crown is to ensure the fairness of the trial process. As articulated by the Supreme Court, the Crown must disclose all information in which there is a reasonable possibility of its usefulness to the accused. However, in fulfilling the disclosure obligation, the Crown Attorney must be mindful of the Crown's concurrent obligation to protect witnesses from intimidation and harassment.

Disclosure of the Crown's case can also assist in making more efficient use of court time by resolving non-contentious and time-consuming issues in advance of the trial and encouraging guilty pleas to appropriate charges early in the proceedings.

As emphasized in the Driskell[14] Report, the Crown's disclosure obligation is a continuing obligation, one that applies throughout the prosecution and extends beyond appeal periods, to ensure that justice is accomplished through fairness in the process.

[14] Supra, note 5

Appendix 1.

Manitoba
Criminal Justice Division **Prosecutions**

5th Floor - 405 Broadway
Woodsworth Building
Winnipeg MB R3C 3L6
CANADA

(204) 945-2852
FAX: (204) 945-1260

June 6, 2008

Dear Sir/Madam:

RE:

As counsel for the above noted accused, I have agreed to provide you with a copy of the video-tape as part of disclosure.

Therefore, I am prepared to release the video-tape in question to you on the following strict trust conditions:

1. That the tape is to be kept in your personal possession;
2. That no copy is to be made of this tape;
3. That the tape is to be returned directly to the writer upon the expiration of the appropriate appeal period, or earlier as may be agreed upon by yourself and the writer;
4. That should you be discharged by your client, the video-tape will be immediately returned to the writer.

If you are unable to accept any of the above conditions, the video-tape must be returned to the writer forthwith.

Yours truly,

Crown Attorney

enclosure - videotape

Manitoba
Department of Justice
Prosecutions

Guideline No: 2:DOM:1

Policy Directive

Subject: Domestic Violence
Date: November, 2015

POLICY STATEMENT:

The twofold test for laying and proceeding with charges of domestic violence is:

1. Whether there is a reasonable likelihood of conviction?

   and

2. Whether it is in the public interest to proceed with the prosecution?

Statistics Canada reports that 60% of all violent crime in Canada occurs between intimate partners and that just under three-quarters of the victims are female (Statistics Canada, July 8, 2015). The criminal justice system plays an important role in deterring and denouncing domestic violence. Manitoba has implemented justice system responses specific to intimate partner violence to better address the unique needs of both victims and offenders. Manitoba has adopted a "zero tolerance policy" meaning that where the legal basis for laying a charge exists, the criminal justice system is engaged with the goal of protecting the victim and seeking to reduce the offender's risk to re-offend. Further, Manitoba has specialized prosecutors, dedicated domestic violence courts, specialized victim services and the availability of civil protection/restraining orders as ways to address domestic violence.

Crimes of domestic violence provide unique challenges for the criminal justice system. Manitoba Prosecution Service's policy concerning domestic violence has two primary objectives; first, to provide protection and support to victims and their families and second, to ensure that offenders face meaningful consequences for their actions. In accordance with Manitoba Justice's Restorative Justice and Diversion Policy (5:COM1.1), meaningful consequences can include participation by the offender in treatment programs with the goal of reducing the risk of re-offending.

Definition of Domestic Violence

Manitoba Prosecution Service defines domestic violence as follows:

(a) A physical and/or sexual assault or the threat of same is committed in any relationship where the individuals (regardless of gender) are or have ever been dating, cohabitating, married, separated or divorced;
(b) Any other offence (for example, criminal harassment, mischief, theft, etc.) is committed between individuals described in paragraph (a);

(c) The offence arises as a result of a relationship described in paragraph (a) even though the offender and victim are not in a relationship (for example, the accused offends against his former wife's new partner).

If there is any uncertainty as to whether a file should be handled by the Domestic Violence (DV) Unit in Winnipeg, there should be consultation with a Supervising Senior Crown Attorney of the DV Unit or a Director.

Applying the Charging Standard

Reasonable Likelihood of Conviction

There are often special considerations that are relevant in applying the charging standard in a domestic violence context.

In assessing whether a reasonable likelihood of conviction exists, the following factors should be considered:

- It is not unusual for a victim to be somewhat reluctant and apprehensive about testifying in court. As well, it is not unusual for a victim to request that the Crown not proceed with the charge(s). Nevertheless, witnesses who are victims of domestic violence should be encouraged to testify. This should involve consultation with Victim Services. If considered necessary to assist the witness in testifying, consideration should be given to an application under s. 486.2(2) of the *Criminal Code* to allow for testimony to be given from behind a screen or by way of closed circuit television.

- Where the victim refuses to testify, recants or claims to have no memory of the incident, the Crown Attorney shall explore all evidentiary options available to proceed with the prosecution. Particular consideration should be given as to whether there is an evidentiary basis to proceed without the necessity of requiring the victim to testify.

- If the victim's statement was taken under circumstances that satisfy the requirements established by the Supreme Court of Canada in cases such as *Khan*, *K.G.B.*, and/or *Khelawon*, consideration should be given to proceeding on the basis of the victim's statement, provided the public interest requirement (discussed below) is satisfied. Prior to proceeding with such an application there should be consultation with either a Supervising Senior Crown Attorney of the Domestic Violence Unit (for cases that are prosecuted by the Winnipeg office) or with the Supervising Senior Crown Attorney of the applicable regional office or any Director.

Given the particular vulnerability of domestic violence victims, their willingness to testify may change over time. If it is determined that there is no reasonable likelihood of conviction, the Crown Attorney should enter a stay of proceedings. This gives the Crown the flexibility to recommence the proceedings if circumstances change.

Prior to instituting contempt of court, public mischief or other charges relating to a victim's refusal to testify, recantation or failure to attend court, the Crown Attorney must seek approval from either a Supervising Senior Crown Attorney of the Domestic Violence Unit (for cases that are prosecuted in the Winnipeg office) or from the Supervising Senior Crown Attorney of the applicable regional office or any Director. Such approval should also be sought prior to authorizing the detention of a victim pursuant to a witness warrant.

Public Interest

The public interest in prosecuting domestic violence charges is to seek to protect the victims and to reduce the risk of further abuse. In seeking to achieve these objectives, Crown Attorneys should consider the following factors:

- In most cases, commencing a criminal prosecution will be appropriate. Reference should still be made to Policy Directive No. 2:INI:1.1 (Laying and Staying of Charges). Domestic violence is not only criminal conduct but also a serious problem within our community. Having the matter dealt with by the criminal justice system serves to denounce this behaviour and assists in changing public attitudes. Further, bringing the offender into the criminal process provides an opportunity to impose meaningful consequences on an offender with the goal of reducing the risk of re-offending.

- There may be cases where requiring a reluctant victim to testify is counter-productive. In certain situations, proceeding with the prosecution could place the victim at a higher level of risk. This can include not only physical risk but emotional/psychological harm. Factors such as the serious potential for retribution or the existence of psychiatric or physical health issues should be taken into consideration when determining whether to proceed. In these situations, it may be preferable to enter a stay of proceedings and explain the options that are available (e.g., counseling, s. 810 order, protection order under *The Domestic Violence and Stalking Act*, prosecution of any future abuse, etc.). Proceeding in this way may offer some protection to the victim. It also lets the victim know that there are options available in the event of further abuse.

  It is impossible to establish clear parameters around when this may be an appropriate course to follow. Clearly, care must be exercised before staying charges or recommending a more lenient sentence. Some considerations are:

  - The safety of the victim must be the paramount consideration.

  - If the offence is very serious, the public interest will usually favour prosecution and incarceration.

  - If the victim's reluctance to testify is as a result of intimidation by the accused or others, the victim should be encouraged to contact police. Victim Services should also become involved to ensure appropriate safety planning.

Restorative Justice

Manitoba has recognized through the *Restorative Justice Act* that there are many appropriate responses to criminal conduct. The Restorative Justice and Diversion Policy (5:COM1.1) (May 2015) states:

> "A restorative justice approach to unlawful conduct may be utilized at any stage of the criminal process. Matters can be diverted out of the criminal justice system altogether before or after charges are laid. Alternatively, restorative approaches can form part of a traditional prosecution resulting ultimately in a stay of proceedings or the mitigation of sentence."

Domestic violence cases will often be appropriate for a restorative resolution that provides treatment to offenders. Depending on the seriousness of the situation, in some instances it may be appropriate to divert the matter out of the criminal system entirely or to stay charges after an offender has completed treatment. In cases where the facts are more serious or the offender has a record for violence, treatment may be considered as part of a probationary sentence. In all cases where the facts support the reasonable likelihood of conviction, an approach should be adopted that results in meaningful consequences to the offender and seeks to reduce the risk of re-offending.

In order to properly assess the risk to the victim and the appropriateness of treatment for an offender, wherever possible, the Crown Attorney should seek input from the victim and Victim Services.

Bail Considerations

Crown Attorneys are reminded that when a new charge of domestic violence appears on the docket, a check should be conducted to determine whether the accused has other outstanding charges. New charges, particularly breaches, should not be disposed of prior to a revocation application on the original matters.

- In assessing whether the Crown Attorney should oppose bail, the considerations set out in the Bail Policy (2:BAI:1) should be reviewed.

- In every domestic violence case, Crown Attorneys should request a no contact order between the accused and victim. Immediately following an incident of domestic violence, no contact orders are needed in order to give the parties time to cool down and also give time to the police, Victim Services and CFS to investigate what measures are necessary for the adequate protection of the victim and any children that may be at risk. In cases where the accused is in custody and has not yet applied for bail, the Crown Attorney should consider making an application for a no contact order pursuant to s. 516(2) of the *Criminal Code*. This is particularly important if information comes to light that the parties have been communicating while the accused is in custody. In that case, it may be necessary for the Crown Attorney to have the charges brought forward for the application to be made. In all cases where the accused has been denied

bail, a no contact order pursuant to s. 515(12) of the *Criminal Code* should be sought.

- Should a victim attend bail court expressing a desire to address the Court, she/he should be encouraged to speak to a Victim Services Worker as it may be very detrimental to the victim to address the Court. As well, the Court should be reminded that the victim has no standing to make representations at this stage of the proceedings.

Sentencing

If an accused is convicted of a domestic violence offence, the Crown Attorney should recommend a sentence that, among other goals, reflects public denunciation of this kind of conduct. Crown Attorneys should refer to s. 718.2(ii) of the *Criminal Code* when making submissions.

Crown Attorneys should ordinarily oppose recommendations for conditional or absolute discharges and conditional sentences unless extraordinary and compelling circumstances are present. In particular, s. 742.1 of the *Criminal Code* does not permit the imposition of conditional sentences for certain offences. Manitoba Prosecution Service policy on Conditional Sentences (4:CON:1) further restricts situations in which a Crown Attorney may recommend the granting of a conditional sentence.

Where an inadequate sentence is imposed, an appeal should be recommended promptly.

Crown Attorneys must be mindful of the orders that should be requested in domestic violence cases. These include: weapons prohibitions, DNA warrants and SOIRA orders where an assault of a sexual nature has occurred. The Crown Attorney should also consider whether an order pursuant to s. 743.21 of the *Criminal Code* is warranted. This allows for protective conditions to be imposed in relation to the victim and/or other witnesses after the accused has been sentenced to a period of incarceration. Any counselling sought should be specific to "domestic violence" as opposed to "anger management" counselling which does not address the abuse that occurs in intimate relationships.

If the victim is under the age of 18, a Child Abuse Registry Form should also be completed in circumstances where there is an age difference between the victim and the accused of two years or more.

RATIONALE

The prosecution of domestic violence cases is made more difficult by many emotional and psychological considerations that are either not present or are only present to a much lesser extent in other cases. These special considerations may call for a more flexible or situation-specific approach to the prosecution of domestic violence cases. The decision as to how best to proceed in a domestic violence case must rely on the judgment of the individual Crown Attorney based on an assessment of the various factors at work in the particular situation. The Attorney General's policy regarding domestic violence is one of

zero tolerance, meaning, that where the legal basis for laying a charge exists, the criminal justice system should be engaged with the goal of protecting the victim and seeking to reduce the offender's risk to re-offend. Deciding how best to deal with a charge requires Crown Attorneys to exercise their professional judgment, first to ensure that the case meets the test for proceeding with a charge, and second to consider how best to resolve the matter.

Manitoba ***Guideline No. 2:HAT:1***
Department of Justice
Prosecutions

Subject: Hate Motivated Crime

Date: August 2022

POLICY STATEMENT:

Hate motivated crimes are serious offences and there is a strong public interest in their prosecution. This policy applies to all hate motivated crime.

Hate crimes are offences that involve the intentional selection of a victim/victim group based either entirely or in part on the offender's prejudice, bias or hate toward the victim based on characteristics such as colour, race, religion, sexual orientation, national origin or ethnic origin.

There are specific hate-crime offences in the *Criminal Code*:

- Section 318 creates an offence for advocating or promoting genocide against an identifiable group. An "identifiable group" is defined in section 318(4) as any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.
- Section 319(1) creates an offence for communicating statements in any public place that incite hatred against any identifiable group where such incitement is likely to lead to a breach of the peace. "Identifiable group" has the same meaning as in section 318(4).
- Section 319(2) creates an offence for communicating statements, other than in private conversation, that wilfully promote hatred against an identifiable group.
- Section 430(4.1) is a special mischief offence that relates to damaging religious property where the motivation for the offence is bias, prejudice or hate based on religion, race, colour or national or ethnic origin.

Section 718.2 (a)(i) of the *Criminal Code* legislates that offending motivated by bias, prejudice or hate is an aggravating consideration for purposes of sentencing. In this sense, offences need not be specifically designated as hate crimes in order to qualify as such. Other criminal offences could be hate crimes if they are motivated by hate.

There is the requirement for the consent of the Attorney General for proceedings under s. 318 and for willful promotion of hatred under s. 319(2). In many cases, public interest considerations would apply in favour of prosecution, however, there may be circumstances that militate against a prosecution or suggest the use of Alternative Measures.

RATIONALE:

Hate crime is a negation of the fundamental values of Canada. Consequently, there is strong public interest in seeing that Manitoba Prosecution Service assesses and handles these matters effectively. This means a consideration of all intervention options, up to and including vigorous prosecution.

Manitoba
Department of Justice
Prosecutions

Guideline No. 2:INF:1

Policy Directive

Subject: In-Custody Informer Policy
Date: November 5, 2001

The testimony of in-custody informers is inherently suspect. Therefore, except in the unusual circumstances permitted by this policy, in-custody informers should not be called to testify on behalf of the Crown. The purpose of this policy directive is to highlight the dangers associated with this type of evidence, to outline a process for evaluating the reliability of the evidence in individual cases, and to describe the rare circumstances in which in-custody informant evidence may be tendered on behalf of the Crown.

The Dangers

In his landmark report on the *Morin* case, the Honourable Fred Kaufman, former Judge of the Quebec Court of Appeal, said as follows:

> In-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth or their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove…
>
> The evidence at this Inquiry demonstrates the inherent unreliability of in-custody informer testimony, its contribution to miscarriages of justice and the substantial risk that the dangers may not be fully appreciated by the jury. In my view, the present law has developed to the point that a cautionary instruction is virtually mandated in cases where the in-custody informer's testimony is contested: see *R. v. Simmons*, [[1998] O.J. No. 152 (QL)(C.A.)]; *R.* v. *Bevan*, [(1993), 82 C.C.C. (3d) 310].

Subsequently, Binnie, J. of the Supreme Court of Canada highlighted the dangers associated with the evidence of in-custody informers (sometimes called "Jailhouse Informants") in *R. v. Brooks* (2000), 141 C.C.C. (3d) 321 (S.C.C.), at p. 360:

> …"jailhouse informant" is a term that conveniently captures a number of factors that are highly relevant to the need for caution. These include the facts that the jailhouse informant is already in the power of the state, is looking to better his or her situation in a jailhouse environment where bargaining power is otherwise hard to come by, and will often have a history of criminality.

Scope of this Policy

This policy applies where any inmate, imprisoned in either a provincial or federal correctional facility anywhere in Canada, usually pending trial or awaiting sentence, claims to have heard another prisoner make an admission about his or her case, and seeks to testify about it on behalf of the Crown. It is immaterial whether the proposed inmate witness seeks a benefit from the Crown or not.

The policy is not intended to address the use of police undercover operators, nor to limit the use of in-custody informers to advance police investigations.[1]

Criteria

Before it can even be considered, the statement of the in-custody informer must be reviewed to determine whether this information could have been garnered from other sources (e.g. media reports of the crime, the disclosure package or from evidence given at the preliminary hearing or from the trial if it is underway or has taken place). If the information could not have been obtained from these other sources, the full circumstances of the case and the background of the informer must be assessed, especially the following factors: [2]

1. The extent to which the statement is confirmed by independent evidence;

2. The extent to which the statement has disclosed evidence that is, in itself, detailed, significant, and revealing as to crime and the manner in which it was committed. For example, a claim that the accused said "I killed A.B." is easy to make but extremely difficult for any accused to disprove;

3. The extent to which the statement contains details and leads to the discovery of evidence known only to the perpetrator;

4. The informer's general character, which may be evidenced by his or her criminal record or other disreputable conduct;

5. Any request the informer has made for special benefits and any promises that may have been made;

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[1] Concerning the latter, see: *R.v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.).

[2] These criteria are taken from the Morin Report, and were approved in *R. v. Brooks* (2000), 141 C.C.C. (3d) 321 (S.C.C.), at p. 348-9 (per Major, J., Iacobucci and Arbour JJ.)

6. Whether the informer has in the past given reliable information to the authorities;

7. Whether the informer has previously claimed to have received statements while in custody;

8. Whether the informer has previously testified in any court proceeding and the accuracy or reliability of that evidence, if known;

9. Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneously with the alleged statement of the accused;

10. The circumstances under which the informer's report of the alleged statement was taken (i.e., how soon after it was made and to more than one officer, etc.);

11. The manner in which the report was taken by the police;

12. Any other known evidence that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer;

13. Any relevant information contained in the Manitoba Justice In-Custody Informer Registry;

14. Any medical or psychiatric reports concerning the in-custody informer where relevant;

Under no circumstance shall Crown Counsel call an in-custody informer who has a previous conviction for perjury, or any other conviction for dishonesty under oath or affirmation, unless the admission of the accused was audio or video recorded and the authenticity of the recording can be verified.

Counsel shall not proceed to trial where the testimony of the in-custody informer is the sole evidence linking the accused to the offence. Further, because of the unfortunate cumulative effect of alleged confessions, no more than one in-custody informant should be used, even if others meet the test. Finally, if the trial judge fails to give the jury the warning required by the decisions in *Simmons* and *Bevan*, the Crown Attorney should, where possible, remind the judge of the need to give such a warning.

The Decision Whether to Call the Evidence: Establishment of an In-Custody Informer Assessment Committee

The decision whether to call an in-custody informer as a witness on behalf of the Crown is a collective one, rather than one made only by the Crown Attorney having conduct of the case.

For this purpose, the In-Custody Informer Assessment Committee ("I.C.I.A.C.") is established. It is composed of the following: the Assistant Deputy Attorney General (as chair); the appropriate Director (Winnipeg, Regional or Special Prosecutions); the Senior Crown Attorney in charge; General Counsel, and the Prosecutor having conduct of the case. The mandate of this committee is to consider the proposed witness' evidence, the background of the witness, and the application of the criteria referred to above to the facts of the case in question.

Wherever possible, the Chair should arrange for the police to conduct an investigation that will assist in making a decision on the suitability of calling the in-custody informer as a witness. The Committee should have a broad range of material and information available to inform its decision, including: previous police reports dealing with the informer; a waiver of confidentiality concerning his (or her) prison files; disposition of charges previously laid against the informer; transcripts of previous testimony provided by the informer, including any findings of credibility made by the trial judge; aliases that may previously have been used, and information on whether the proposed witness has previously been turned down as an informant/witness. Any material received should be discussed with the informant before a decision is made.

Before making a final assessment, the in-custody informant must provide a videotaped statement in accordance with the decision of the Supreme Court of Canada in *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257 (S.C.C.).

In-Custody Informer Registry

Once a decision is taken by the In-Custody Informer Assessment Committee, either to call the informer as a witness or not, the chair of the Committee shall advise the Deputy Attorney General of the result. The office of the Deputy Attorney General shall maintain a registry of all decisions taken by the I.C.I.A.C. The Registry shall be a public document and information from the Registry shall be available to any member of the public on request, provided that disclosure of the information sought is lawful, will not prejudice any ongoing police investigation, or the conduct of a prosecution, and will not imperil the safety of any person. A decision by the Deputy Attorney General not to release information in a specific case is reviewable by the Ombudsman of Manitoba pursuant to provincial law.

Disclosure to the Defence

The decision to call an in-custody informer as a witness for the Crown creates additional disclosure responsibilities for the prosecuting Crown Attorney. In general, the following shall be provided to the defence in a timely way, although in particular cases there may be an obligation to disclose further materials or information in the possession of the Crown:

a) criminal record of the in-custody informer;

b) Manitoba Registry record of the in-custody informer, if any;

c) particulars respecting any benefits, promises or understandings between the in-custody informer and the Crown, police or correctional authorities, including any written agreements to testify;

d) any other known evidence that may attest to or diminish the credibility of the in-custody informer, including any relevant medical or psychological reports accessible to the Crown as well as all of the materials originally placed before the I.C.I.A.C., providing it is lawful to disclose them.

Written Agreement to Testify

Where the I.C.I.A.C. has approved the proposed testimony of an in-custody informer, the Department shall enter into a written agreement with the informer to testify, in which all of the understandings, terms and conditions of that testimony are agreed upon. The purpose of the agreement is to ensure that there is a clear understanding of the basis upon which the informer agrees to provide evidence. In all cases, Crown Counsel will provide the agreement to the defence as part of the pre-trial disclosure, and will seek to file the agreement with the court as an exhibit before the person testifies.[3] A checklist of those issues to be addressed in the agreement has been attached as an Appendix to this policy statement.

In circumstances where the agreement contemplates the conferring of a benefit on the informer (such as a reduction in charges, dropping charges, immunity from prosecution, etc), the benefit should be conferred *before* the in-custody informant testifies: see *R. v. Piercey* (1988), 42 C.C.C. (3d) 475 (Nfld. C.A.); *R. v. Canning* (1937), 68 C.C.C. 321 (S.C.C.) at page 322-3. This will serve to offset any suggestion that the in-custody informer is only providing testimony because there is still something to be gained by testifying in a certain way. Under no circumstances shall the conferring of a benefit on an in-custody informer be conditional upon the conviction of the accused. The informer must also be advised clearly that any benefits are based on the understanding that the testimony provided in court is truthful.

Where the informer is charged with further offences prior to completing his or her testimony, prosecuting counsel shall re-assess the future use of the informer as a witness on behalf of the Crown.

[3] As suggested by the Privy Council in *R. v. McDonald*, [1983] N.Z.L.R. 252 (P.C.).

Prosecution of an In-Custody Informer for Giving False Statements

Crown Counsel are expected to prosecute cases vigorously where an in-custody informer has lied to the police, Crown Attorney or the court. To ensure independent action, it will, in many cases, be necessary to refer the case to an independent counsel for the prosecution. The purpose of prosecuting in-custody informers who attempt (even unsuccessfully) to falsely implicate an accused is, amongst other things, to deter other members of the prison population from attempting the same thing. If convicted of perjury or a similar offence, Crown Counsel shall ask for a significant consecutive prison term.

Legal Authorities for Further Consideration

As in all cases of this nature, professional judgment will have to be made on whether or not to call a particular witness. In the exercise of that judgment, counsel should bear in mind, and be guided by, the following authorities:

R. v. Brooks (2000), 141 C.C.C. (3d) 321 (S.C.C.);

Manitoba, The Inquiry Regarding Thomas Sophonow
The Investigation, Prosecution and Consideration of Entitlement to Compensation (Winnipeg: Department of Justice, September 2001);

Ontario, Report of the Commission on Proceedings involving Guy Paul Morin ("Kaufman Report") (Toronto: Ontario Ministry of the Attorney General, 1998);

R. v. Bevan (1993), 82 C.C.C. (3d) 310 (S.C.C.);

R. v. Vetrovec (1982), 67 C.C.C. (2d) 1 (S.C.C.);

Sherrin, Christopher, "Jailhouse Informants, Part I; "Problems with their Use" (1998), 40 C.L.Q. 106;

Sherrin, Christopher, "Jailhouse Informants in the Canadian Criminal Justice System, Part II: Option for Reform" (1998), 40 C.L.Q. 157;

Report of the 1989-1990 Los Angeles Grand Jury: Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County, June 26, 1990.

For ease of reference, it should be noted that the Kaufman Report, referred to above, is available on the Internet at: www.gov.on.ca/ATG/morin, as is the decision of the Supreme Court of Canada in *R. v. Brooks*, at: www.droit.umontreal.ca/doc/csc-scc/en/index.html

Appendix
Contents of Immunity Agreements: A Checklist

An agreement with an in-custody informer should be in writing, be signed by and given to the witness before testifying, and should include, among other things, the following information:

a) the name of the in-custody informant who is entering into the agreement;

b) the person to whom the benefit is to be provided (if any) (usually the in-custody informant himself);

c) the benefit to be provided (e.g. staying existing charges, release from custody, Crown to suggest a particular sentence on outstanding charges, etc.);

d) the scope of the agreement (that it does not extend to crimes undisclosed by the in-custody informant, crimes unknown to the police and any future crimes that may be committed by the in-custody informant);

e) the evidence or other information provided by the in-custody informant in exchange for the benefit;

f) any additional commitments made by the parties, including the specifics of any expenditures to be made by the Crown;

g) a general description of what will amount to a breach of the agreement, and the consequences of such a breach;

h) an explicit statement by the in-custody informant that he or she is providing truthful information and will testify truthfully in all court proceedings;

i) a statement that the In-Custody Informer Assessment Committee has reviewed the agreement and endorses it;

j) the signatures of the Assistant Deputy Attorney General and the in-custody informant.

Manitoba ***Guideline No: 2:INI:1.1***
Department of Justice
Prosecutions

Policy Directive ***Subject: Laying, Staying and Proceeding on Charges***
Date: June 2017

POLICY STATEMENT:

Crown attorneys shall continue to use the following twofold test in exercising their professional judgment to determine whether charges ought to be laid or proceeded upon:

1. Is there a reasonable likelihood of conviction; and
2. Is it in the public interest to proceed?

The first arm of this test requires prosecutors to bring all of their professional skills to bear on making a determination of whether a conviction to the criminal law standard of beyond a reasonable doubt is the more likely outcome if the matter was to proceed to trial.

The second arm requires prosecutors to recognize that many societal values impact the criminal justice system. Prosecutions advance the important societal interest in the deterrence, denunciation and punishment of criminal conduct. But society equally values other important ideals including:

- the timely prosecution of criminal matters in accordance with s.11(b) of the *Canadian Charter of Rights and Freedoms*:
- support to victims of crime and respect for their views; and
- the legal duty to further reconciliation with Canada's Indigenous peoples and to enhance equality.

Prosecutors are expected to exercise their professional judgment to consider these and other societal interests in determining whether a prosecution is in the public interest, recognizing that the more serious the offence and the more dangerous the offender the more likely that the value in prosecution will outweigh other public interest concerns.

Manitoba ***Guideline No: 2:FIR:1***
Department of Justice
Prosecutions

Subject: Prosecution of Offences Involving Firearms
Date: July 2020

POLICY STATEMENT:

The primary focus of this policy is protection of the public. Liberal access to firearms is a factor in violent crime, accidents and suicide. The effects of easy access to firearms are well documented both in Canada and in other countries. The magnitude of violence that can result from the criminal use of firearms and the public's perception of that violence must be kept in mind when handling cases involving the use of firearms. This will ensure that Crown Attorneys' responsibility to protect the public in such cases will be met.

Crown Attorneys must be aware of the various special provisions of the Criminal Code with respect to firearms. The intention of these provisions is to afford protection to the public and instill confidence in the criminal justice system's handling of such cases.

SPECIAL PROVISIONS OF THE *CRIMINAL CODE* WITH RESPECT TO FIREARMS

In any bail hearing for an offence involving violence, attempted violence, threatened violence, criminal harassment or the illicit possession or use of firearms, Crown Attorneys must consider whether to seek a condition that the accused be prohibited from using or possessing any firearm, ammunition, explosive substance or other weapon and that the accused surrender any firearms licence and registration certificates issued to him/her. This may be an appropriate term of bail for many types of charges, particularly intimate partner violence (IPV) assault cases where there is often a risk that violence will continue.

PEACE BONDS, PREVENTATIVE PROHIBITION AND LIMITED ACCESS ORDERS

Where a criminal prosecution is not feasible or no criminal act has occurred, but where concerns about public safety exist, Crown Attorneys should consider, in consultation with the police, whether a court order prohibiting an individual from possessing firearms should be sought. Such orders might include the following:

a) preventative prohibition orders (s.111 , s.117.05)
b) peace bonds (s.810, 810.01, 810.1, 810.2)
c) limitations on access orders (s.117.011)

MANDATORY MINIMUM SENTENCES

Note that for certain offences (s. 95, 96, 102) the existence of a mandatory minimum sentence depends upon the Crown electing to proceed by indictment. Crown Attorneys must consider proceeding by indictment where the facts, prior record of the accused and other relevant factors suggest that a sentence of at least one year is called for.

The mandatory minimums sentences for section 95 offences of three years for a first offence and five years for a second or subsequent offence were struck down as unconstitutional by the Supreme Court: *R. v. Nur*, [2015] 1 SCR 773. Nevertheless, Crowns should be mindful of the Court's comments that most cases within the range of conduct captured by section 95(1) may well merit a sentence of three years or more: *Nur* at para. 82. A first offender whose conduct falls within the middle of the offence range can attract a sentence of three years: *R. v. Kennedy*, 2016 MBCA 5.

CHARGES UNDER SECTION 85 OF THE CRIMINAL CODE

Section 85(1) of the Criminal Code makes it an offence to use a firearm in the commission of an indictable offence and requires the judge to impose a sentence of at least one year consecutive to the sentence imposed on the substantive offence. Section 85(2) creates a similar offence for the use of an imitation firearm in the commission of an indictable offence. A charge under one of these subsections should be considered whenever the facts indicate that a firearm or an imitation firearm was used in the commission of the offence.

PLEA NEGOTIATIONS

The resolution of firearms offences should be premised on providing the greatest possible protection to the public. By providing for mandatory minimum sentences and minimum consecutive sentences for certain firearms offences, Parliament has confirmed the gravity of these offences and expressed the need to deter and denounce those particular offences. All Crown Attorneys must be aware of the import of the Mandatory Minimum Sentence policy in the context of Firearms offences (4: SEN: 2).

Where a Crown Attorney is considering departure from proceeding with a mandatory minimum sentence or accepting a plea to an alternative charge to avoid a mandatory minimum penalty they should do so only after having consulted with their Supervising Senior Crown Attorney.

PROHIBITION ORDERS AT SENTENCING

In addition to seeking the mandatory prohibitions provided in s.109, Crown Attorneys should seek discretionary prohibitions under s.110 where they have concerns regarding the safety of the victim or the public at large.

The Youth Criminal Justice Act provides for specific weapons prohibitions for young offenders (s. 51).

FORFEITURE OF FIREARMS

Crown Attorneys are expected to bring to the Court's attention the provisions of the Criminal Code, which require the forfeiture of weapons upon sentencing.

LIFTING OF PROHIBITION ORDER

Crown Attorneys must oppose the lifting of any prohibition order where they have concerns regarding the safety of any person. Even if a prohibition order is lifted, Crown Attorneys are expected to advocate for very strict terms and conditions for the possession of those weapons, consistent with section 113 of the Criminal Code and the case law interpreting that provision

RATIONALE:

Protection of the public must be the focus of the Department's Firearms Policy. The Criminal Code provides means through which individuals who present a risk to the public can be denied access to firearms and it provides for increased penalties for those who use firearms in a criminal manner. In order to extend as much protection to the public as possible, Crown Attorneys should make full use of these provisions.

Manitoba
Department of Justice
Public Prosecutions

Guideline No. 2: MEN:1

Policy Directive ***Subject: Mentally Disordered and Cognitively Impaired Offenders***
Date: May 2015

POLICY STATEMENT

Mentally disordered and cognitively impaired offenders warrant special consideration within the criminal justice system. The criminal law response will vary with the nature of the impairment and its severity and the associated public safety risk. *The Restorative Justice Act* recognizes that in some situations public safety can be enhanced by diverting an offender out of the criminal justice system or by involving an offender in a program that can address issues related to mental disorders and cognitive impairment as part of the criminal process. The nature and extent of the disability serves to mitigate the criminal law response. In other situations, where the mental disorder gives rise to a finding that the offender is not criminally responsible or is unfit to stand trial, the *Criminal Code* provides a detailed regime to manage and treat the offender. In still other situations the level of impairment may go to the ability of the accused to form specific intent and may give rise to a defence. Given the different legal responses by the criminal justice system to varying types and degrees of mental disorders and cognitive impairment, Crown Attorneys must make all reasonable efforts to understand the nature of an offender's impairment and its severity.

In some instances referral to the Mental Health Court (MHC) will be appropriate. MHC is based on a therapeutic model of justice. The goal is to support and assist appropriate individuals who have been charged with criminal offences and who are suffering from mental illness so that they are stabilized and do not become re-involved in criminal activity.

In some cases, mentally disordered and cognitively impaired offenders may represent a significant danger to the public. If there is reason to believe that an accused person poses a significant danger as a result of a mental disorder (including cognitive impairment- see *R. v. Stone*, [1999] 2 SCR 290) then the matter should proceed under s.16 and Part XX.1 of the *Criminal Code.* These provisions apply to mentally disordered offenders whose impairment renders them: 1) Unfit to stand trial; or 2) Not criminally responsible due to mental disorder (NCR).

In addition, if an accused is found NCR for a serious personal injury offence that was committed when the accused was 18 years of age or more, a determination by the Court that the accused is a high-risk accused may be appropriate where:

a) The court is satisfied that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person; or
b) The court is of the opinion that the acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person.

Designating an NCR accused person as high-risk has additional consequences such as: precluding the granting of an absolute or conditional discharge for that person, precluding the person being allowed to go into the community unescorted and restricting escorted passes to narrow circumstances and subject to sufficient conditions to protect public safety, and authorizing Review Boards to extend the review period to up to three years for such persons who show no signs of improvement, instead of the usual annual review.

Where an accused is found not criminally responsible due to mental disorder or unfit to stand trial, the Manitoba Criminal Code Review Board (the "Review Board") is mandated to hold a disposition hearing following the court verdict and every year thereafter while the mentally disordered offender remains under the jurisdiction of the Review Board. The Review Board's disposition, and the conditions of the disposition, must be necessary and appropriate in the circumstances taking into account four factors (*Criminal Code* s. 672.54):

1. The safety of the public which is paramount;
2. The mental condition of the accused;
3. The reintegration of the accused into society; and
4. The other needs of the accused.

RATIONALE:

The criminal law has recognized for over two centuries that mental disorders and cognitive impairment are mitigating factors in determining criminal responsibility and can, in certain circumstances, excuse criminal liability. Public safety is always a primary consideration in determining how best to deal with an offender who is suffering with a mental disorder or is cognitively impaired. Sometimes resolving the matter in accordance with the Restorative Justice and Diversion policy or proceeding through the MHC is an appropriate way to manage public safety concerns. In situations where an accused meets the test set out in s.16 of the *Criminal Code* for a finding of NCR, the Review Board regime provides a balanced approach that both respects public safety concerns and the liberty interests of the accused. Crown Attorneys plays a critical role before both courts and review boards in highlighting for these decision-makers various factors affecting public safety and offering recommendations to meet public safety concerns.

Manitoba
Department of Justice
Public Prosecutions

Guideline No. 2:PLE:1

Policy Directive

Subject: Plea Bargaining
Date: May 2015

POLICY STATEMENT

The Supreme Court of Canada has recognized plea bargaining as an essential part of the exercise of Crown discretion; *R. v. Anderson*, 2014 SCC 41. Making an informed decision about which charges are to be proceeded upon and whether to accept a plea to a lesser charge are two examples set out in *Anderson* as being essential roles for a Crown Attorney. Thus, in order to fulfill their role, Crown Attorneys should facilitate discussions with defence counsel concerning potential resolution of a matter.

PRINCIPLES:

The following principles should govern plea bargaining:

1. A Crown Attorney's actions in relation to plea bargaining must always be guided by the public interest and the need to promote confidence in the administration of justice.

2. There is an overarching duty of fairness expected of Crown Attorneys. The accused should never be overcharged or a plea obtained by the threat of the Crown proceeding with a more serious charge for which the factual underpinning does not meet the charging standard; *R. v. Babos*, 2014 SCC 16.

3. A plea bargain may involve acceptance by the Crown of guilty pleas to lesser charges or to the staying of some charges in exchange for guilty pleas to the balance of charges. It may also involve resolving the matter in accordance with the Restorative Justice and Diversion policy (April, 2015).

   Crown Attorneys may also agree with defence counsel to adopt a particular position on the matter of sentence. This may involve agreeing to make no recommendation respecting sentence, agreeing to recommend a certain type of sentence (e.g. a fine), agreeing to recommend a sentence within a certain range or agreeing to recommend a specified term of imprisonment. Plea bargaining may also involve agreements concerning terms of probation.

4. Pleading guilty is a mitigating factor in sentencing as it shows remorse, reduces the strain on resources and lessens the stress/inconvenience to witnesses. Therefore, if an accused wishes to resolve a matter by guilty plea, this warrants consideration when determining the proper disposition. An accused who chooses to plead guilty early in the process, thereby taking responsibility at the first opportunity and minimizing the strain on victims, witnesses and the system as a whole deserves significant consideration in mitigation. On the other hand, an accused who pleads guilty on the eve of trial deserves considerably

less consideration. However, an accused should not be expected to enter into plea negotiations until he/she has received sufficient disclosure to make an informed decision; *R. v. Babos*, 2014 SCC 16.

5. Crown Attorneys are reminded of their statutory obligations under both the federal and provincial *Victims' Bill of Rights* with respect to providing information to victims and receiving input from them. See: Victims' Policy (2:VIC:1) and Prosecution of Offences Against Police Officer (2:PRO:1).

6. It is proper for a Crown Attorney to make agreements respecting pleas or sentence where extenuating circumstances exist or arise in the course of a prosecution with a view to avoiding an unsuccessful prosecution. Examples of such circumstances include witnesses who do not testify as expected, where there is uncertainty as to the admissibility of evidence or where there has been excessive delay in bringing the matter to trial.

7. Facts provided to a court on a guilty plea must be facts, either accepted by defence counsel, or that the Crown can prove beyond a reasonable doubt if disputed; *R. v. Gardiner*, [1982] 2 SCR 368. Crowns must never mislead the court. All facts that are relevant to the disposition must be provided to the judge. Therefore, Crowns must not withhold information such as prior convictions or leave out relevant facts that may reasonably affect sentence including the imposition of mandatory minimum penalties.

8. Once a plea agreement has been reached it can only be repudiated in rare and exceptional circumstances; *R. v. Nixon*, 2011 SCC 34. Therefore, Crown Attorneys should be cautious in making any agreements as to plea on serious matters until all relevant information has been considered.

9. A Crown Attorney should not make any agreement regarding sentence where it is understood that a pre-sentence report or forensic report will be obtained as the information in these types of reports is often vital to determining a fit sentence.

10. The judiciary should not normally be brought into the plea bargaining process but it is recognized that at Case Management or Resolution Conferences, the Crown should be prepared to discuss possible resolution.

11. Though rare, there are situations where a Crown Attorney may properly decide to stay proceedings or recommend a particular sentence based on compassionate grounds.

12. A plea bargain should not include an agreement by a Crown Attorney to forego an appeal of the sentence imposed by the judge.

RATIONALE:

Plea bargaining avoids unnecessary litigation, reduces the strain on resources, minimizes inconvenience to witnesses and increases the timeliness of case resolution. Crown Attorneys should participate in plea negotiations with defence counsel in accordance with the guidelines provided above.

The benefits and practicality of plea bargaining are apparent to those who work in the criminal courts. However, the public and the news media often seem to regard plea bargaining with suspicion and some may even regard it as unseemly. This attitude may be attributable, at least

in part, to the fact that plea bargaining occurs in private and often seems to result in the accused receiving what, at first glance, appears to be an unwarranted benefit (e.g. convicted of a reduced charge or receiving a lenient sentence). Crown Attorneys should, where it is reasonable and appropriate to do so, attempt to make the plea bargaining process more transparent by providing an explanation on the record of the factors that led to the plea bargain. The explanation may involve pointing out the exigencies of the case or explaining what compromises or concessions have been made by the Crown. The explanation need not be lengthy but it should be sufficient for the judge and the public to understand why the Crown is accepting the plea bargain.

Further, an explanation need not be provided every time a case is resolved through a plea bargain. There may be circumstances where disclosing the entire rationale is not in the public interest. Examples may include cases where an explanation would jeopardize the safety of witnesses, reveal sensitive information about organized crime or compromise ongoing investigations.

Manitoba
Department of Justice
Prosecutions

Guideline No. 2:TRA:1

Subject: Transfer of Charges

Date: April 2022

POLICY STATEMENT:

It is in the public interest to have matters heard in the community or the closest judicial centre to allow members of the affected community to participate fully in the proceedings. This is particularly true where the matter is sensitive, involves vulnerable victims or has had a broad community impact.

This principle extends to both transfer of charges from within Manitoba as well as transfer of charges from Manitoba to another province.

It is the responsibility of the Crown Attorney in the office where the offence originates to ensure that the charges are appropriate for transfer and that there is no compelling local interest that the matter remain where it arose.

Manitoba ***Guideline No. 2: VIC: 1***
Department of Justice
Prosecutions

Policy Directive ***Subject: Victims***

Date: May 2021

POLICY STATEMENT:

At all stages of criminal and quasi-criminal proceedings, including matters in which charges are being contemplated, whether or not they are yet laid, and matters under appeal, Crown Attorneys must be attentive and sensitive to the needs and views of victims and seek to maintain a sense that they will be treated fairly in the justice system.

Since the coming into force of the *Manitoba Victims Bill of Rights* [MVBR] in 2001 and, more recently, the federal *Canadian Victims' Bill of Rights* [CVBR], there has been increasing awareness of the role and rights of victims in the criminal justice system and the need for prosecutors to fulfill their legislative obligations accordingly in a trauma informed manner.

These two pieces of legislation along with the *Criminal Code* set guidelines for the necessary approach for Crown Attorneys, all of which is supported by the work of the Victim Services Branch.

Victim Participation

To the best of their ability, Crown Attorneys must ensure that victims (and other witnesses) are prepared for any upcoming court hearings. This includes a review of the testimony expected of the victim (or witness) and an overview of what to expect during a preliminary hearing or trial. The nature of the case will determine the extent of preparation required.

Communications with Victims

Section 14 of the MVBR, as well as section 6 and following of the CVBR entitle victims to communicate with the assigned Crown Attorney on certain matters relating to the prosecution of a case. This does not mean that the victim is entitled to direct the prosecution or make decisions with respect to how the case is handled. **Crown Attorneys are required to listen to, acknowledge and seriously consider any concerns and information that the victim has to offer.**

Victim Impact Statements

Victims/complainants are entitled to provide a Victim Impact Statement to the Court. The CVBR also provides for Community Impact Statements.

RATIONALE:

Crown Attorneys have an obligation to ensure that the voices of victims of crime are heard and that their concerns are addressed as appropriate.

Related Policies:

Elder Abuse 2:ELD:1 located at:
http://intranet.mbgov.ca/justice/crown/prosecutions/prostaff/policy/Documents/elder_abuse.pdf

Domestic Violence 2:DOM:1 located at:
http://intranet.mbgov.ca/justice/crown/prosecutions/prostaff/policy/Documents/domesticviolenceapr15.pdf

Sentencing – Restitution 4 SEN:1 located at:
http://intranet.mbgov.ca/justice/crown/prosecutions/prostaff/policy/Documents/sentencing_disputefacts.pdf

Victim Impact Statements 4 SEN:1 located at:
http://intranet.mbgov.ca/justice/crown/prosecutions/prostaff/policy/Documents/sentencing_disputefacts.pdf

Child Abuse 2:CHI:1 located at:
http://intranet.mbgov.ca/justice/crown/prosecutions/prostaff/policy/Documents/childabusepolicy_apr17_2014.pdf

Direct Indictments 2:DIR:1 located at:
http://intranet.mbgov.ca/justice/crown/prosecutions/prostaff/policy/Documents/directindictmentpolicy.pdf

Manitoba
Department of Justice
Public Prosecutions

Guideline No. 4:APP:1

Policy Directive

Subject: Appeal
-Principles & Procedures
Date: October 10, 1990

POLICY STATEMENT:

General

The governing principle in the decision to appeal on behalf of the Crown will be one of restraint. Appeals will only be taken in cases where there is a substantial public interest to be served by bringing the matter before an appellate court. An error of law, in the case of an acquittal, or an unfit sentence will not justify an appeal unless, having regard to the circumstances of the case the public interest requires that an appeal be taken. An appeal will not be taken unless there is a reasonable expectation that it will be successful.

Acquittals

Generally, an appeal against acquittal by the Crown must be based on an error in law. Findings of fact and of credibility do not found an appeal by the Crown. In Summary Conviction Offences circumstances may arise where it is necessary for an appellate Court to give direction on an issue of mixed fact and law.

In indictable offences a Crown appeal against acquittal must be based solely on an error of law which is limited to exclusion of a crucial piece of evidence, a misdirection on the law in reasons for judgment, an error of law in the charge to the jury, or the granting of a constitutional remedy such as striking down legislation.

Sentence

An appeal against sentence must proceed on the basis that it is inordinately low on its face, having regard to the offender's background as well as aggravating and mitigating factors, or that the sentencing judge committed a demonstrable error in principle in imposing the sentence.

Some factors (not inclusive) that enter into a decision to appeal are:

1. The seriousness of the offence;
2. The previous record, or character of the offender;
3. The sentence given to a co-accused (principle of parity);
4. The sentence is illegal;
5. The sentence is inordinately low on its face, outside any previously appropriate range;
6. The position taken by the Crown at the sentencing hearing;
7. The facts admitted by defence counsel, or proved by the Crown, at the sentencing hearing;
8. The principle of totality, including other matters dealt with on the same day, and a sentence already being served;
9. Whether a plea to a lesser offence was accepted, and the reasons leading to that decision;
10. Time spent in custody awaiting sentence, and the reasons for this;
11. Whether the accused was on probation, on parole, pending on other matters when the offence occurred, or was re-involved (and convicted) while awaiting sentence.

PROCEDURE

Summary Conviction Appeals

All recommendations shall be made directly to the Senior Crown Attorney in charge of the section in which the case originates.

Appeals to the Court of Appeal

Recommendations shall be made concurrently to the General Counsel Unit in Winnipeg and the responsible Director. The decision to appeal will be the joint responsibility of the General Counsel Unit and the Director.

Timeliness

The 30 day limit for filing and service of appeals necessitates the expeditious forwarding of recommendations to appeal.

Recommendations - Contents

Appended to this guideline is the Recommendation for Appeal form which is to be filled out in its entirety by the Crown Attorneys recommending appeals to the Court of Appeal. A thorough and accurate detail is necessary to ensure that the recommendation can be properly assessed. Recommendations for appeal from acquittal must contain a clear statement of the error of law committed by the trial Judge. All recommendations should include reference to any authorities counsel rely on in support of the allegation that the trial Judge erred in law or imposed a sentence which is unfit. Appeals will not be launched without adequate documentation. Recommendations must also attach the written material referred to on page two of the form, unmarked.

Note: The Appellate Court will not consider any such material which has not been filed and entered as an exhibit in the Court below.

Transcripts

As a general policy, transcripts of proceedings in trial Courts will not be ordered until an appeal has been filed by the Crown Attorney in charge of authorizing that particular appeal.

Exceptions to the rule will be approved by the Crown Attorney in charge of the appeal, in the following circumstances:

(a) In the case of acquittal appeals, after a discussion between trial counsel and appeal counsel as to the merits of the case, of an expedited transcript of the reasons for judgment, in a decision to exclude evidence, or to charge a jury to acquit, on an alleged ground in law;

(b) In the case of sentence, only after a discussion between the trial and appeal counsel will an expedited transcript be ordered;

Transcripts - Sentence Appeals

(a) Sentence After Guilty Plea

On occasion, the facts of an offence may be read in by Crown Counsel, and the matter of sentencing adjourned, for several reasons. In such a case, Appellate counsel must be advised of all court appearances during which representations were made by counsel, and commented upon by the Presiding Judge (in order to have all relevant transcripts before the Appeal Court).

(b) Sentence After Trial

On a Crown appeal after trial, as to sentence, the findings of fact of the trial Judge are crucial. Whether sentencing proceeds the same day, or after an adjournment for the submission of materials, the findings of fact concerning the offence are vital to the sentence appeal.

A transcript of the Judges reasons for convicting are a necessary part of the statement of facts for the verdict reached in the trial Court.

Trial counsel must record the necessary information along with his or her notes of the reasons for judgment to allow appellate counsel to obtain the required material.

Manitoba ***Guideline No: 4:SEN:1***
Department of Justice
Prosecutions

Subject: Sentencing
Date: July 2020

POLICY STATEMENT:

Appropriate sentences play a significant role in protecting society, contributing to respect for the rule of law, and the maintenance of a just, peaceful and safe society by imposing just sanctions.

Parliament has pronounced the significance of appropriate sentences in the *Criminal Code of Canada* and set out the purpose and principles in s. 718:

FUNDAMENTAL PRINCIPLES

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- To denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct
- To deter the offender and other persons from committing offences
- To separate offenders from society, where necessary
- To assist in rehabilitating offenders
- To provide reparations for harm done to victims or to the community and
- To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community

Other sentencing principles are set out at section 718.2:

- A sentence should be similar to that imposed on similar offenders for similar offences committed in similar circumstances
- Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh
- An offender should not be deprived of liberty, if a less restrictive way of dealing with the case is appropriate in the circumstances
- All available punishments other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Indigenous offenders

In comparison, sentencing purposes and principles for youth focus on rehabilitating youth and reintegrating them into society.

Crown Attorneys are required to balance the principles and purposes of sentencing when advocating/presenting a sentence recommendation. This will involve presenting the facts, highlighting the applicable aggravating and mitigating factors and the relevant sentencing principles and articulating why the recommended sentence is proportionate to the gravity of the offence and the degree of responsibility of the offender.

USE OF ORDERS

Crown Attorneys should make effective use of orders, designations and conditions available in law to assist in the protection and safety of the victim and other members of society.

INDIGENOUS OFFENDERS

The Criminal Code as well as the Supreme Court of Canada recognizes special deliberations are required when sentencing an Indigenous accused to address overrepresentation in the criminal justice system. It is necessary to consider the systemic and background factors affecting Indigenous Peoples in Canadian society such as the history and impact of colonialism, including displacement and residential schools.

EXPERT ASSESSMENTS/REPORTS

Crown Attorneys should consider requesting reports and assessments where appropriate as well as consider whether expert or viva voce evidence is required to allow the sentencing Judge to perform their function and to ensure a proper and complete record.

VICTIMS

Crown Attorneys must be aware of the rights of victims to be a part of the sentencing process. The CVBR provisions in the Criminal Code and Manitoba *Victims Bill of Rights* set out the obligations on prosecutors and must form part of the consideration as a case reaches its conclusion. Of particular note is the right of a victim to file a Victim Impact Statement, including, the right to present it at the sentencing hearing.

RESTORATIVE JUSTICE

The concept of Restorative Justice is applicable throughout the Criminal Justice System, including at the point of case resolution. Crown Attorneys should consider the use of Restorative Justice options as an aspect of sentencing where appropriate, such as post plea mediation or a sentencing circle.

RATIONALE:

Crown Attorneys play an important role in public safety by ensuring the principles and purposes of sentencing are achieved by making the most effective use of all provisions in the *Criminal Code of Canada.*

Manitoba
Department of Justice
Public Prosecutions

Guideline No. 5:COM:1

Policy Directive

Subject: Community Access to Justice
Date: January 3, 1991

POLICY STATEMENT:

It is the policy of the Department of Justice that the administration of justice will be accessible to the communities it serves, through the community leaders.

Crown Attorneys who are responsible for prosecutions at courts in rural municipalities will contact in person the band councils of reserves served by the Court, as well as elected municipal officials.

The Crown Attorney is responsible for ensuring that the community leaders understand that the Department of Justice is available to them to address justice related issues, and understand the role of the Crown Attorney in the justice system.

RATIONALE:

For a justice system to be effective it must have community support.

Accessibility to the justice system is essential to the maintenance of community support. It is therefore essential that there be available avenues of communication between the justice system and the community it serves.

This is particularly applicable to aboriginal communities which,
of their cultural differences, may have justice related needs which are unique, yet which traditionally have not had direct access to the justice system.

Accessibility is important to foster a proper understanding of the role of the Crown Attorney in the administration of justice. Open communication will assist in ensuring the justice system is responsive to community needs, for example by developing community related programs, such as community based sentencing resources for probation, supervision, and community service.

Manitoba
Department of Justice
Public Prosecutions

Guideline No. 5: COM: 1.1

Policy Directive

Subject: Restorative Justice and Diversion
Date: May 2015

POLICY STATEMENT

The Restorative Justice Act emphasizes Manitoba's commitment to address certain criminal matters through resolutions that promote healing, reparation and re-integration into the community. Further, the *Act* recognizes that criminal behaviours are often directly related to addictions, mental illness or cognitive impairment and that public safety can be enhanced by addressing these issues.

Restorative justice is defined in *The Restorative Justice Act* as "an approach to addressing unlawful conduct outside the traditional criminal prosecution process". A restorative justice approach asks what harm has been done and how that harm can be repaired. Restorative justice can involve a variety of different outcomes including having the offender work with the victim or the community to make amends, paying financial compensation or attending treatment programs with the goal of reducing the likelihood of re-offending.

A restorative justice approach to unlawful conduct may be utilized at any stage of the criminal process. Matters can be diverted out of the criminal justice system altogether before or after charges are laid. Alternatively, restorative approaches can form part of a traditional prosecution resulting ultimately in a stay of proceedings or the mitigation of sentence.

Under *The Restorative Justice Act* the accused or the victim may request that the matter be dealt with through restorative justice. The ultimate decision as to whether a case is properly dealt with using restorative approaches rests with the Crown Attorney. In determining whether a restorative justice approach is appropriate, Crowns should be mindful of the need to protect public safety but should also recognize that addressing underlying causes of crime such as addictions and mental illness will often promote public safety.

PRINCIPLES:

- All offences are potentially eligible for restorative approaches (for example, a homicide by a person suffering with dementia could be diverted to the mental health system). However, restorative approaches for crimes involving significant violence or crimes that are otherwise very serious would be rare and would

normally only be appropriate post-conviction as part of an overall sentencing plan.

- Matters cannot be prosecuted unless as a first step there is a reasonable likelihood of conviction (see the policy on Laying Charges, May 2015). If this threshold is met, then in determining whether there is a public interest in proceeding with criminal charges, Crown Attorneys should consider whether diversion out of the system or a restorative justice approach is an appropriate outcome. An accused with a criminal record, even for a related offence, is not necessarily an inappropriate candidate for a restorative justice approach. However, the more extensive the accused's history of criminal activity, the less likely it is that such an approach will be appropriate.

- Restorative justice approaches are generally only appropriate if the accused is prepared to admit his or her responsibility for the offence. In some cases this may not be necessary if the accused is prepared to admit a need to obtain help to deal with personal issues such as an addiction and is not challenging the allegations. Certain programs may require the accused to admit responsibility. The admission cannot be used against the accused if it is necessary to ultimately proceed with a prosecution.

- In determining whether a restorative justice approach is appropriate, consideration must be given to the special status of aboriginal people as set out in the *Youth Criminal Justice Act* [s. 38(2) (d)], the *Criminal Code* [s. 718.2(e)], appellate decisions such as *R. v. Gladue* and the recommendations of the Aboriginal Justice Inquiry and the Aboriginal Justice Implementation Commission.

- Where required by either the provincial or federal *Victims' Bill of Rights* or the YCJA (s. 12), the Crown Attorney should speak to the victim regarding the referral of the case to a restorative justice program. The victim's input, while not determinative of whether referral will occur, must be considered. If the victim is not an identifiable individual (e.g. a large corporation), it may not be possible to determine the effect of the particular offence on the victim or to elicit the personal views of the victim regarding that particular offence. In those cases, the Crown Attorney should have regard to all the circumstances in deciding whether consultation with the victim is appropriate.

RATIONALE:

The province has recognized through *The Restorative Justice Act* that there can be many effective and appropriate responses by the justice system to criminal conduct. Rehabilitation has always been an important principle of criminal sentencing. Diverting matters out of the system or utilizing non-traditional approaches that stress healing or reparation to resolve matters within the system is consistent with this goal. If the accused agrees to accept responsibility for his or her action and to participate in a restorative justice program, there could be greater benefit for the accused, the victim and the

community than would be expected by proceeding through the more traditional criminal prosecution system.

Manitoba *Guideline No. 5:COU:1*
Department of Justice
Prosecutions

Policy Directive *Subject: Appointment of Independent Counsel*
Date: September, 2012

POLICY STATEMENT:

Public prosecutions commenced at the instance of the Province of Manitoba are normally conducted by the Province's Crown Attorneys. This cadre of Crown Attorneys is amongst the most experienced and talented group of criminal litigators in Manitoba, and the Department of Justice is fortunate to have their services.

There are, however, some cases that, if prosecuted by the Province's Crown Attorneys, might give rise to inappropriate public perceptions and raise issues of public confidence. Most commonly, these cases involve situations where those who are involved in the administration of criminal justice in Manitoba are themselves directly involved in the case. For instance, where, following a police investigation, it is proposed that criminal charges be laid against a prosecutor or a judge, there exists the need to assure the public that decisions will be made on a principled basis, free from any sort of bias. There will also be cases where public confidence can be assured through prosecution by a provincial Crown Attorney from another part of the province.

The purpose of this policy is to ensure confidence in the justice process by providing for the appointment of independent counsel in those situations where a reasonable person would perceive that an accused person may receive differential treatment because of his/her relationship with Manitoba Justice. The likelihood of such a perception is determined, in large part, by the closeness of the relationship between the accused and the Department. The nature of the alleged offence may also be a secondary factor. The following categories describe the circumstances where the use of independent counsel should be considered, as well as the method by which that decision should be made.

1. Direct Connection to the Justice System. Whenever a criminal charge is laid against a person who is directly connected to the justice system, there may be a reasonable perception that the accused could receive some kind of differential treatment if prosecuted by a staff Crown Attorney. In all such cases, consideration must be given as to whether the matter should be conducted by independent counsel.

Persons who come within this category include judges, Crown Attorneys, police officers, lawyers involved in criminal defence work (or those having regular business with the

Department), as well as employees of the Department of Justice who have direct involvement in either the court process (e.g. court clerks) or Prosecutions (e.g. support staff within Prosecutions). Members of the Legislative Assembly and their immediate staff and family are also in this category. Independent counsel must be considered where the Department has been asked by the Commissioner of the Law Enforcement Review Agency to consider whether criminal charges should be laid following an investigation under *The Law Enforcement Review Act* respecting the conduct of a police officer.

The Assistant Deputy Attorney General is responsible for the assignment of cases to independent counsel. However, the Assistant Deputy Attorney General may delegate this task or matters relating to the supervision of independent counsel. Therefore, when a case in this category arises, the Crown Attorney is expected to refer it to the Assistant Deputy Attorney General (or delegate) as soon as possible.

2. General Connection to the Justice System. This category includes employees of Manitoba Justice who are not directly involved in the court process and, in addition, close relatives of a person with a direct connection to the justice system (provided the Crown is aware of this relationship). In these cases, independent counsel may be appointed. However, in order to require the appointment of independent counsel, the connection of the accused to the justice system must be more than trivial. In making this judgment, consideration should also be given to the seriousness and notoriety of the alleged offence.

In cases where the accused has a general connection to the justice system, the Crown Attorney is expected to refer the case as soon as possible to the Assistant Deputy Attorney General (or delegate) along with a recommendation as to whether independent counsel should be appointed. The Assistant Deputy Attorney General (or delegate) will determine whether the circumstances warrant prosecution by a staff Crown Attorney or outside independent counsel.

3. No Obvious Connection to the Justice System. In the vast majority of cases, there will be no connection between the accused and the justice system. These cases should generally be prosecuted by staff Crown Attorneys. However, there may be unusual circumstances where facts come to light that suggest that independent counsel is appropriate. Crown Attorneys must be alert to situations where a reasonable person may perceive that the accused could receive differential treatment.

If the Crown Attorney, after consultation with his/her Supervising Senior Crown, believes that the circumstances of an accused might give rise to a perception of bias, the case should be referred to the Assistant Deputy Attorney General (or delegate) for a decision as to whether independent counsel should be appointed.

Other Considerations

This Policy applies to individuals who have been charged with criminal offences. However, it may be appropriate to appoint independent counsel in cases involving provincial statute offences given the closeness of the accused's relationship to the Department and given the nature or severity of the offence. Crowns Attorneys who, after consultation with their Senior Supervising Crown, are concerned about the need to appoint independent counsel in a non-criminal case should refer the matter to the Assistant Deputy Attorney General (or delegate) for a decision as to whether independent counsel will be appointed.

It may also be appropriate to apply this Policy, where the individual is not charged with an offence but is the victim of a crime or will be called as a material witness. If the case is one in which a reasonable person would have concern about differential treatment or where the Crown Attorney is concerned that his/her decisions about the case may be influenced because of the identity of a witness or victim, the Crown Attorney should refer the case to the Assistant Deputy Attorney General (or delegate) for a decision regarding the appointment of independent counsel.

Where charges to which this Policy applies have already been laid, or an opinion is sought on whether charges are appropriate, counsel should refer the matter as soon as possible to the Assistant Deputy Attorney General (or delegate) for the appointment of independent counsel.

Nature of Appointments

There are an infinite variety of circumstances in which it may become necessary to appoint independent counsel. In view of this, there are a number of alternative approaches that may be adopted to ensure an independent decision-making process. In ascending levels of independence from government, they are:

a) *Appointment of a Crown Attorney from within Manitoba but from another Crown Office*

In many situations, the necessary degree of independence may be achieved through this type of appointment.

b) *Appointment of a Private Practitioner from Manitoba*

Where a former Crown Attorney who has since left the Department is being considered for appointment as independent counsel, care must be taken to ensure that sufficient time has elapsed to gain a "distance" from the Department. Care must also be taken to ensure that the person selected has not had any previous dealings with the alleged offender.

c) *Appointment of a Crown Attorney from Another Province*

Informal protocols exist between this Department and many other provinces and territories to facilitate the appointment of a Crown Attorney from outside of Manitoba. This approach was judicially approved by the Alberta Court of Appeal in *Kostuch* v. *AG Alberta* (1995), 101 C.C.C. (3d) 321 Alta. C.A., at p. 333 (in which a

Manitoba Crown Attorney was appointed to prosecute in Alberta to avoid a perceived conflict of interest in that province).

d) *Appointment of a Private Practitioner from Another Province*
This option gives maximum independence from the Department. It is also the most expensive option, given the need to travel to and from Manitoba to interview witnesses and conduct proceedings. This option should only be pursued in exceptional cases, and after conferring with the Deputy Attorney General.

Depending on the issues that arise in a particular case, it may be necessary to appoint independent counsel for only one aspect of the case (e.g. the examination or cross-examination of a specific witness).

APPENDIX TO THE POLICY

Upon determining that independent counsel should be appointed, the Assistant Deputy Attorney General (or delegate) will proceed to make the appointment. While individual Crown Attorneys may have relatively little involvement at this stage, it is important that the process should be as transparent as possible and it is useful for Crown Attorneys to be aware of the process.

The Process of Appointment

The principal criteria for the selection of an independent counsel are:

- independence from government and the individuals involved in the specific case;
- excellence in the practice of law;
- a track record for integrity; and
- significant previous experience in either the prosecution or defense of criminal charges in the court system.

In some cases, the Assistant Deputy Attorney General (or delegate) will consult with the Deputy Attorney General before making a final decision. *Ad hoc* appointments will usually be appropriate as individual cases arise. In matters arising under *The Law Enforcement Review Act*, a standing appointment of the independent counsel will be made to facilitate referrals from the Commissioner of the Law Enforcement Review Agency directly to the independent counsel.

Terms and Conditions of Appointment

Where a lawyer from outside the Department is retained to act as an independent counsel, the terms of reference under which the independent counsel is retained should be reduced to writing and made publicly available upon request in order to ensure a transparent process and public accountability. A copy of this Policy Statement and any prosecutions policies or directives that reasonably appear at the outset to be applicable to the retainer must also be provided to the independent counsel once retained, and be made available to the public on request.

Absent exceptional circumstances, the following should generally form a part of the terms of reference:

a) The retainer agreement, including the terms of reference and any subsequent amendments, are publicly available on request;

b) Where a legal opinion is sought, the precise question(s) for which the advice is being sought, and the person to whom it should be provided;

c) The advice and decisions in the case are final and binding on the Department of Justice for the Province of Manitoba, subject only to receiving direction from the Attorney General or the Deputy Attorney General, which direction, if given, will forthwith be made public;

d) Independent prosecutors are required to keep the Department of Justice advised of all significant decisions that they propose to take in connection with the cases they are assigned. This is done solely to keep Department of Justice officials apprised of the status of the case, and to enable the Attorney General or the Deputy Attorney General to give direction as contemplated by "c" of this policy. Independent prosecutors may secure legal assistance from Department of Justice officials who have special expertise in the area being prosecuted on strategies for implementing the decisions that have been taken by independent counsel. However, independent prosecutors should not consult with Department of Justice officials as to the position they will take regarding resolution of the case. In other words, the independent counsel may consult with officials over tactical or legal issues arising in the case but the decision as to how the case should ultimately be resolved must remain with the independent counsel. Should the tactical or legal advice rendered cause the independent counsel to change their position on resolution of the case, this change must be publicly disclosed on the Manitoba Justice website after the trial judge has rendered a verdict in the case or the charge has been stayed. Subject to this policy, independent counsel has full access to all parties within, and all relevant documents and information held by the Department of Justice for the Province of Manitoba. The Assistant Deputy Attorney General (or delegate) shall facilitate contact between the departmental prosecutor and employees and the independent counsel and assist in accessing any documentation held by the Department of Justice.

e) The independent counsel is to be guided by the prosecution policies issued on behalf of the Attorney General of Manitoba, which apply to all provincial prosecutions throughout the province. This includes, for instance, the charge approval standard (see: Crown Policy on Laying and Staying of Charges), disclosure policies as well as directives from the Attorney General on the position to be taken in cases of gang-related crime, violent crime, child victims, etc.

f) The independent counsel is required to consult with the Manitoba Justice Constitutional Law Branch on issues of constitutional law, should they arise in a particular case. This will ensure that independent counsel do not take positions that

are different from, or incompatible with constitutional law positions taken by departmental prosecutors regarding requirements of the Constitution and other related issues.

g) The independent counsel may wish to consult with or obtain advice from experienced criminal lawyers on issues that may arise during the prosecution of a case. Manitoba Justice has several independent counsel on retainer at any given time. Independent counsel may consult with these lawyers, or any of them, in order to obtain guidance. Further, as part of their retainer, members of this group are expected to assist when called upon.

h) The independent counsel is bound by the same obligations as those imposed on departmental prosecutors with respect to *The Victim's Bill of Rights*. A copy of the prosecutions policy regarding legislative obligations on departmental prosecutors under *The Victim's Bill of Rights* must also be provided to the independent counsel. Additional inquiries can be directed by independent counsel to the Assistant Deputy Attorney General (or delegate) who can facilitate consultation with the Victims Services Branch.

i) Periodic administrative meetings may be held between the Assistant Deputy Attorney General (or delegate) and independent counsel to ensure that the referrals to independent counsel are being handled in a conscientious manner (in particular, that files are not being neglected). These administrative meetings are necessary and reasonable and do not diminish the independence of the prosecutor, as the ultimate decision-making authority remains with the independent counsel.

j) In many cases, it will be appropriate to include in the terms of reference a statement to the effect that advice is also being sought on the extent to which information concerning the case, including the opinion sought, should be made available to the public. This will be especially important where the case has attracted considerable public attention and scrutiny.

Manitoba ***Guideline No. 5:PRI:1***
Department of Justice
Prosecutions

Policy Directive ***Subject: Private Prosecutions***
Date: March 2010

POLICY STATEMENT:

All private prosecutions are subject to the scrutiny of the Attorney General. In assessing whether a private prosecution should proceed, Crown Attorneys should be guided by the same charging standard that applies to criminal charges initiated by the police. That is:

1. Is there a reasonable likelihood of conviction, and

2. Is it in the public interest to proceed with the prosecution?

PROCEDURE:

Crown Attorneys should be guided by the following considerations:

The *Criminal Code*

- Section 579(1) authorizes the Crown to enter a stay of proceedings on any criminal charge, including a private prosecution.

- Section 507.1 requires that the Crown be notified of potential private prosecutions. In Winnipeg, the Supervising Senior Crown in the Domestic Violence Unit should be notified of private prosecutions that allege acts of domestic violence. The Supervising Senior Crown in the Youth Unit should be notified of private prosecutions that allege acts by youths. Notice concerning all other private prosecutions arising from Winnipeg should be referred to the Supervising Senior Crown who has been designated for that purpose. In regional offices, notification should be to the Supervising Senior Crown in that area. The Supervising Senior Crown to whom notice is given is expected to consider the merits of the case and make a decision as to whether it is appropriate for the private prosecution to proceed.

Applying the charging standard

- The Crown should not be overzealous in intervening to stay proceedings in private prosecution matters. Allowing a private citizen to bring an allegation of criminal wrongdoing before the court is an important aspect of our legal system. Denial of that opportunity raises access to justice issues.

- The primary concern of the Crown Attorney in evaluating a private prosecution is to assess whether it is either vexatious or without an evidentiary basis that would

support a conviction. In either of these situations, a stay of proceedings is called for.

Options open to the Crown

- Stay of proceedings. This is appropriate where the circumstances of the case do not meet the charging standard.

- Allow the private prosecutor to proceed.

- The Crown takes over the prosecution.
    a) The Crown would be expected to take over a private prosecution if the case is one where the Crown would normally have prosecuted had the case been brought to its attention earlier. Other reasons would include where the case meets the charging standard and is serious, complex or involves an incident where an indictable offence could be charged.
    b) There can be situations where the Crown will decide to take over the prosecution but it will be necessary to appoint independent counsel to conduct the prosecution, e.g. where the accused is a police officer. See the policy on Appointment of Independent Counsel (5:COU:1) for guidance as to when an independent prosecutor is required.

Private Prosecutions versus Peace Bonds.

- The Crown is expected to be involved in reviewing potential private prosecutions. That involvement may even extend to taking over the prosecution in some situations. The situation is very different where a private citizen applies to the court for a recognizance under s. 810. The Crown should generally not become involved in that process.

RATIONALE:

As the "guardian of the public interest," it is incumbent on the Attorney General (and the Crown Attorneys who carry out the work of the Attorney General) to oversee the charges that are brought before the courts to ensure that individuals are not harassed by vexatious criminal allegations where there is no reasonable likelihood of conviction.

Manitoba
Department of Justice
Prosecutions

Guideline No: 6:CRI:1

Policy Directive

Subject: Criminal Convictions – Crown Attorneys

Date: April 20, 1990
Reviewed: May, 2017

POLICY STATEMENT:

There are several categories of offenders and its must be borne in mind that no firm rule can apply, though the following will have application in the absence of extraordinary circumstances:

1. Regulatory Offences:

   Convictions for speeding, imprudent driving, and so on will not usually warrant disciplinary action: However, the attendant behavior of the Crown Attorney with the enforcement official may in certain cases, attract censure. This applies to any situation.

2. Impaired Driving:

   This and related offences are no longer being treated routinely by the courts or society. Convictions in this category will result in a minimum suspension of two (2) consecutive weeks without pay, with additional time imposed according to exacerbating features of the case. These would include a high reading, public endangerment, abusive behavior, and so on.

3. Theft:

   Convictions for crimes of moral turpitude will result in immediate dismissal irrespective of whether a discharge is imposed.

4. Other Criminal Offences:

   Convictions for crimes of violence or other serious matters, particularly indictable offences may result in termination, according to the particular case.

In the event of an acquittal, the record may nevertheless be reviewed, with a view to disciplinary consequences. Though it may fall short of the standard for criminal conduct,

it may be conduct which falls short of what is expected of crown counsel in their professional and/or public deportment.

RATIONALE:

The fact of convictions for criminal and some quasi-criminal offences is an embarrassment to the Crown office, where a prosecutor is found guilty of these kinds of misconduct. In many respects, it impairs the ability of the prosecutor to be perceived as impartial and representative of the best ideals of the community.

Manitoba
Department of Justice
Public Prosecutions

Guideline No. 6:OBL:1

Policy Directive

Subject: Obligation to Report to Professional Associations

Date: April 17, 1991

POLICY STATEMENT:

Where a Crown Attorney is charged with any criminal offence, the Deputy Attorney General shall be notified in accordance with the policy on this subject.

It shall be the responsibility of the Assistant Deputy Attorney General to notify the Law Society of Manitoba, in writing, of such charges being laid.

Further, it shall be the responsibility of the Assistant Deputy Attorney General to notify any professional agency, of any criminal charge laid against one of its members, where the subject of the criminal charge involves a matter of significant public protection, and which in particular, may involve the welfare of vulnerable groups.

RATIONALE:

Law prescribes the minimum standard of conduct. Ethics, which are generally the responsibility of professional associations, govern conduct of members to a much high standard. Associations are unable to exercise their ethical or professional sanctions unless they know of alleged criminal conduct, and are unable to track it adequately.