



# Crown Prosecution Manual

Criminal Law Division – Ministry of the Attorney General

## **Preamble to the Prosecution Manual**

### **Prosecution Manual**

The legal framework for decisions made by Prosecutors is provided by the Criminal Code, other federal legislation and legal decisions of courts. It is also necessary in the public interest to have uniform prosecution policies applicable across the province in order to assist and guide Prosecutors in the exercise of their discretion. Prosecution policies provide mandatory direction, advice and guidance to Prosecutors on the exercise of prosecutorial discretion.

In Ontario, prosecution policies are issued by the Attorney General through the issuance of Directives. The Directives, as a whole, constitute Ontario's Prosecution Manual. Directives provide consistency of approach to prosecutions across Ontario and typically relate to a particular category of cases (e.g. impaired driving or intimate partner violence) or to a specific prosecutorial issue (e.g. judicial interim release (bail)). The Directives also provide the public with an indication of the guiding principles for Prosecutors, enhancing accountability and transparency.

Prosecutors are required to familiarize themselves with the contents of the Prosecution Manual and must follow the mandatory direction, advice and guidance as set out in the Directives when making decisions in cases. The Directives are not intended to replace the sound judgement that Prosecutors exercise. Prosecutors are expected to exercise their discretion in accordance with the overall priorities in the Manual, keeping in mind the need to see justice done in individual cases. Directives which bind the discretion of the Prosecutor in the conduct of individual cases are few and far between. There will be decisions made daily by Prosecutors that are not specifically described in the Directives. In general, Prosecutors should exercise their discretion in keeping with the spirit of the Directives and their duties as local Ministers of Justice.

### **The role of the Attorney General**

The Attorney General of Ontario occupies a unique dual position – as both the Minister of Justice for the provincial government and as the Chief Law Officer of the Crown. The Attorney General is a minister and member of Cabinet. The responsibilities of the Attorney General extend beyond those of other Cabinet ministers [[Roles and Responsibilities of the Attorney General](#)].

Under the Canadian constitution the federal government is responsible for the creation of criminal law, and the provinces are responsible for the administration of justice. As

Chief Law Officer in Ontario, the Attorney General is responsible for the administration of justice, including the prosecution of individuals charged with criminal and regulatory offences. The Attorney General must carry out the prosecutorial responsibilities based on objective, legal criteria, independent of any political considerations that may arise in any particular criminal case or area of criminal policy.

It is extremely rare for an Attorney General to become involved in decision-making in individual prosecutions. Decisions in individual prosecutions are made by the Prosecutors who act as agents for the Attorney General. The Prosecutors are part of the Criminal Law Division under the Ministry of the Attorney General.

In the event that the Attorney General or Deputy Attorney General seeks to provide instructions to the Assistant Deputy Attorney General – Criminal Law Division on the conduct of a particular criminal prosecution or appeal that direction must be given in writing and must be published in a publicly accessible electronic forum. The publication of any such direction may be delayed by the Assistant Deputy Attorney General – Criminal Law Division, if the publication of the direction would interfere with the interests of justice.

Where the Attorney General or Deputy Attorney General provides their personal consent to a prosecution-related matter as required under the *Criminal Code*, that consent will be filed with the relevant court or tribunal and will thereby be publicly accessible.

As with a particular prosecution or appeal, it is equally important that the development of criminal policy that relates to the prosecution of a category of cases or to specific prosecutorial issues also be free from political influence. Where the Attorney General seeks to provide specific direction to the Deputy Attorney General and the Criminal Law Division as it relates to the prosecution of a category of cases, specific prosecutorial issues or criminal policy that specific direction will be in writing. The applicable Directive will be revised (or newly posted) and the 'new' content will be clearly identified.

The publication of any such direction promotes the paramount goals of openness and transparency. Transparency avoids allegations of improper political influence that, even unfounded, can have significant adverse implications for the Attorney General, the government and public confidence in the criminal justice system.

## **The role of the Prosecutor**

Prosecutors are appointed to act as 'agents' for the Attorney General and in turn, make the vast majority of prosecution-related decisions. Prosecutors have significant discretion to conduct cases in a way that ensures justice is done and is responsive to the particular circumstance of a case. When exercised fairly and impartially, prosecutorial discretion is an essential component of the criminal justice system.

The independence of the Attorney General advances the public interest by enabling Prosecutors to exercise considerable prosecutorial discretion and properly fulfill their quasi-judicial role as ministers of justice without fear of political influence.

The Prosecutor must act with objectivity, independence and fairness in each case to ensure timely and principled decision making based on the circumstances of the accused and the alleged offence and an appropriate use of legal principles without outside pressure or considerations. Decisions made by Prosecutors in the proper exercise of their discretion will be supported by the Attorney General.

The Prosecutor should not consider the personal feelings of any official involved in the prosecution about the alleged victim or the accused, the potential political advantage or disadvantage that might flow from the decision to undertake or stop a prosecution, or the possible effect on the personal or professional circumstances of anyone connected to the exercise of prosecutorial discretion.

Prosecutors are dedicated to enhancing public safety and to promoting public confidence in the administration of justice and the rule of law. As representatives of the Attorney General, Prosecutors act with integrity to protect the interests of all Ontarians through fair, effective and efficient prosecutions.

### *Acting as "advocate"*

Public confidence in the administration of criminal justice is strengthened by a system where Prosecutors are not only strong and effective advocates for the prosecution but also Ministers of Justice with a duty to ensure that the criminal justice system operates fairly to all: the accused, victims of crime and the public. A Prosecutor's role excludes any notion of winning or losing. A Prosecutor's responsibilities are public in nature. As a Prosecutor and a public representative, demeanor and actions should be fair, dispassionate and moderate; show no signs of bias; and be open to the possibility of the innocence of the accused person.

Prosecutors have a responsibility to ensure that every prosecution is carried out in a manner consistent with the public interest. The Prosecutor must remain objective and

be aware of the negative impact of stereotypes. In particular, stereotypes relating to race or ethnic origin, colour, religion, sex, sexual orientation, gender identity, gender expression, political association or beliefs of the accused or any person involved in the case must be rejected.

#### *Relationship with the police*

Police officers have a responsibility and discretion over the investigation of a criminal offence and the laying of criminal charges except where the consent of the Attorney General is required by statute. While both the police and the Prosecutors exercise discretion independently and objectively, the relationship between the investigative service and the prosecutorial service is one of cooperation and mutual reliance.

#### *Relationship with victims*

Prosecutors owe special duties of candour and respect to all victims. The Prosecutor is not, and can never, function as the victim's lawyer. Prosecutors must display sensitivity, fairness and compassion in their dealings with victims. In circumstances where the fair and impartial exercise of prosecutorial discretion is at odds with the victim's desires, the Prosecutor should be sensitive but realistic and candid with the victim.

Prosecutors must ensure that efforts are made that victims are provided with all relevant information that allows for full and fair participation in criminal proceedings. Prosecutors also have an important role to play in identifying victims who may require assistance to fully access the criminal justice system, or to communicate their evidence to the court.



## Words and Phrases for Directives

### 1. General guidelines concerning interpretation

In the Manual, the following general guidelines apply:

- a) a word importing a masculine gender includes the feminine gender, and a word importing a feminine gender includes the masculine gender
- b) a word in the singular includes the plural, and a word in the plural includes the singular
- c) where a word is defined, other parts of speech and tenses of the same word have corresponding meaning.

### 2. Specific Definitions

In the Manual, except where the context requires otherwise, each of the following words and phrases has the corresponding meaning that is set out below:

**“accused”** refers to a person charged with an offence and alleged to have committed an offence

**“approval”** means receiving prior permission, absent exceptional circumstances

**“Attorney General”** means the principal law officer of “the Prosecution service”; the Minister of the provincial government responsible for the administration of justice

**“Crown Attorney”** means the Crown Attorney of a particular jurisdiction

**“Director”** means the Director of Crown Operations of a particular region, the Director of the Crown Law Office – Criminal or the Director of Guns and Gangs

**“designate”** means the approval function has been delegated to experienced counsel who were selected and approved by the appropriate supervisor

**“exceptional circumstances”** are those where public safety including that of specific victims or overall public interest is better served by departing from the recommended

course of action and includes unusual or unique situations arising in criminal prosecutions, many of them unforeseeable; issues relating to expediency or complexity do not constitute exceptional circumstances

“**may**” indicates that there is an issue that must be considered or a discretion to exercise, and that decision or action may, or may not, be taken

“**must**” indicates a mandatory direction made by the Attorney General

“**must, absent exceptional circumstances**” means that the Attorney General’s policy strongly leans toward the suggested course of action, but takes into account the unique situations that arise in criminal prosecutions

“**must obtain approval from...**” signifies an action or decision that requires supervisory permission received prior to the action or decision being made, absent exceptional circumstances

“**offender**” means a person who has been determined by a court to be guilty of an offence, whether on acceptance of a plea of guilty or on a finding of guilt

“**Prosecutor**” means counsel responsible for criminal and quasi-criminal prosecutions and related matters on behalf of the Attorney General, and includes outside prosecutors and *per diem* prosecutors

“**shall**” reflects a legal requirement relating to a statutory obligation

“**should**” indicates that there is an expectation that a task will be carried out, but recognizes that it may not always be possible or desirable to do so in the particular circumstance

## Appeals

The *Criminal Code* creates the rights of appeal to all levels of court, for both an accused and the Attorney General. Anyone convicted of an offence may appeal conviction and/or sentence. The *Criminal Code* also provides the Attorney General with a right to appeal acquittals, orders for stays, and sentences in certain circumstances.

The appeal process in each level of court is governed by rules created for that specific court. Appeals from summary conviction matters are first heard in the Superior Court of Justice. In some cases, there is a further right of appeal, from the Superior Court to the Court of Appeal of Ontario. Appeals from indictable matters are heard in the Court of Appeal of Ontario. In limited circumstances, a decision of the Court of Appeal may be appealed to the Supreme Court of Canada.

When a case is being appealed, the appellate Prosecutor must notify the Prosecutor who conducted the trial (or who conducted the summary conviction appeal) of significant steps in the appeal proceedings before the case is heard in court. The appellate Prosecutor also must ensure that efforts are made to advise the victim of significant steps in the appeal proceedings before the case is heard in court. Reference should be made to the [Victims Directive](#).

### Crown appeals

The *Criminal Code* provides the Attorney General with a right to appeal in some circumstances, and sets out the legal criteria that shall be met. No Crown appeal may be approved unless it is in the public interest to fix the error and the legal basis for an appeal has been satisfied.

- in the case of indictable appeals to the Ontario Court of Appeal and the Supreme Court of Canada, the proposed appeal must involve an error of law alone
- in the case of summary conviction appeals, the proposed appeal can be based on a question of fact, or mixed fact and law, or an error of law alone

- the verdict would not necessarily have been the same if the error had not been made or
- in the case of a sentence appeal, the sentence that was imposed was demonstrably unfit, illegal or the result of an error in principle.

Prudence, restraint and a careful attention to the public interest are important principles that guide the Attorney General in reaching a decision whether or not to launch any appeal. Not every unfavourable ruling, judgment or sentence can or should be appealed. Even if the strict legal criteria for an appeal is met, a Crown appeal will not be commenced unless a thorough and considered review of the circumstances of the case, the state of the law, and the public interest has been conducted. The following factors inform such determinations:

1. the safety and security of the public, having particular regard to the seriousness of the offence and the future dangers posed by the offender
2. the importance of the legal issue raised
3. the current state of the law on the issue being raised
4. the importance of the factual issue(s), if raised on a summary conviction appeal, having regard for the impact of the finding in the particular jurisdiction
5. the effect of the legal error on public confidence in the criminal justice system if it is left to stand
6. deference to the jury's verdict and the recognition that it will not be lightly set aside by an appellate court
7. whether the trial record provides a suitable basis upon which to raise the issues on appeal
8. the strength of the Crown's case and whether it may have deteriorated by the time a new trial is ordered or whether the Crown intends to proceed with a new trial. Generally, it will not be in the public interest to appeal an acquittal where there is no expectation that the Crown will proceed with a new trial
9. whether there is a reasonable prospect that the appeal will be successful.

#### *Obtaining approval for crown appeals*

As a general rule, summary conviction appeals are dealt with by the Crown Attorney's office in the jurisdiction where the trial took place. The Prosecutor who conducted the trial must obtain approval for an appeal to the Superior Court of Justice from her Crown Attorney or designate. In the case of trials of summary conviction matters that were prosecuted by counsel from the Crown Law Office – Criminal, approval for a summary conviction appeal to the Superior Court of Justice must be obtained from the Director or designate.

All requests for a Crown appeal to the Court of Appeal for Ontario must, absent exceptional circumstances have the approval of either the Crown Attorney or the Director for the jurisdiction where the trial took place, or their designate. The request must be made in writing to the Director of Crown Law Office – Criminal who will decide whether the proposed appeal should be launched.

Following an unsuccessful Crown appeal or a successful defence appeal, the Attorney General may seek a further appeal to the Supreme Court of Canada. The appellate Prosecutor who conducted the appeal in the Court of Appeal for Ontario must obtain the approval for an appeal to the Supreme Court of Canada from the Director of Crown Law Office - Criminal.

### *Timelines*

Strict time lines that are set out in the rules govern all appeals. There are some differences in the timelines depending on the nature of the appeal, who is the appellant and the court to which the appeal is being filed. In limited circumstances, the Court may extend these timelines.

For Crown appeals to the Superior Court of Justice and the Court of Appeal for Ontario, from an acquittal, an order staying the trial, or a sentence, the appellate Prosecutor shall serve the notice of appeal within 30 days of the date of the decision being appealed.

All notices of appeal of a mental disorder disposition shall be served within 15 days of the date of receipt of the reasons for the disposition.

### **Publication bans**

The appellate Prosecutor must ensure compliance with any publication bans imposed, whether by statute or otherwise, by court order.

### **Responding to defence appeals**

The *Criminal Code* provides a broad right of appeal to an accused from conviction and sentence. Defence appeals can be brought with or without a lawyer. Each jurisdiction, or level of court, may have specific procedures and rules that govern appeals brought by unrepresented appellants who are in custody.

### *Judicial interim release pending an appeal*

An appellant who has been sentenced to a period of custody may apply to be released from custody pending appeal, in accordance with the relevant legislation.

The appellate Prosecutor must ensure that efforts are made to notify the Prosecutor who conducted the trial (or the summary conviction appeal), when the appellate Prosecutor is notified of an application for judicial interim release pending appeal.

The appellate Prosecutor also must ensure that efforts are made to advise the victim when an application for judicial interim release pending appeal has been made and advised of the outcome of the hearing. The appellate Prosecutor should consider the directions set out in the [Victims Directive](#).

### *Conceding appeals*

The appellate Prosecutor may concede an appeal only where no reasonable argument can be made to sustain the verdict and/or sentence, after a comprehensive and rigorous analysis of the strengths and weaknesses of the case. In addition, the appellate Prosecutor must be satisfied that fairness and the interests of justice are best served by a concession. Although the Court will give the concession considerable weight, it is not bound to accept a concession.

In all cases, before conceding a defence appeal, the appellate Prosecutor must, absent exceptional circumstances, consult with the Prosecutor who had carriage of the trial or the summary conviction appeal.

In the case of a summary conviction appeal, the appellate Prosecutor must obtain the approval for the concession from the Director, or where delegated the Crown Attorney or the Supervisor of the Summary Conviction Appeals Office. For an indictable appeal, the appellate Prosecutor must obtain the approval for the concession from the Director of Crown Law Office - Criminal.

This requirement for approval to concede an appeal applies equally where the appellate Prosecutor concludes that there was a *Charter* violation and there is no reasonable argument that can be made against the granting of a *Charter* remedy.

### *Concessions of unconstitutionality*

Striking down a piece of legislation (provincial or federal) or common law rule as unconstitutional has broad implications for the administration of justice. Only in rare circumstances will it be appropriate for the Prosecutor to concede that a statutory

provision or common law rule is inconsistent with the *Constitution* and cannot be saved as a reasonable limit under the *Charter*.

In all cases whether trial or appeal, a Prosecutor must obtain the approval of the Deputy Attorney General before conceding that a statute or common law rule is unconstitutional, regardless of whether reliance will be made on section 1 of the *Charter*.

## **Attorney General Consent and Delegation**

The *Criminal Code* directs that certain criminal proceedings or procedures can be commenced or undertaken only with the consent of the Attorney General. The Attorney General grants broad areas of discretion in criminal proceedings to Prosecutors, his agents, except in those specific circumstances where the law requires the personal consent of the Attorney General.

The *Criminal Code* defines the Attorney General as including his lawful Deputy. The Attorney General and his delegates exercise discretion in a fair and conscientious manner unaffected by irrelevant considerations, prejudice or partisan motives. Individual cases are assessed objectively and dispassionately. The public interest in the effective enforcement of the criminal law is the paramount consideration in making decisions to consent or refuse to consent.

### **Attorney General consent**

The Attorney General's consent has not been delegated and is required in the following circumstances:

- initiating a dangerous offender or long-term offender application
- directing an indictment
- initiating a prosecution for advocating genocide
- initiating a prosecution for wilfully promoting hatred
- seizing hate propaganda
- providing an undertaking for suspected proceeds of crime, valued at greater than two million dollars
- the negotiation for a remediation agreement with an organization alleged to have committed an offence
- designating wiretap agents to obtain wiretap authorizations
- extending wiretap notification periods
- recommencing a prosecution where jurisdiction has been lost
- overriding an accused's election and directing a jury trial

## **Power to delegate**

The Attorney General has the power to delegate his authority and, in certain instances, has delegated consent and power to the Assistant Deputy Attorney General, the Directors, Crown Attorneys or to Prosecutors in the Criminal Law Division.

In all instances where the Attorney General has delegated consent and power, the decisions are made in the same way, and on the same basis, that the Attorney General exercises this discretion. Once the Attorney General delegates authority, the delegate must exercise the power personally and must not delegate any further.

Where the consent of the Attorney General or delegate is required the Prosecutor must follow the process and procedures mandated by the relevant Directives (e.g. [Direct Indictments](#), [Hate Propaganda and Hate Motivated Offences](#), [Dangerous/Long-term Offenders](#) Directives).

Where the consent of the Attorney General or his delegate is received to initiate a prosecution, the Prosecutor must notify the Assistant Deputy Attorney General -Criminal Law Division in order to seek prior approval prior to withdrawing or staying the prosecution.

[List of Attorney General Delegations](#)

## **Charge Screening**

A charge may only proceed if there is a reasonable prospect of conviction and it is in the public interest. The appropriate exercise of prosecutorial discretion is fundamental to the proper application of the charge screening standard. The community relies upon Prosecutors to pursue charges that can be proven while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction.

Deciding to continue or terminate a prosecution can be one of the most difficult decisions a Prosecutor can make. The Prosecutor must act with objectivity, independence and fairness in each case to ensure a principled decision is made. It requires a balancing of competing interests including the interests of the public, the accused and the victim.

The charge screening obligation is ongoing as Prosecutors receive new information in preparation for and during the conduct of bail hearings, pre-trials, preliminary hearings, trials and appeals. Any new information received during or after all appeals have been exhausted should be forwarded to the Director of Crown Law Office – Criminal.

Decisions made by Prosecutors about whether to continue or terminate a prosecution made in the proper exercise of their discretion will be supported by the Attorney General.

### **Reasonable prospect of conviction**

When considering whether to continue the prosecution of a charge, the Prosecutor should determine if there is a reasonable prospect of conviction. This standard must be applied to all cases and at all stages. If at any stage of the proceeding, the Prosecutor determines there is no longer a reasonable prospect of conviction, the prosecution must be discontinued.

The reasonable prospect of conviction standard is higher than a *prima facie* case that merely requires that there is evidence whereby a jury, properly instructed, could convict. On the other hand, the standard does not require "a probability of conviction," that is, a conclusion that a conviction is more likely than not. The term reasonable prospect of conviction denotes a middle ground between these two standards. It requires the exercise of prosecutorial judgment and discretion based on objective indicators found in the case itself.

Applying the reasonable prospect of conviction standard requires a limited assessment of credibility based on objective factors, an assessment of the admissibility of evidence and a consideration of likely defences.

In applying the standard, Prosecutors should consider the following factors:

- the availability of evidence
- the admissibility of evidence implicating the accused
- an assessment of the credibility and competence of witnesses, without taking on the role of the trier of fact
- the availability of any evidence supporting any defences that should be known or that have come to the attention of the Prosecutor.

## **Public interest**

If there is a reasonable prospect of conviction, the Prosecutor must then consider whether it is in the public interest to continue the prosecution. The public interest factors must only be considered after it is determined there is a reasonable prospect of conviction. No public interest, however compelling, can warrant the prosecution of an individual if there is no reasonable prospect of conviction.

When deciding whether to prosecute or discontinue the prosecution a number of public interest factors should be considered. No one factor is determinative when assessing the public interest, but consideration should be given to:

1. the gravity or relative seriousness of the incident
2. circumstances and views of the victim including any safety concerns
3. the age, physical health, mental health or special vulnerability of an accused, victim or witness

4. the prevalence of the type of offence and the actual or potential impact of the offence on the community and/or victim
5. the criminal history of the accused
6. whether the consequences of any resulting conviction would be unduly harsh or oppressive to the accused
7. whether the accused is willing to co-operate or has already co-operated in the investigation or prosecution of others
8. the degree of culpability of the accused, particularly in relation to other alleged parties to the offence
9. the likely outcome in the event of a finding of guilt, having regard to the sentencing options
10. the length and expense of a trial when considered in relation to the seriousness of the offence
11. the availability of any alternatives to prosecution such as diversion and civil remedies.

This is a non-exhaustive list and some cases will raise unique factors. Not all factors will be applicable to every case and in any particular case one factor may deserve more weight than it might in another case.

In determining whether there is a public interest to proceed or discontinue the prosecution, the Prosecutor must remain objective and be aware of the negative impact of stereotypes. In particular, stereotypes relating to race or ethnic origin, colour, religion, sex, sexual orientation, gender identity, gender expression, political association or beliefs of the accused or any person involved in the case must be rejected.

The Prosecutor should not consider the personal feelings of any official involved in the prosecution concerning the victim or the accused, any political advantage or disadvantage that might flow from the decision to undertake or stop a prosecution or the possible effect on the personal or professional circumstances of anyone connected to the prosecution decision.

There is no class of cases that are of necessity outside the public interest to prosecute.

## **Discontinuing the prosecution**

Where there is no reasonable prospect of conviction or there is no public interest to proceed, the Prosecutor must withdraw the charge. Brief reasons should be provided on the record where the Prosecutor withdraws the charge unless such comments would breach a privilege or create a risk of harm.

A stay of proceedings is not appropriate where a charge does not meet the charge screening standard and there is no expectation that it will meet the standard within a year. A stay is only appropriate where the proceedings are temporarily discontinued with an expectation of recommencing within one year.

Before discontinuing the prosecution, the Prosecutor must ensure reasonable steps are taken to inform the victim and the investigating officer that the charges will be withdrawn. Reference should be made to the [Victims Directive](#), [Sexual Assault Against Adults Directive](#) and [Intimate Partner Violence Directive](#).

## Community Justice Programs for Adults

Community justice programs may provide an effective alternative to a formal prosecution. In some cases, the needs and interests of society can be better served through the exercise of prosecutorial discretion to withdraw or stay criminal charges upon an accused person's completion of a comprehensive diversion program.

Community based sanctions hold an accused person accountable for criminal conduct by requiring the completion of rehabilitative programs that effectively respond to the nature of the offence and accused, and the local needs of the community. An example is the Direct Accountability Program, in place in most jurisdictions across Ontario. Another example is the Indigenous Community Justice Program that provides an alternative for Indigenous adults.

Accused persons participating in one of the programs must be willing to assume responsibility for the actions that lead to the criminal charge and be prepared to make meaningful amends. Once in a program, a plan will be created for the accused that will address the underlying cause that lead to the offence. Prosecutors must only consider community based sanctions if a reasonable prospect of conviction exists and must not impose additional requirements on the accused person as a precondition to offering an alternative to diversion.

In circumstances where no formal programming options exist, Prosecutors may also exercise their discretion to consider informal modes of diversion. Where the alternative is a donation to charity, the amount donated must be approved by the Crown Attorney or designate, if it exceeds \$1000.

This directive addresses diversion for adult accused persons. For young persons, please see [Youth Criminal Justice - Extrajudicial Sanctions](#). For an adult suffering a mental illness, please see [Mentally Ill Accused - Alternatives to Prosecution](#). For an Indigenous accused, please see [Indigenous Peoples Directive](#).

## Ineligible offences

Prosecutors must not refer any of the following offences to a community justice program, regardless of the circumstances of the offence or the accused:

- murder, manslaughter, infanticide, criminal negligence causing death
- driving offences causing death or bodily harm
- aggravated assault
- simple impaired driving or driving with a prohibited blood alcohol concentration or refusing to provide a breath sample
- offences involving firearms
- criminal organization offences
- terrorism offences
- kidnapping
- voyeurism
- publication etc., of intimate images without consent
- child abuse and child luring
- offences involving child pornography
- home invasions
- human trafficking offences
- robbery
- sexual offences including sexual assault, sexual assault cause bodily harm, sexual interference and exploitation, invitation to sexual touching and incest
- any offences where the Attorney General's consent was obtained to initiate proceedings.

## Presumptively ineligible offence

In exceptional cases, the Prosecutor may refer the following presumptively ineligible offences to a community justice program with the prior approval of the Crown Attorney or designate:

- hate-motivated offences [[Hate Propaganda and Hate Motivated Offences Directive](#)]
- intimate partner violence offences [[Intimate Partner Violence Directive](#)]
- criminal harassment.

## **Eligible offences**

The Prosecutor may refer any other offence to a community justice program.

## **Factors to consider**

In determining if a community justice program is an effective alternative to a formal prosecution for a presumptively ineligible offence or eligible offence for an adult accused, the Prosecutor and Crown Attorney or designate must consider the following factors:

### *Background of the accused person:*

1. the age and health of the accused person
2. any prior findings of guilt or past involvement with community justice programs
3. the nature and number of any such previous offences
4. any outstanding charges
5. the role of the accused person and their corresponding degree of responsibility in relation to the offence
6. whether the accused person had been previously victimized
7. any remorse and willingness to engage in a community justice program
8. any prior restitution
9. if the accused person comes from a disadvantaged group
10. whether the accused self-identifies as Métis, Inuit or First Nation.

### *The circumstances and nature of the offence:*

1. whether the offence is summary or indictable
2. whether the offence involves violence
3. whether the offence actually harmed the victim (physical, psychological or financial) and/or society
4. whether the incident affected the sexual integrity of a person
5. whether a weapon was used or threatened to be used
6. whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable
7. whether the offence was against the administration of justice, such as breach of a court order, and, if so, the extent of non-compliance
8. whether the offence involved malice, extortion, exploitation or revenge
9. whether the offence involved a breach of trust
10. whether the offence was motivated by bias, prejudice, or hate

11. the age of the victim
12. the views of the victim and/or their parents or legal guardians (if victim is a child), if available.

*Administration of justice considerations:*

1. public confidence in the administration of justice
2. the length and expense of a trial when considered in relation to the seriousness of the offence
3. the likely sentence upon conviction
4. the availability of an appropriate sanction, including culturally relevant programming options, which will hold the accused person accountable and focus on correcting the offending behaviour
5. frailties in the prosecution e.g. staleness of the case, or the technical nature of the offence
6. whether the consequences of the prosecution would be unduly harsh to the accused person, the victim or any witnesses in the case, owing to such factors such as age, health or the relationship between the parties
7. whether a just result is accelerated by a referral to a community justice program.

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## **Confidential Informers**

Confidential informers play a vital role in law enforcement. The near absolute privilege attached to the identity of these individuals is premised on the duty of all citizens to aid in enforcing the law and is meant to protect them against retribution from those involved in crime and to encourage continued information sharing.

Confidential informer privilege applies to those who provide information about a crime to the police, or otherwise assist the police, on the understanding that their identities will not be revealed. In order for the privilege to apply, there must be an explicit or implicit offer of confidentiality.

### **Informer privilege**

Prosecutors have a duty to protect the identity of confidential informers. Once informer privilege is found to exist the Prosecutor, police and Court are duty bound to protect the privilege.

Where the privilege applies, Prosecutors must ensure that no disclosure occurs of any information that might tend to reveal the identity of an informer, or their status as an informer. This obligation continues throughout every stage of the proceedings including the questioning of witnesses. In light of the serious consequences that could arise from a breach of this privilege, Prosecutors must alert their Crown Attorney to the existence of any case involving a confidential informer at the earliest opportunity.

Any issues regarding confidential informer privilege should be considered at the earliest possible stages in a prosecution.

## **Waiver**

The privilege belongs jointly to the prosecution and the confidential informer. Neither can waive it without the consent of the other. Waiver is only valid where the informer has clearly and unequivocally waived the procedural safeguards associated with the privilege and is doing so with full knowledge of the rights that the privilege is designed to protect and of the effect, the waiver will have on those rights.

Waiver of an informer's privilege will only apply to the particular case and should never be assumed to mean an informer has waived any claims to privilege in past or future cases.

## **Disclosure obligations**

A Prosecutor must not disclose any information that might tend to identify a confidential informer. It is the responsibility of the Prosecutor, together with the police, to comprehensively review and vet all disclosure materials.

Once it is determined that a case involves a confidential informer, that case must be brought to the attention of the Crown Attorney or designate for immediate assignment. The assigned Prosecutor is responsible for determining what material can be disclosed. No information that may tend to reveal the identity of the informer nor implicitly reveal their identity may be disclosed.

No disclosure in a criminal file involving an informer should be provided until the Prosecutor has been able to review and vet the entire file. Where possible, this should be done with the assistance of a confidential informer's assigned handler to ensure that no information is disclosed that may tend to identify a confidential informer.

The privilege continues to apply even if the informer's identity becomes known through notoriety or inadvertent disclosure.

## **Inadvertent disclosure**

The Prosecutor must immediately inform the relevant police agency of any breach or potential breach of informer privilege so that appropriate steps can be taken.

In these circumstances, the Prosecutor must immediately notify her Crown Attorney of the breach. The Prosecutor must contact defence counsel, request the information be returned, along with any copies produced, and request that the information not be disclosed to any other person, including their client. The Prosecutor may be required to

bring an application before the court for an order compelling the defence counsel to return the materials sought.

## **Innocence at stake exception**

The privilege that is attached to a confidential informer's identity may give way when an accused person's innocence is at stake. "Innocence at stake" is the *only* justification to pierce informer privilege.

Confidential information protected by privilege may be disclosed by court order where an accused person establishes that their innocence is at stake. A claim of innocence at stake cannot be speculative and shall be supported by evidence. The application to establish innocence at stake is generally made at the close of the Crown's case.

If the judge determines that the evidence establishes that innocence is at stake, then the judge will order production of information only to the extent necessary.

If an order is granted requiring disclosure of confidential information that may tend to reveal the identity of an informer, a Prosecutor must inform her Crown Attorney of the ruling.

The Prosecutor must not reveal information that may tend to disclose the identity of an informer who has not waived the privilege, even where the exception is found to apply. If an order is made that innocence is at stake and the informer does not waive the privilege, the Prosecutor must reassess reasonable prospect of conviction and determine whether the prosecution can continue. The Prosecutor may also request an appeal of the judge's ruling under the *Canada Evidence Act*.

## **Contact with Media**

Public confidence in the administration of criminal justice is enhanced by the availability of appropriate and timely information about cases before the courts and the criminal process. Prosecutors have an important role to play as “Ministers of Justice” and have a responsibility to relate to the media and the public in a manner consistent with that role. Comments must be fair, factual, dispassionate and moderate and must be respectful of the court and all participants in the proceedings.

All communication with the media must be open and transparent and never “off the record”. The Prosecutor must not express personal opinions.

Prosecutors may confirm or provide factual information that is already in the public domain. They should also provide general information or explanations about the criminal process. Prosecutors must not provide information to the media prior to its presentation as evidence in court. Prosecutors must not initiate contact with the media without having obtained prior approval of the Crown Attorney or designate.

This policy applies to all methods of communication including traditional media, electronic news outlets, websites and social media.

## **Public discussions**

Any public discussions which could prejudice ongoing proceedings are prohibited and this prohibition applies until the end of the appeal process. In all their dealings with the media, Prosecutors must bear in mind the presumption of innocence and the need to protect the integrity of the court process and the rights of all the participants in the court process. Prosecutors must not comment on:

- the possibility of charges being laid
- cases under review or investigations that are ongoing
- speculation as to what may happen during any stage of ongoing proceedings

- discussions held with colleagues or members of an investigative agency, whether or not such advice or discussions are privileged
- any information the disclosure of which is prohibited by law or by a court-imposed publication ban
- policies, procedures or decisions of investigative agencies (such inquiries should be directed to the investigative agency)
- the wisdom or efficacy of federal or provincial policies, programs or legislation
- the existence of any plea negotiations or possibility of a plea of guilty or other disposition
- the strength or weakness of the prosecution or defence case including undisclosed elements of the prosecution's case or strategy
- the appropriateness of a judge's charge to the jury, particular rulings, the verdict of a jury, the sentence or any comments made by the judge
- whether a decision will be appealed or whether an appeal has been requested or not (however, the procedure for considering whether or not to appeal may be explained) or
- the guilt or innocence of an accused or anything that could jeopardize the accused's right to a fair trial.

Prosecutors should refrain from publicly elaborating on the reasons for the exercise of prosecutorial discretion beyond what was placed on the court record. When the Prosecutor is unsure how to respond to a media inquiry, Prosecutors should refer the media to the Ministry's media spokesperson at the Ministry of the Attorney General.

## **Publication bans and court exhibits**

If a member of the media inquires about a restriction on publication, the Prosecutor should advise the media member about the existence of a publication ban. A Prosecutor must avoid providing legal advice to members of the media or the public respecting the propriety of publication or the breadth of any publication ban.

Judicial documents and court exhibits, including Victim Impact Statements, are generally accessible to the public. The Prosecutor should seek to restrict access in any case where public access to court exhibits may undermine the right to a fair trial, violate privacy interests or interfere with the administration of justice.

Reference should be made to the [Publication Bans and Sealing Orders Directive](#).

## **Communicating with the media in a personal capacity**

Public statements by Prosecutors must not compromise their ability to function effectively as public servants nor diminish the public perception of impartiality necessary to fulfill a Prosecutor's quasi-judicial responsibilities. Prosecutors must also be mindful of their oath of loyalty and confidentiality and statutory restrictions on political comment by public servants. In their personal capacity Prosecutors must not make public statements that would:

- compromise their ability to function as a minister of justice by commenting publicly on the wisdom of a particular offence or specific law, a government policy, position or proposal
- discourage public respect for the administration of justice or weaken the public's confidence in legal institutions
- contravene professional codes of conduct or
- lecture on matters of public interest where their opinion is sought because they are a representative of the Crown.

If participating in external professional events, the Prosecutor must make it clear the oral or written views being expressed are personal views that do not necessarily represent the position of the Ministry.

This directive applies to Prosecutors who write, blog, participate in virtual communities or social networking sites outside of the scope of their employment. Prosecutors should also consider their safety and security when posting or providing information online.

Reference should also be made to the [Publication Bans and Sealing Orders](#) and [Professionalism](#) Directives.

## Criminal Asset Forfeiture

Asset forfeiture plays an important role in deterring the commission of criminal offences. It is crucial that the profit motive from criminal offences is removed through the identification, restraint, seizure and forfeiture of proceeds of crime. It is equally important that property that is used to commit criminal offences be taken out of the hands of criminal organizations and individual offenders.

On occasion, police in the course of an investigation seize property used in the commission of an offence or obtained by proceeds of crime. This property may be tendered as evidence at a prosecution. The *Criminal Code* authorizes the return of property to its owner or the victim. It also authorizes the forfeiture of proceeds of crime and the forfeiture of property used to commit criminal offences (offence-related property).

The *Criminal Code* prioritizes the compensation of victims of crime over forfeiture. In determining whether an application for forfeiture should be made, Prosecutors must determine whether restitution to identified victims would be necessary in the circumstances of the offence.

### Resolution discussions and sentencing

Seized property must be returned to its owner or the victim or be forfeited at the conclusion of the criminal case. The Prosecutor must ensure that an order is obtained to dispose of the property. The order sought must provide for forfeiture of the property or its return to its owner, or victim as appropriate. If forfeiture or return of property is not addressed at the conclusion of the proceedings by way of a forfeiture order or return order, the Prosecutor must bring an application to dispose of the property.

Prosecutors must ensure that notice is given to all parties who appear to have a valid interest in any proceeds of crime that the Prosecutor is seeking to have forfeited.

Other government bodies may have an interest in conducting legal proceedings to determine lawful entitlement to the property. Prosecutors must be mindful not to bind those interests during resolution discussions pertaining to the property.

#### *Proceeds of crime*

A Prosecutor is entitled to bring an application for forfeiture of proceeds of crime where it can be shown that the proceeds of crime derived from the commission of the offence that resulted in the conviction or discharge of the accused, or the property is nevertheless proceeds of crime from another offence.

Proceeds of crime is defined as:

- any property, benefit or advantage
- that is within or outside Canada
- that was derived directly or indirectly from the commission of an offence that may be prosecuted by indictment in Canada.

In the event that the property cannot be subject to forfeiture, for instance if it has been spent or hidden, the court may order a fine in lieu of forfeiture. The fine shall be of equal value to the property. In these circumstances, the court is obligated to impose a default consecutive jail sentence for failure to pay the fine in lieu of forfeiture.

#### *Offence-related property*

Where a prosecution has proceeded by way of indictment, a Prosecutor is entitled to apply for forfeiture of offence-related property where it can be shown that the property was used or intended to be used in the commission of an offence that resulted in the conviction of the accused, or in relation to some other offence.

Offence-related property is defined as:

- any property
- that is within or outside Canada
- that is used in any manner in connection with the commission of an offence prosecuted by indictment or that is intended to be used for committing an indictable offence.

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## **Dangerous/Long-term Offenders**

Protection of the public is the paramount consideration in dealing with potential dangerous and long-term offenders. The protection of the public requires Prosecutors to assess offenders who pose an ongoing risk to the safety of the public. While making this assessment, Prosecutors should determine whether an application is warranted for a court order declaring the offender to be a dangerous or long-term offender.

The consent of the Attorney General is required to initiate a dangerous or long-term offender application. It is for the Attorney General to determine whether an application will be made and whether it will be for a dangerous offender or a long-term offender designation. The Attorney General cannot be bound by any discussions or positions taken by Prosecutors.

After being declared a dangerous offender by a court, the offender shall receive an indeterminate prison sentence unless the court finds that a less severe measure will adequately protect the public. An offender who is declared a long-term offender shall be sentenced to an appropriate term of imprisonment and upon release be subject to a long-term supervision order for a period less than 10 years.

Each region has a designated Prosecutor known as Crown Counsel High-Risk Offender (CC-HRO), who has specialized expertise to assist in the prosecution of dangerous and long-term offenders and breaches of long-term supervision orders. Once a file is screened, and the possibility of a dangerous or long-term offender application is being considered, the Prosecutor must inform the CC-HRO of the case.

### **Resolution discussions**

Where a case has been identified as a potential dangerous or long-term offender application, the Prosecutor must not negotiate a guilty plea in exchange for agreeing to forego a dangerous or long-term offender application without first consulting with the CC-HRO and her Crown Attorney.

It would rarely be appropriate for the Prosecutor to recommend a long-term offender designation, followed by a supervision order, for an offender who meets the statutory dangerous offender criteria because of the dramatically different consequences.

Any plea negotiations involving a dangerous or long-term offender application are subject to the Attorney General's approval as the Attorney General's consent is required to initiate the application. The Prosecutor must not purport to bind the Attorney General regarding the type of designation that may be sought in any plea negotiations.

Any recommendation of the Prosecutor must be amenable to reassessment following the results of the psychiatric assessment. The Prosecutor retains the discretion to amend her recommendation as new information comes to light.

## **Psychiatric assessment**

A psychiatric assessment is required in order to bring a dangerous or long-term offender application. The Prosecutor must consult with the CC-HRO and must obtain the approval of her Crown Attorney or designate prior to seeking an order from the court directing a psychiatric assessment.

The Prosecutor must ensure that a full assessment is requested and must not agree to restrict the scope of the assessment to either a dangerous offender or long term offender designation. The Prosecutor must be mindful that the psychiatric assessment is not determinative of the legal issues that the Court must decide. The Prosecutor must still determine whether the evidence satisfies the legal requirement that the offender's risk can reasonably be controlled in the community.

## **Attorney General consent**

Upon receipt of the assessment, if the Prosecutor in consultation with the CC-HRO determines that a dangerous or long-term offender application is warranted, the Prosecutor must obtain the Attorney General's consent to initiate proceedings. The Prosecutor must have the approval of her Crown Attorney or designate and the Assistant Deputy Attorney General - Criminal Law Division prior to commencing the process to seek the Attorney General's consent.

The position taken by the Prosecutor will depend on the evidence and the demands of the interests of justice in each particular case. The Attorney General's authority to initiate a dangerous or long-term offender application and direction to seek a particular type of designation does not detract from the Prosecutor's obligation to make decisions based on the evidence, the facts of the case and the applicable law. If the evidence before the court, psychiatric or otherwise, is different than what was anticipated such that it does not support the original position, the Prosecutor should exercise her discretion appropriately. The Prosecutor must notify the Assistant Deputy Attorney General - Criminal Law Division of any significant change in the application.

Reference should be made to the [Attorney General Consent and Delegation Directive](#).

## Direct Indictments

The *Criminal Code* permits the Attorney General or the Deputy Attorney General to direct an indictment and send a criminal case directly to trial without a preliminary hearing in the following circumstances:

1. prior to an accused person making an election to have a preliminary inquiry
2. a preliminary inquiry has commenced but has not been concluded, or
3. after an accused has been discharged at a preliminary inquiry.

The Prosecutor should make a request for the consent of the Attorney General or Deputy Attorney General to direct an indictment where the interests of justice require that the matter be brought directly to trial.

Generally, full disclosure must be made prior to the Prosecutor's request for a direct indictment. If full disclosure has not been made prior to the request, the Prosecutor must ensure that disclosure allowing the accused to properly exercise their right to full answer and defence will be made prior to trial.

The Prosecutor must have concluded that there is a reasonable prospect of conviction and the continuation of the prosecution is not contrary to the public interest. The Prosecutor must also have the approval of her Crown Attorney and Director before requesting a direct indictment from the Attorney General or Deputy Attorney General.

### Factors to consider

The factors that the Prosecutor should consider in determining whether to request a direct indictment include, but are not limited to, the following:

- delays in the trial that could deprive the accused of the right to be tried within a reasonable time
- the physical or psychological health of victims and witnesses
- difficulties involved in having victims and witnesses testify more than once including the victimization of vulnerable witnesses

- preservation of the integrity of evidence including the risk that evidence could be destroyed
- preservation of the integrity of related ongoing police investigations
- safety concerns for the victims, witnesses and public
- the need to avoid multiple proceedings
- the accused was wrongly discharged following the preliminary inquiry because of errors or new evidence that has been discovered
- a preliminary inquiry would be unreasonably costly, complex, long or inappropriate because of the nature of the issues or the evidence
- the need to maintain public confidence in the administration of justice
- the case is notorious or of particular importance to the public such that the case should be tried as soon as possible
- there are circumstances that require the case be expedited.

Reference should be made to the [Attorney General Consent and Delegation](#), [Charge Screening](#), [Sexual Offences Against Adults](#) and [Offences Against Children](#) Directives.

## **Disclosure**

The Prosecutor must provide to the accused all information in her possession relating to the charges against the accused unless it is clearly irrelevant. Some information is exempt from disclosure because it is protected by privilege. The Prosecutor has discretion as to the timing of disclosure and the form it will take [e.g. hard copy, electronic]. Disclosure of all relevant information is vital to ensuring that the trial process is fair to all those accused of criminal offences.

Any information that points to either guilt or innocence that could be used by the accused in meeting the case for the prosecution, advancing a defence, or otherwise determining how to conduct a defence must be disclosed. The Prosecutor's duty to disclose is ongoing throughout the trial and appeal process and continues after those processes have concluded.

### **Duty to inquire**

Where a Prosecutor has a reasonable basis to believe that the police or other government entity may be in possession of material or information that could reasonably impact the result of the prosecution, the Prosecutor has a duty to make inquiries of these parties for the purpose of obtaining the material. If the police or other government entity declines to provide the material, the accused may seek a court order for the material to be provided. The Prosecutor does not have a duty to inquire where there is not a reasonable basis for the request or there is no likelihood of relevance.

### **Exceptions**

The Prosecutor is not obliged to disclose information that is irrelevant, protected by privilege or that is recognized at common law or by statute as an exception to the duty to disclose. In those cases the Prosecutor must not disclose the information without a court order. The material that falls within this category includes, but is not restricted to:

1. information that may identify a confidential informer (see [Confidential Informers Directive](#))
2. information subject to solicitor-client privilege
3. information subject to work-product privilege
4. information that may jeopardize ongoing police investigations or reveal confidential police investigative techniques
5. information that may jeopardize the safety of a witness or another third party
6. private information i.e. medical records, personal diaries, cell phones or therapeutic records (e.g. see [Sexual Offences Against Adults Directive](#)).

There may be occasions when information in the possession of the prosecution does not fall within its defined disclosure obligations or an existing judicially or statutorily-recognized exception. In those cases, prior to providing, withholding or delaying disclosure, the Prosecutor must consult with her Crown Attorney or designate, who must, in turn, consult with the Director.

## **Prosecutorial discretion**

The Prosecutor has discretion as to the timing and form of disclosure. While the law provides for delayed disclosure in limited circumstances, such delays should be rare and should never be for tactical reasons. The Prosecutor should only delay providing disclosure after consultation with her Crown Attorney. The safety of witnesses, the protection of ongoing investigations or privacy concerns could justify a delay in disclosure or a variation in the form that the information is provided.

### *Child pornography*

Possession of child pornography is a criminal offence. Police shall remain the custodians of all seized images of child pornography. Disclosure of these images is made by invitation to counsel to view the images in a secure, private location. Requests for electronic copies of the images must be declined. Those images may be provided electronically only pursuant to a court order with a corresponding sealing order.

Reference should be made to the [Internet Child Exploitation](#) Directive.

*Audio or Video material depicting or recounting child abuse or a sexual offence*

Audio or video material depicting or recounting a sexual offence or crime of child abuse warrants additional precautions with respect to its access.

This audio or video material may be disclosed only upon receipt of a signed undertaking by counsel to use the material for the purpose of making full answer and defence in the particular case. If counsel refuses to provide this undertaking, the Prosecutor may impose conditions on viewing the material.

Audio or video material depicting or recounting child abuse or a sexual offence must not be provided to an unrepresented accused without a court order. The court order should direct the Prosecutor to provide the material and impose conditions on its possession by the accused (e.g. no copying or disseminating the material). In absence of a court order, arrangements should be made to permit the unrepresented accused to review the audio or video material.

*Youth Criminal Justice Act and Young Offender Act records*

Access to records pertaining to youth involved in criminal justice is governed by the *Youth Criminal Justice Act* and the *Young Offenders Act*. These records should only be disclosed in accordance with the relevant legislation.

Reference should be made to the [Youth Criminal Justice - Court Practices and Procedures](#) Directive.

## DNA Data Bank Orders

A strong and effective DNA Data Bank benefits the criminal justice system by assisting law enforcement agencies to identify persons who have committed crimes. The collection and storage of DNA from convicted offenders has additional broader purposes including:

- to deter potential repeat offenders
- to promote the safety of the community
- to detect the presence of a serial offender
- to assist in solving old cases
- to streamline investigations
- to exclude innocent suspects
- to exonerate those wrongfully convicted.

The issuance of a DNA order will usually be in the best interests of the administration of justice. The greater the number of offender DNA profiles that are entered onto the Convicted Offenders Index of the National DNA Data Bank, the more effective the use of the Data Bank and its ability to fulfill its purposes.

### Duty of the Prosecutor

For the purpose of DNA collections, the *Criminal Code* designates eligible offences as either compulsory primary offences, other primary offences or secondary offences.

#### *Compulsory primary designated offences*

The *Criminal Code* directs that the court shall make a DNA Data Bank order for an adult convicted or discharged or for a young person found guilty of a “compulsory primary designated offence”. The Prosecutor must remind the court of its obligation to make the order.

#### *Other primary designated offences*

The *Criminal Code* directs that the court shall make a DNA Data Bank order for “other primary designated offences”. However, the court is not required to make the order if it is satisfied the offender has established that the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice. The Prosecutor must advocate for a DNA Data Bank order for “other primary designated offences”.

#### *Secondary designated offence*

The *Criminal Code* directs that upon application by the Prosecutor the court may make a DNA Data Bank order where it is in the best interests of the administration of justice for secondary designated offences. Given the number and nature of previously unsolved criminal investigations that were solved by samples taken on secondary designated offences, the Prosecutor should apply for a DNA Data Bank order for these offences. The Prosecutor should apply for an order in relation to each count even if an order was made on another count. In exceptional circumstances, the Prosecutor need not apply for the order where she determines that seeking a DNA Data Bank order is not in the interests of justice.

#### *Not Criminally Responsible (NCR)*

In the case of an accused found NCR, the *Criminal Code* directs that a court may make a DNA Data Bank order for compulsory primary, other primary or secondary offences, upon application of the Prosecutor, where it is in the best interests of the administration of justice. The Prosecutor must advocate for a DNA Data Bank order for compulsory primary or other primary offences when an accused is found NCR. For secondary offences, the Prosecutor should apply for a DNA Data Bank order if it is in the best interests of the administration of justice. Reference should be made to the [Mentally Ill Accused Directives](#).

## **Resolution discussions and sentencing**

Given the importance of the DNA Data Bank in the investigation and prosecution of crime, Prosecutors must not agree to withdraw a DNA designated offence as part of the negotiation process solely for the purpose of avoiding a DNA order.

Where the Prosecutor becomes aware that a DNA order was not considered at the time of conviction or sentencing, the Prosecutor must, absent exceptional circumstances, either take steps to have the matter brought back before the court or bring it to the attention of the Crown Attorney or designate.

Where the Prosecutor becomes aware of any problems with or errors in a particular DNA Data Bank order, including any issues relating to the execution or endorsement of orders, the Prosecutor must, absent exceptional circumstance, bring this to the attention of the Crown Attorney or designate.

## Expert Evidence

Expert evidence is admissible where the subject matter requires specialized knowledge that is likely outside of an ordinary person's knowledge or experience and is necessary in order for the court to reach a correct judgment about the issue.

When considering the use of expert evidence, Prosecutors should be guided by the general duty to see that justice is done in the circumstances of the particular case. The Prosecutor who tenders expert evidence must ensure that it is presented to the court with no more, and no less, than its legitimate force and effect.

The role of an expert in the criminal justice system is a neutral one that requires independence and objectivity at all stages of her involvement.

### Retaining an expert

Prosecutors should decide at the earliest possible opportunity whether expert evidence is required. This should be done early in the proceeding to minimize the delay occasioned by retaining an expert and in order to meet the notice and disclosure requirements set out in the *Criminal Code*.

The Prosecutor must obtain prior approval from the Director or designate before retaining and paying an expert for the purpose of giving evidence or assisting the Prosecutor in preparing for trial.

### Disclosure

The Prosecutor must generally disclose all relevant information in her possession relating to the charges against an accused. This includes all expert reports, summaries of expert opinions and, if requested, any underlying material relied upon by the expert where it is practicable to do so.

The Prosecutor is not obliged to disclose information that is irrelevant, protected by privilege or that is recognized at common law or by statute as an exception to the duty to disclose.

The Prosecutor's duty to disclose is ongoing throughout the trial and appeal process and continues after those processes have concluded.

Reference should also be made to the [Disclosure Directive](#).

## **Presenting expert evidence**

In preparing experts for their testimony, Prosecutors should ascertain from the expert the limitations on the expert opinion including their qualifications and any limitations on the inferences that can be reliably drawn from the expert evidence. When presenting the expert evidence in court, Prosecutors should make every effort to ensure that those limitations are fully impressed upon the court.

Where an expert expresses to the Prosecutor a concern that their evidence has left a misleading or inaccurate impression with the Court, the Prosecutor must immediately disclose this to the defence and in circumstances where the concerns are justified, it must be conveyed to the Court.

## **Reporting concerns**

A Prosecutor must report to her Crown Attorney adverse judicial findings or comments about an expert or her own concerns about an expert's participation in the criminal justice system.

The Crown Attorney must forward any adverse judicial findings or comments about an expert or any concerns expressed by a Prosecutor regarding an expert's participation, to the Director, who will forward it onto the Assistant Deputy Attorney General - Criminal Law Division.

## **Extradition**

Extradition is the diplomatic process where one country requests the return of a fugitive found in another country for the purpose of trial or punishment for the commission of an offence. Extradition may be requested for those accused of crimes and for those who have been convicted and have outstanding sentences. The Department of Justice Canada is responsible for responding to requests by foreign states for the return of fugitives found in Canada and for determining whether to seek the extradition of a Canadian from a foreign state.

### **Process**

In Ontario, a request for the return of a fugitive to Ontario often begins with an inquiry by the police to a Prosecutor. The following factors inform the Prosecutor's assessment of whether to seek extradition:

- the strength of the case
- the seriousness of the allegations
- the dangerousness of the accused
- whether the offence warrants a substantial period of imprisonment upon conviction (usually a penitentiary term)
- whether there is a significant and pressing public interest in securing the return of the accused to Canada for prosecution or sentencing.

When a Prosecutor, with the approval of the Crown Attorney or designate, concludes that the request for extradition of the fugitive is warranted, the Prosecutor should work with Crown Law Office – Criminal in preparing the required materials. The request is forwarded to Department of Justice Canada where the determination is made whether to seek extradition.

A provisional arrest warrant permits a foreign state to secure the detention of a fugitive pending extradition. Department of Justice Canada determines whether it is appropriate for Canada to seek the diplomatic assistance of a foreign country to arrest and detain a fugitive pending extradition. The execution of a provisional arrest warrant triggers timelines for the formal extradition request to be transmitted to the foreign state.

Upon receipt, the foreign state will initiate its own internal process for extradition which may involve a hearing or a consent extradition. When the process is complete, the individual may be extradited to the requesting country.

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## Firearms

The illegal possession and use of firearms is a matter of grave public concern because of the potential for violence and serious physical harm including death. The protection of the public is the paramount consideration at all stages from judicial release to sentencing, in any prosecution involving firearms.

The term “firearm” refers to any barreled weapon from which a shot, bullet or other projectile can be discharged and that is capable of causing serious bodily harm and may include a pellet gun or air gun.

### Judicial interim release (bail)

In all cases involving firearms, the Prosecutor must seek a detention order, absent exceptional circumstances, to ensure the safety and security of the public. If exceptional circumstances exist, the Prosecutor must obtain prior approval of the Crown Attorney or designate before recommending or consenting to any form of judicial interim release. This decision should be made at the earliest reasonable opportunity having regard to the requirements of the *Criminal Code*.

The Prosecutor must advise the Crown Attorney or designate, when an accused charged with an offence involving firearms is granted judicial interim release. In these circumstances, the Crown Attorney or designate should consider whether a bail review is warranted.

Reference should be made to the [Judicial Interim Release \(Bail\) Directive](#).

#### *Charge screening*

There are certain firearms offences that are so serious and inherently dangerous as to warrant proceeding by indictment.

The Prosecutor must elect to proceed by indictment, absent exceptional circumstances, where an accused is charged with one of the following hybrid offences:

- possession of restricted or prohibited firearm with ammunition
- possession of firearm obtained by crime
- making automatic firearm
- carrying a concealed firearm
- possession of a firearm for purpose dangerous to the public
- unauthorized possession of a firearm
- possession of firearm at unauthorized place
- possession of firearm in motor vehicle
- transfer a firearm without proper authority
- unauthorized importing or exporting of firearms
- possession of a firearm contrary to a court order.

If exceptional circumstances exist, the Prosecutor must seek prior approval from her Crown Attorney or designate before electing to proceed summarily.

Regarding all other hybrid firearms offences, the Prosecutor should consider the circumstances of the offender and the circumstances surrounding the offence in determining whether to proceed summarily or by indictment, including the following:

- whether the accused has prior convictions or outstanding charges for weapons or violent offences
- whether the conduct of the accused posed a danger to the public
- whether the accused associates with or is a member of a criminal organization
- whether the accused engaged in other criminal conduct
- whether the offence is of a regulatory nature
- whether the firearms, weapons or ammunition have been seized and will be forfeited
- whether the accused is violating a prohibition order
- whether the sentence if prosecuted summarily would adequately reflect the gravity of the alleged offence.

## Resolution discussions and sentence

The resolution of firearms offences should be premised on providing the greatest possible protection of the public.

Absent exceptional circumstances and then only with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- reduce or withdraw a charge involving a firearm to avoid a mandatory minimum term of imprisonment
- reduce or withdraw a charge of break and enter to steal a firearm, robbery to steal a firearm, possession of restricted or prohibited firearm with ammunition, any firearms trafficking offence, any importing or exporting firearms offence
- reduce or withdraw a charge of possession of firearm contrary to a court order.

Prosecutors should be aware that the Chief Firearms Officer has independent statutory authority and discretion under the *Firearms Act* and may seek a different regulatory remedy outside that agreed to by the Prosecutor.

### *Notice of Intention to Seek Increased Penalty*

Notice of Intention to Seek Increased Penalty will be provided to an accused, where the Prosecutor seeks a higher range of sentence by reason of the accused's previous criminal record.

Absent exceptional circumstances, the Prosecutor must file a Notice of Intention to Seek Increased Penalty in all qualifying cases where the accused has a previous conviction for a firearms offence.

In exceptional circumstances where the Prosecutor is satisfied that the accused poses no future threat to public safety, the public interest may be served without filing the Notice of Intention to Seek Increased Penalty. In these circumstances, the Prosecutor must obtain the prior approval of the Crown Attorney or designate not to seek an increased penalty.

## **Gaming and Betting**

The *Criminal Code* prohibits various gambling related activities involving betting, pyramid schemes and games of chance and lotteries. Backroom betting businesses, black market internet gambling websites, rigged midway games at a summer fair and video gambling machines in a bar are just a few examples of illegal gambling activities.

### **Exceptions**

The *Criminal Code* provides for exemptions and exceptions to these prohibitions. Generally speaking, bets between private individuals who are not engaged in the business of betting are lawful. The provinces, charitable and religious organizations, horseracing associations and local fairs have been afforded exemptions to offer gaming and betting related activities, subject to strict controls.

### **Circumstances of the offence**

What may appear as isolated gaming and betting related offences may in fact be linked to organized crime. Organized crime relies on gambling to raise money and to launder proceeds of crime. There is a high public interest in prosecuting organized crime. Criminal conduct in the regulated gaming and betting spheres – such as a fraud committed by an Ontario Lottery and Gaming Corporation (OLG) lottery ticket seller, or cheating by a patron or operator at an OLG casino - is also serious. Such conduct undermines the integrity and reputation of lawful gaming and betting operations. Even comparatively low level gambling related offences – for example, a corner store or bar owner offering a video gambling machine for customers - can encourage other criminal or anti-social behaviour potentially corrosive to the safety and security of the local community.

The Prosecutor reviewing gaming and betting related charges should confer with the investigating police agency. Information provided by the investigating police agency will include the circumstances of the offence.

## **Forfeiture**

In gaming and betting related offences, the *Criminal Code* authorizes the restraint, seizure and forfeiture of the proceeds of crime and of the property used to commit the offence. The Prosecutor must ensure that notice is given to all parties who appear to have a valid interest in any proceeds of crime or property that the Prosecutor is seeking to have forfeited. Reference should be made to the [Criminal Asset Forfeiture Directive](#).

## **Resolution discussions and sentence**

Gaming and betting related offences are not victimless crimes. The resolution of gaming and betting related offences should be premised on providing protection to the public.

Several gaming and betting related offences are subject to mandatory minimum terms of imprisonment for second and subsequent convictions. The Prosecutor must not withdraw charges for such offences solely to avoid the imposition of the mandatory minimum sentence.

Absent exceptional circumstances, the Prosecutor must file a Notice of Intention to Seek Increased Penalty where an accused has a prior conviction for any of these offences. In exceptional circumstances where the Prosecutor is satisfied that the public interest could be served without seeking an increased penalty, the Prosecutor must obtain prior approval from the Crown Attorney or designate not to file a Notice of Intention to Seek Increased Penalty.

Other government bodies have independent authority and discretion over aspects of gaming and betting. Prosecutors must be mindful not to bind those interests during resolution discussions.

## Hate Propaganda and Hate Motivated Offences

Hate propaganda and hate motivated offences involve the intentional selection of a victim based on the offender's prejudice toward a "group" characteristic of the victim such as race, ethnic background, religion, gender, physical or mental disability or sexual orientation.

There is a substantial public interest in the prosecution of these offences. These offences are particularly serious because of their potentially devastating impact not only on the individuals involved, but also on the target group, other vulnerable groups and the community as a whole. The impact of hate propaganda and hate motivated offences include the following:

- the psychological and emotional harm caused by hate crimes on the identity and feelings of self-worth of the victim can be severe and long-lasting
- the group members of a target group may feel vulnerable to future victimization
- negative impact on other vulnerable groups that share minority status or identify with the targeted group, especially if the hate crime is based on an ideology or doctrine that covers a number of the groups that live within the community
- they can be socially divisive and undermine our collective identity. In a multicultural society like Canada, where all groups strive to live together in harmony and equality, hate crime is an anathema to our shared values. Any occurrence of a hate crime can lead to the erosion of fundamental Canadian values.

### Hate propaganda offences

The offences of advocating genocide, public incitement of hatred, and wilful promotion of hatred against an identifiable group are characterized as hate propaganda offences that are prohibited by the *Criminal Code*. An identifiable group is defined as "any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression or mental or physical disability."

The Attorney General's consent is required to initiate a prosecution for the offence of wilful promotion of hatred and the offence of advocating genocide.

Formal and informal requests by the police for the initiation of these proceedings must be brought immediately to the attention of the Assistant Deputy Attorney General - Criminal Law Division.

Once the consent of the Attorney General is received the hate propaganda proceedings are initiated. If new information comes to light the Prosecutor should apply the charge screening standard to the proceedings. If the Prosecutor concludes that the charge screening standard is no longer met, the Prosecutor must notify the Assistant Deputy Attorney General -Criminal Law Division in order to seek approval prior to withdrawing or staying the prosecution. Allegations of hate propaganda offences are not eligible for diversion.

Reference should be made to the [Attorney General Consent and Delegation Directive](#).

#### *Seizure and forfeiture of hate propaganda*

In order to inhibit distribution of hate propaganda, the *Criminal Code* allows for the seizure and forfeiture of hate publications intended for public sale or distribution. In both circumstances, the Attorney General's consent is required to commence proceedings for the seizure and/or forfeiture of hate propaganda.

The *Criminal Code* authorizes the court to issue a warrant to seize copies of publications where reasonable grounds exist for believing that the publication is hate propaganda and that copies are kept for sale or distribution. If the court is satisfied that the publication constitutes hate propaganda, the court shall order the forfeiture of the offending material.

The *Criminal Code* also provides a procedure for removing hate propaganda from the Internet. If the court is satisfied that the material or data is available to the public and is hate propaganda, the court may order the material or data be deleted and the electronic copy destroyed.

Reference should be made to the [Criminal Asset Forfeiture Directive](#).

## **Hate motivated offences**

Attorney General consent is not required where the offence is motivated by hate or where hate is an aggravating factor.

### *Mischief to property*

The *Criminal Code* specifically prohibits mischief to religious property where the mischief is motivated by bias, prejudice or hate. There is no requirement for the Attorney General's consent to initiate proceedings with this offence.

### *Diversion*

Generally, diversion is not an appropriate resolution for a crime motivated by hate. In exceptional circumstances, however, the issuance of an apology and/or rehabilitative considerations may be a just resolution. Where such exceptional circumstances exist, the Prosecutor must seek the prior approval from the Crown Attorney or designate.

### *Sentencing*

The *Criminal Code* directs courts to consider evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or gender identity or expression or any other similar factor as aggravating factors on sentence. If there is evidence that the motivation for a crime was hate, bias or prejudice, the Prosecutor should tender that evidence during the sentencing phase.

## High-Risk Offender National Flagging System

The identification of violent offenders who pose an ongoing serious threat to society is an essential component of public safety. In Ontario, one of the ways that this is done is through participation in the National Flagging System. The National Flagging System is a Canada wide initiative that gathers and distributes information to interested prosecution services on violent offenders who have been identified and flagged as posing a high risk to violently re-offend. This information can be accessed by police and prosecution services. Each province has a Provincial Flagging Coordinator.

### Duty of Prosecutor

Where an offender meets one or more of the following criteria, the Prosecutor, with the approval of her Crown Attorney or designate, must request that the offender be flagged by the Provincial Flagging Coordinator:

1. where the Prosecutor believes that the violent offender constitutes an ongoing serious threat to society or
2. where a review of the available information indicates that if the offender commits a further serious personal injury offence or a sexual offence, there will be a reasonable prospect that they will be declared a dangerous or long-term offender (see [Dangerous / Long-term Offender](#) Directive) or
3. where the offender has been sentenced to life imprisonment.

When dealing with an offender who is known to have been flagged on the National Flagging System, a Prosecutor must request the offender's file from the Provincial Flagging Coordinator. At the conclusion of the prosecution, the Prosecutor must provide the Provincial Flagging Coordinator with the outcome of the prosecution and forward all new relevant material from the prosecution.

## Impaired Driving

Individuals who drive under the influence of alcohol and/or drugs pose an unacceptable risk of harm to themselves and to the public. The *Criminal Code* and *Highway Traffic Act* (HTA) provide criminal sanctions and administrative measures, including the Ignition Interlock Program, to combat these offences. The protection of the public is the primary concern at every stage of the prosecution of impaired driving offences.

The following list sets out some aggravating features of an impaired driving offence. A Prosecutor should consider those features prior to making any significant decisions at all stages of the prosecution:

1. death, serious injuries and/or substantial property damage
2. a motor vehicle collision
3. driving conduct that poses a high risk to other motorists, pedestrians and/or police, such as excessive speed, racing or flight from police
4. whether the offence involves breach of a court order and frustrates the administration of justice, such as driving while prohibited or refuse breath sample
5. the presence of vulnerable people such as children
6. any prior criminal or *HTA* record for similar offences and/or fail to comply offences
7. high levels of blood alcohol concentration.

## Charge screening

### *Ignition Interlock Program*

The *Criminal Code* permits an offender to drive during a portion of the duration of the mandatory driving prohibition order, on certain conditions including installing the ignition

interlock device in their vehicle. An ignition interlock device is an in-car alcohol breath screening device that prevents a vehicle from starting if it detects a certain blood alcohol concentration. The Ignition Interlock Program is administered by the Ministry of Transportation [[link](#)].

Where the Prosecutor intends to seek an increased absolute driving prohibition period, or an order that the offender not be permitted to drive with the interlock at all, the Prosecutor must convey that position to the offender prior to the plea being entered. In coming to this decision, the Prosecutor should consider the circumstances of the offence and the offender, any prior convictions under the *Highway Traffic Act* or *Criminal Code*, including those that are more than 10 years old.

Offenders convicted of drug impaired offences, or offences involving a combination of drugs and alcohol, are not eligible for the program.

## **Resolution discussions and sentence**

Absent exceptional circumstances and then only with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

1. withdraw a *Criminal Code* driving offence that relates to the impairment of the driver in exchange for a guilty plea to an offence under the *Highway Traffic Act* or a *Criminal Code* offence that does not address the impairment of the driver
2. withdraw charges of “Over 80” solely because the readings are low
3. withdraw fail to remain or drive while disqualified charge in exchange for a guilty plea to impaired or “Over 80” or vice-versa.

### *Notice of Intention to Seek Increased Penalty*

Notice of Intention to Seek Increased Penalty will be provided to an accused, where the Prosecutor seeks a higher range of sentence by reason of the accused’s previous criminal record.

Absent exceptional circumstances, the Prosecutor must file the Notice of Intention to Seek Increased Penalty in all cases where the accused has a previous conviction for a drinking and driving offence within a five-year period of the current offence date. If exceptional circumstances exist, where the previous conviction is within a five-year period and the Prosecutor is satisfied that the accused poses no future threat to the safety of the public, the Prosecutor may consider that the public interest is served without seeking an increased penalty. In these circumstances, the Prosecutor must

obtain the prior approval of the Crown Attorney or designate not to seek an increased penalty. The Prosecutor must still advise the court of the existence and complete extent of any criminal record of the accused.

After the five-year period, the Prosecutor may exercise her discretion to file the notice. In any event, the Prosecutor must still advise the court of the existence and complete extent of any criminal record of the accused.

### *Victims*

Where the impaired driving offence has resulted in serious injury or death Prosecutors should ensure that efforts are made to inform the victim of the Victim/ Witness Assistance Program (V/WAP) or similar victim support services. For further direction reference should be made to [Victims Directive](#).

## **In-Custody Informers**

Experience has shown that the use of in-custody informers may pose a substantial risk to the proper administration of justice. Prosecutors must be aware of the dangers of calling in-custody informers as witnesses. Policies are in place to prevent an injustice that occurs when an in-custody informer falsely implicates another person.

An in-custody informer is someone who claims to have received one or more statements from an accused person while both are in custody about offences that occurred outside the custodial institution. The accused person need not be in custody for, or charged with, the offences to which the statements relate. Excluded from this definition are informers who claim to have direct knowledge of an offence independent of the statements provided by the accused person.

Because of the potential risks posed by reliance upon evidence of an in-custody informer, there must be a compelling public interest to tender evidence from an in-custody informer. A decision to seek to tender this evidence must be the product of a rigorous, objective assessment of the in-custody informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the in-custody informer's general reliability.

In circumstances where the Prosecutor becomes aware that an in-custody informer has the intent to mislead and make a false statement with respect to an accused person, the case must be directed to the Crown Attorney. The case will then be investigated.

### **Calling an in-custody informer as a witness**

Depending on the nature of the proceedings, a Prosecutor who seeks to tender the evidence of an in-custody informer must obtain the approval of the Crown Attorney, the Director, the In-Custody Informer Committee and/or the Assistant Deputy Attorney General - Criminal Law Division.

### *Preliminary inquiry*

If the Prosecutor seeks to tender the evidence of an in-custody informer at a preliminary inquiry, the Prosecutor must bring the matter to the attention of her Director.

The Director must determine whether the in-custody informer's evidence can be used at the preliminary inquiry or if the case should be referred to the In-Custody Informer Committee for a decision.

An in-custody informer can only be called as a witness at a preliminary inquiry with the approval of a Director or the In-Custody Informer Committee.

### *Trial*

A Prosecutor who forms the opinion that there is a compelling public interest in relying on the evidence of an in-custody informer at trial must refer the case to the In-Custody Informer Committee.

The Committee will consider the materials submitted by the Prosecutor, and absent exceptional circumstances, will meet with the Prosecutor to discuss the case before making its decision.

An in-custody informer can only be called as a witness at a trial with the approval of the In-Custody Informer Committee.

The deliberations of the Committee are privileged and will not be disclosed.

The existence of a public interest in proceeding with a prosecution based solely on the unconfirmed evidence of an in-custody informer is exceptional. In these circumstances, approval to tender the evidence must be approved by the Assistant Deputy Attorney General – Criminal Law Division as well as the In-Custody Informer Committee.

### **Agreements to testify**

An in-custody informer must never be given consideration that is conditional upon the accused's conviction.

Any agreements made with in-custody informers relating to consideration in exchange for information or evidence must, absent exceptional circumstances, be reduced to writing and signed by a Prosecutor (other than the Prosecutor assigned to the case), the informer and counsel (if represented). An oral agreement, fully recorded, may

substitute for a written agreement. A videotape recording or other type of record, such as audiotape or affidavit, may also suffice.

A Director must approve any agreements respecting consideration and the agreement must be provided to the In-custody Informer Committee.

## **Restrictions**

If the in-custody informer recants their evidence following a decision by the In-Custody Informer Committee and the Prosecutor determines that the evidence of the in-custody informer should be tendered, the matter must be referred back to the Committee and the Director.

Where the in-custody informer is charged with additional criminal offences and/or seeks additional consideration, the Prosecutor must notify her Director who reviewed the original file, who will then determine whether the In-Custody Informer Committee ought to reconsider the matter.

## **The In-custody Informer Registry**

The Ministry of the Attorney General has established an In-custody Informer Registry. The Chair of the In-custody Informer Committee is responsible for updating the registry with information provided by Prosecutors and the police.

Prosecutors who become aware of individuals coming forward to act as in-custody informers must forward to the Committee the name of the potential in-custody informer and the result of any investigation into the statement of the informant regardless of whether the Prosecutor seeks to use the informant's evidence. These names and this information will be included in the In-Custody Informer Registry.

The Prosecutor must forward to the Committee the outcome of a prosecution where an in-custody informer was permitted to testify at a preliminary inquiry or trial. These results will be noted in the In-Custody Informer Registry.

## Indigenous Peoples

Canada has distinct legal and constitutional obligations to Indigenous peoples derived from the recognition and confirmation of Aboriginal and Treaty rights in *The Constitution Act 1982*. The *Criminal Code*, the *Youth Criminal Justice Act*, and legal decisions of the Supreme Court of Canada, requires consideration of the unique circumstances of Indigenous peoples.

Indigenous peoples within Canada include status and non-status First Nation, Inuit and Métis peoples. Many Indigenous peoples may prefer to self-identify as members of a specific community.

Canada's history of colonialism towards Indigenous peoples has included harmful policies of forced assimilation, displacement and child apprehension. The intergenerational impact of policies such as the '60's scoop' and residential schools has fragmented and dislocated families and communities and has caused significant trauma to Indigenous peoples and communities.

Many Indigenous peoples view the Canadian justice system as a foreign system that has been imposed upon them without their consent. Indigenous communities may prefer to adopt restorative justice principles that reflect Indigenous values and laws. Restorative justice principles can include a focus on relationships, repairing harm, taking responsibility and taking personal and family history into account.

Prosecutors should be familiar with the history of Indigenous peoples and understand the impact of that history on Indigenous accused, victims and communities. Prosecutors should also be aware of the value of restorative approaches to justice.

## Relationships

A strong, positive working relationship based on mutual respect between Prosecutors and Indigenous communities, including police, advances the public interest. Prosecutors should work together with Indigenous leaders and Elders to build local relationships that ensure social harmony and community safety. Where feasible, the formation of a joint

plan to promote safety in the community could be formulated through efforts by the community, police and the Crown Attorney.

## **Criminal proceedings**

Indigenous peoples are overrepresented in virtually all aspects of the criminal justice system. There is widespread bias against Indigenous peoples within Canada and there is evidence that this widespread racism has translated into systematic discrimination in the criminal justice system.

The Prosecutor must maintain a flexible and open approach to criminal matters arising in Indigenous communities. The unique circumstances of an Indigenous accused, including their background, community history, and the effects of systemic discrimination should be considered at many stages of criminal proceedings, including bail and sentencing.

The Prosecutor should be aware of Indigenous programs and services in the courts and the community that are tailored and available to meet the unique needs of Indigenous persons in the criminal justice system, such as restorative justice diversion programs, Aboriginal Court Workers, *Gladue* Courts, Friendship Centres, and Indigenous Legal Services.

### *Diversion*

For certain offences, diverting Indigenous accused to Indigenous Restorative Justice Programs may serve as an effective alternative to formal prosecution. Indigenous Restorative Justice Programs hold an Indigenous accused accountable for criminal conduct by bringing them before members of Indigenous communities with a focus on developing a plan that will allow the accused to take responsibility for their actions, address the root causes of the problem, and reintegrate into the community in a positive way.

Indigenous Restorative Justice Programs should be recommended where diversion is appropriate and the program is available. These programs may be meaningful to the Indigenous accused due in part to the fact that the consequence is imposed by community members often including respected Elders.

Prosecutors may consider the appropriateness of a community based sanction only if a reasonable prospect of conviction exists. A Prosecutor must not impose additional requirements on the accused person as a precondition to offering diversion.

When determining eligibility for diversion, Prosecutors should consider the background and systemic factors that brought an Indigenous accused in contact with the criminal justice system.

Reference should be made to the [Community Justice Programs for Adults Directive](#), the [Youth Criminal Justice: Extrajudicial Sanctions Directive](#) and the [Mentally Ill Accused: Alternatives to Prosecution Directive](#).

#### *Judicial interim release (bail)*

When determining a position on bail, the Prosecutor must apply the general principles set out in the [Judicial Interim Release \(Bail\) Directive](#) and consider the background and unique circumstances of an Indigenous accused and their connections to the Indigenous community. The Prosecutor should also consider the distance and remoteness of many Indigenous communities and the barriers that this creates for access to bail hearings and forms of release. A significant disadvantage is created since the accused is unlikely to have established connections or supports in the community in which the bail hearing is taking place. In these circumstances, seeking the detention of an Indigenous accused should remain an exceptional measure unless the release of the accused would jeopardize the safety and security of the victim or the public. Although the Prosecutor should keep in mind the principles referred to by the Supreme Court in *Gladue*, a *Gladue* report should not be requested by the Prosecutor for a bail hearing.

As with all accused, conditions of release shall not be imposed to change an Indigenous accused's behaviour or to punish the accused. These conditions often relate to therapeutic or rehabilitative measures and are more appropriate following conviction. The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the Indigenous accused and relate to the alleged offence. The Prosecutor should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply.

Reference should be made to the [Judicial Interim Release \(Bail\) Directive](#).

#### *Sentencing*

The Prosecutor must consider the unique systemic and background factors that may have played a part in bringing an Indigenous offender before the court in determining a position on sentencing. These factors may mitigate the Indigenous accused's moral blameworthiness. These factors are also relevant in assessing other principles of sentencing and to the types of sentencing options that may be appropriate because of the offender's particular Indigenous heritage or connection.

In determining a fit sentence, the court shall consider information provided by a *Gladue* Report, an enhanced Pre-Sentence Report and/or the submissions of defence counsel and the Prosecutor. This information could include a description of relevant community supports. The Prosecutor should provide the court with any relevant information that the Prosecutor is aware of about the Indigenous offender's background or unique circumstances.

### **Information about the offender and community in sentencing**

Where the Prosecutor is seeking a significant custodial sentence, the accused, Prosecutor and/or judge may request that a *Gladue* Report be prepared following a finding of guilt or guilty plea.

A *Gladue* Report provides information to the court about the offender and their community including the unique systematic or background factor which may have played a part in bringing the particular Indigenous offender before the courts and may reduce the moral blameworthiness of the offender.

A *Gladue* Report contains information collected from research about the community and interviews conducted with the offender, family members, community leaders and others with relevant background information about the offender. The report also provides information of the types of sentencing procedures and sanctions that may be appropriate in the circumstances of the offender because of their particular Indigenous heritage or connection.

Although a *Gladue* Report is preferable, where one is not available, information about the offender and their community may be collected and provided to the court in an enhanced Pre-Sentence Report that would contain information about the offender's community obtained from research and interviews.

In addition, the Prosecutor may consider requesting a summary *Gladue* Report, use a past *Gladue* Report or work with defence counsel to introduce alternative sources of information (e.g. letters from family, friends, service providers and community members).

## **Victims**

The Prosecutor should ensure that efforts are made to refer an Indigenous victim to Indigenous-specific Victim Services or, if Indigenous-specific services are not available, to Victim Witness Assistance Program or other victim services support.

The Prosecutor must ensure that efforts are made to advise an Indigenous victim of testimonial aids that are available and appropriate to the circumstances. Further, steps should be taken to ensure that the Indigenous victim has access to translation and interpretation services into the victim's first language so that the victim can fully participate in the criminal proceeding.

As soon as feasible after an accused person is found guilty, the Prosecutor must take reasonable steps to provide an Indigenous victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it in court and their other options.

Reference should be made to the [Victims Directive](#) and the [Testimonial Aids and Accessibility Directive](#).

## International Evidence Gathering

Countries often seek the assistance of other countries in gathering evidence located in foreign jurisdictions for use in domestic criminal investigations and prosecutions. This assistance is provided by way of both informal and formal information-sharing processes.

Informal information-sharing processes typically involve police services in different countries working together to investigate offences allegedly committed in one or both countries. Informal police-to-police cooperation may take place where the requested assistance does not require a formal court process in the foreign jurisdiction. This assistance may include, for example, interviewing cooperative witnesses, conducting surveillance, gathering publicly-available information, and conducting coordinated joint investigations of cross-border offences. Informal police-to-police cooperation is performed by and in the discretion of the police.

The term “Mutual Legal Assistance” refers to the formal legal process through which countries cooperate in the investigation and prosecution of criminal offences. Mutual Legal Assistance does not replace existing means of informal cooperation. Informal police-to-police cooperation remains an important mechanism for international assistance, even where Mutual Legal Assistance is legally available.

When a search warrant, summons, production order or similar legal mechanism is necessary to obtain evidence in a foreign jurisdiction, a Mutual Legal Assistance request may be made. Mutual Legal Assistance requests typically involve confidential state-to-state communications governed by treaties and protocols. Where no treaty exists, assistance may still be provided pursuant to agreement between Canada and the foreign country.

Mutual Legal Assistance may include:

- gathering evidence, including documents and records
- compelling witnesses to give statements or testimony
- exchanging information and objects, such as exhibits
- locating and identifying persons

- transferring persons in custody
- executing requests for search and seizure
- serving documents
- enforcing fines and confiscation orders.

## **Seeking information/evidence in a foreign country**

In Ontario, requests for Mutual Legal Assistance to obtain information in a foreign country in relation to criminal (and some provincial) investigations and prosecutions are made by the Crown Law Office – Criminal to the Department of Justice Canada, with input from the investigating police force and/or the assigned Prosecutor. The ultimate determination of whether Mutual Legal Assistance will be sought from the foreign country rests with the Department of Justice Canada.

Prosecutors requesting Mutual Legal Assistance should contact the Crown Law Office – Criminal as early on in the criminal process as possible, as Mutual Legal Assistance requests involve inherent delays and may be time-consuming. As noted above, informal means of cooperation may be more efficient and appropriate in certain cases.

## **Responding to requests for assistance by a foreign country**

Mutual Legal Assistance requests by foreign countries for information and evidence located in Canada are reviewed by the Department of Justice Canada, and, if approved, forwarded to the appropriate province or territory for execution. In Ontario, Crown Law Office – Criminal is responsible for processing these requests with the assistance of local law enforcement.

If a Prosecutor is contacted directly by a foreign state seeking assistance, she should contact Crown Law Office – Criminal immediately. Crown Law Office – Criminal will advise whether the requested assistance can be provided through informal information-sharing processes or whether a formal Mutual Legal Assistance request must be made. If a formal Mutual Legal Assistance request is required, Crown Law Office – Criminal will refer the request to the Department of Justice.

## Internet Child Exploitation

Internet child exploitation covers a number of offences including child pornography, voyeurism, luring a child, agreeing or arranging to commit a sexual offence against a child and making sexually explicit material available to a child. This may include the non-consensual distribution of intimate images. Child pornography exists in a variety of forms including written material, audio recordings, photographic, film, video or other visual representations. Like all crimes against children, offences relating to Internet child exploitation pose a serious threat of harm to children, the family and the community and must be prosecuted vigorously.

Prosecutions of Internet child exploitation offences raise a number of unique concerns in relation to victims, disclosure of sensitive or illegal materials, management of the courtroom and exhibits at trial, and ancillary orders at sentencing and wellness of those exposed to this evidence.

Sensitivity to the perspective of the child victims, their privacy interests, and their need to be protected from re-victimization must be considered at every stage of the prosecution. This is true even in cases where the specific identity or whereabouts of the child victims are unknown.

If the identity of victims is known, the Prosecutor should ensure that efforts are made to advise victims and/or where appropriate their parents or legal guardians of significant steps in the proceedings in advance of the case being heard in court, as appropriate. This includes meeting with victims in advance of the preliminary hearing and trial. Prosecutors should also ensure that efforts are made to inform the victims and/or where appropriate their parents or legal guardians of available specialized victims' services as facilitated by the Victim Witness Assistance Program (VWAP) or similar victims' support services.

Prosecutors dealing with cases involving Internet child exploitation should also consider the directions set out in the [Offences against Children](#) and the [Victims](#) Directives.

## Prosecution

### *Charge screening*

The Prosecutor should decide, at the charge screening stage, whether hybrid offences should be prosecuted by indictment or summary conviction. The Prosecutor should consider the directions set out in the [Offences Against Children Directive](#) when determining whether to proceed summarily or by indictment. In addition, it is generally in the public interest to proceed by indictment where the offence involves making permanent recordings or distributing them on the Internet.

The Prosecutor should also consider the [High-Risk Offender National Flagging System](#) and [Dangerous/Long-term Offenders](#) Directives when prosecuting offences involving Internet child exploitation.

### *Disclosure*

Prosecutions of child pornography offences raise unique disclosure concerns because access to child pornography is a criminal offence, there is potential trauma that may be caused by viewing such materials and the strong public interest in protecting the privacy and dignity of the children depicted in child sexual abuse materials.

In these unique circumstances, disclosure may be provided in two ways:

- by providing defence counsel with an opportunity to view the child pornography in a secure, private location
- by providing copies of the material pursuant to a court order with conditions sufficient to satisfy concerns that the material will be used for a legitimate purpose connected to the administration of justice, disclosure does not pose an undue risk of harm to children and the privacy interests of the children depicted in the child pornography will be adequately protected.

Reference should be made to the [Disclosure Directive](#).

## **Protecting the privacy of child victims**

### *Publication bans*

The Prosecutor must employ the relevant statutory provisions to ensure that the privacy interests of the child victim, and that of other witnesses, are protected. The Prosecutor should have regard to the direction provided in the [Publication Bans and Sealing Orders Directive](#).

In cases involving a child pornography offence, the *Criminal Code* directs that the judge impose a publication ban, even in the absence of a request by the prosecution. The Prosecutor must remind the court of its obligation to make the order.

#### *Tendering child pornography evidence*

In prosecutions related to Internet child exploitation, exhibits are often filed that contain material alleged to be child pornography. Prosecutors must seek to protect the privacy and dignity of those children who may be depicted in child sexual abuse materials, as well as others who may be impacted by inadvertent exposure to such materials.

Given these concerns, all precautions must be taken to ensure that child pornography evidence is presented to the Court in such a manner that only those who are required to view the material are able to do so. Ultimately, the manner in which this material may be accessed will be determined by the Court.

#### *Sealing orders*

Prosecutors must apply for a sealing order in respect of any exhibit containing material alleged to be child pornography. On appeal, Prosecutors must seek an order sealing any Appeal Books or exhibits containing child pornography and seek restrictive terms respecting the use and eventual destruction of the Appeal Books.

### **Resolution discussions and sentence**

Prosecutors should consider the specific directions set out in the [Offences Against Children Directive](#) when entering into resolution discussions. As soon as feasible, the Prosecutor must take reasonable steps to ensure that the victims and/or where appropriate their parents or legal guardians are informed of a proposed resolution (e.g. a guilty plea or proposed sentence) or that the charges will be withdrawn.

Absent exceptional circumstances, and then only with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- reduce or withdraw a charge relating to Internet child exploitation
- accept a plea to a different offence, solely to avoid a mandatory minimum sentence
- accept a plea to a different offence, solely for the purpose of avoiding a DNA order or an order under the *Sex Offender Information Registration Act (SOIRA)*.

#### *Victim impact statements*

The *Criminal Code* directs the court to ask the Prosecutor if reasonable steps were taken to provide the victim with an opportunity to prepare a victim impact statement. As soon as feasible after a finding of guilt, the Prosecutor must take reasonable steps to provide the victim and/or where appropriate their parents or legal guardians with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options.

## **Ancillary orders**

All Internet child exploitation offences are “primary designated offences”, with the exception of voyeurism. The Prosecutor must remind the court that the DNA order is mandatory and must seek a DNA order regardless of whether the offender’s profile is already included in the DNA Data Bank. See [DNA Data Bank Orders Directive](#).

All child exploitation offences are designated offences for which a *SOIRA* order is mandatory, with the exception of voyeurism. The Prosecutor must remind the court of this mandatory order and of the appropriate duration of the order.

In cases of voyeurism, the Prosecutor should make an application for both DNA and *SOIRA* orders where the Prosecutor is of the view that the voyeurism offence was committed with the intent of committing a designated sexual offence (such as making child pornography) or there is evidence supporting a legitimate concern that the offender’s behavior may be escalating or that the offender has a history of antisocial behavior.

Where appropriate, Prosecutors should apply for a prohibition order restricting the offender’s ability to interact with children under the age of 16, either in person or over the Internet.

In all cases where an offender has been convicted of an offence involving Internet child exploitation, Prosecutors should apply for forfeiture of things used in child pornography or Internet luring, including computers. Prosecutors must seek forfeiture of any child pornography, the possession of which is illegal and all offence related property.

## **Intimate Partner Violence**

Intimate partner (or domestic) violence involves the use of physical, psychological or sexual force, actual or threatened, as well as criminal harassment, in an intimate relationship. Intimate relationships vary in duration and legal formality, and include dating, living common law or married, whether current or former.

Intimate partner violence offences are often committed in a context where there is a pattern of assaultive and/or controlling behaviour. Violence may go beyond physical assault and may include emotional, psychological and sexual abuse that is intended to induce fear, humiliation and powerlessness. Intimate partner violence is not a private matter but is a serious criminal act. Intimate partner violence is a prevalent social problem with far ranging harmful effects.

The Prosecutor must be aware of the dynamics that exist in an intimate relationship that may affect the conduct of the prosecution. In addition to fear for their personal safety and that of their children, victims of these offences may be under considerable pressure on account of many factors, including financial considerations, the need for childcare, disapproval of family members, immigration consequences or fear of being ostracized by the community. In many cases, victims will also continue to feel an emotional bond to the accused.

Children are also directly affected by intimate partner violence. The Prosecutor must be aware of the risk that children often suffer lasting emotional and psychological harm when exposed to intimate partner violence. Prosecutors shall report to child protection agencies any cases where they have reasonable suspicion that a child is, or may be, in need of protection.

At all stages of the prosecution, including bail hearings, the safety of victims and their families is a paramount factor for Prosecutors to consider in the exercise of their discretion.

Each Crown Attorney's Office has a designated "Intimate Partner Violence" Prosecutor, who is also a member of the local Domestic Violence High-Risk Committee and any Domestic Violence Court Advisory Committee.

## **Judicial interim release (bail)**

In intimate partner violence offences, the Prosecutor must take a position on judicial interim release applying the same general principles set out in the [Judicial Interim Release \(Bail\) Directive](#), including the requirement for ongoing assessment of the strength of the Crown's case. Prosecutors should be sensitive to the needs of the victim and to the dynamics that exist in families where a partner is allegedly abused. The Prosecutor must be conscious of the potential increased risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public.

In determining whether to consent to or oppose release, the Prosecutor must consider the possibility of ongoing violence and its potential impact on the physical, emotional and psychological well-being of any children, including any child witnesses. The Prosecutor must also consider any risk assessment information before taking a position on judicial interim release. Risk factors can include but are not limited to history of violence, a pending or actual separation or substance abuse issues.

The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the alleged offence and the accused. The Prosecutor should have regard to the existence of any family court orders.

The Prosecutor must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Prosecutor must ensure that victim notification occurs as soon as possible. On request, the victim must be provided with a copy of the court order.

## **Charge screening**

When applying the [Charge Screening](#) Directive the Prosecutor should keep in mind the factors unique to cases of intimate partner violence. The public interest factors in these cases must be considered with the predominant need to protect the victim. Given the prevalence and danger of intimate partner violence it will usually be in the public interest

to proceed with these prosecutions. Ultimately, the decision to prosecute must be based on factors specific to each case.

In certain circumstances, the interests of justice may be best served by requiring a motivated, low-risk accused to complete domestic violence education and counselling. The Prosecutor may consider recommending counselling provided by an early intervention program only where:

- the accused pleads guilty [or agrees to enter into a s.810 Recognizance]
- the accused has no convictions for violence-related offences
- the accused did not cause serious injuries or harm
- no weapon was used in the offence
- the victim is consulted.

The Prosecutor must not withdraw charges solely based on the victim's request. The Prosecutor must consider all the circumstances. These victims may be reluctant to continue a prosecution and be under considerable pressure to seek the withdrawal of the charges.

## **Victim as witness**

In cases where the victim recants or refuses to testify, the Prosecutor must consider the reasons for the recantation or refusal. The Prosecutor must consider whether the case can be proven using other evidence and the appropriateness of an adjournment.

## **Resolution discussions and sentencing**

### *Section 810 recognizances ("Peace Bonds")*

There may be exceptional cases where the victim's safety, their best interests and the interests of society could be served by employing an alternative to criminal prosecution. The Prosecutor may resolve the case by way of a section 810 recognizance after considering all the circumstances, including the victim's views and public safety and the factors outlined in the [Community Justice Programs for Adults](#) Directive.

A decision to agree to a section 810 recognizance must be approved by the Crown Attorney or designate. In all cases where a Prosecutor decides a section 810 recognizance is appropriate, firearms and weapons prohibitions must be considered as conditions of the peace bond. A Prosecutor must not use a common law peace bond in intimate partner violence cases unless a section 810 recognizance is not available and

even then only with the prior approval of the Crown Attorney or designate. The same considerations apply to the use of a common law peace bond as a section 810 recognizance.

### *Victim impact statements*

As soon as feasible after a finding of guilt, the Prosecutor must take reasonable steps to provide the victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options. The victim may be informed of these rights early in the process.

### *Restitution*

The *Criminal Code* directs the court to consider making a restitution order and to ask the Prosecutor if reasonable steps have been taken to provide the victim with an opportunity to indicate whether they are seeking restitution i.e. compensation for counselling. As soon as feasible after a finding of guilt, the Prosecutor must take reasonable steps to provide the victim with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.

### *Sentencing*

In cases of high-risk offenders, the Prosecutor must refer the case to the High-Risk Offender National Flagging System. In appropriate cases, the Prosecutor should consider whether to proceed with a Dangerous/Long-term Offender Application (see [High-Risk Offender National Flagging System Directive](#) and [Dangerous/Long-term Offender Directive](#)).

Where probation is imposed, the Prosecutor should consider whether the Partner Assault Program or other relevant counselling program is appropriate.

Reference should be made to the following Directives [DNA Data Bank Order](#), [Weapons Prohibitions and Forfeiture](#), the [Firearms](#) and [Indigenous Peoples](#).

## Judicial Interim Release (Bail)

One of the fundamental presumptions in Canadian criminal law is that a person arrested and charged with an offence will be out of custody prior to trial. This is based on the presumption of innocence. The *Criminal Code* and legal decisions from the Supreme Court of Canada emphasize that liberty while awaiting trial is a basic principle underlying the judicial interim release process.

Upon arrest an accused may be released by police or brought before the court for a bail hearing. A bail hearing involves a balancing of potentially conflicting interests: the liberty interests of the accused and the *Charter* right to reasonable bail balanced against societal interests in public safety and confidence in the administration of justice. Where a hearing is held, the court determines whether the accused should be released with or without conditions and with or without sureties, or held in custody prior to trial.

An accused is presumed innocent and the Prosecutor must be aware of the impact of even a brief period of detention in custody upon an accused. Even a brief period of detention in custody affects the mental, social and physical life of the accused and their family. An accused is presumed innocent and must not find it necessary to plead guilty to secure their release.

The decision whether to consent to or oppose bail is one of the most critical decisions in the criminal process. It requires a consideration of competing interests including the interests of public safety, the accused and the victim. This process is complicated by the challenges of accurately predicting future conduct.

The appropriate exercise of prosecutorial discretion is fundamental to the proper functioning of the bail process. The Prosecutor must act with objectivity, independence and fairness in each case to ensure early, timely and principled decision making based on the circumstances of the accused and the offence and an appropriate use of legal principles without outside pressures or considerations. Decisions made by Prosecutors about consenting to or opposing release made in the proper exercise of their discretion will be supported by the Attorney General.

The accused should be released or a bail hearing should be held at the earliest opportunity having regard to the requirements of the *Criminal Code*. The Prosecutor should consider the least restrictive form of release and should not request a release with a surety (the most onerous form) unless each lesser form of release has been considered and rejected as inappropriate. As noted by the Supreme Court of Canada, the default position is the unconditional release of the accused. Any conditions that are requested should be necessary and required in the interests of the accused and the safety and security of the victim or public and related to the commission of the offence.

Where the Prosecutor believes that the release of the accused would jeopardize the safety or security of the victim or the public and such risk cannot be appropriately mitigated by some form of community based release with conditions, the Prosecutor must seek the accused's detention.

Additional principles and directions that apply to specific circumstances are particularized in specific Directives. Reference should be made to the following Directives: [Firearms](#), [Indigenous Peoples](#), [Intimate Partner Violence](#), [Mentally Ill Accused - Court Practices and Procedures](#), [Offences against Children](#), [Sexual Offences against Adults](#), [Victims](#), [Weapons Prohibitions and Forfeiture](#) and [Youth Criminal Justice - Court Practices and Procedures](#).

## **Bail hearing**

The *Charter* guarantees the accused right not to be denied reasonable bail without just cause. The concept of "reasonable bail" relates to the terms of bail, including any monetary component and other restrictions that are imposed on the accused, and requires the least restrictive form of release available consistent with the public interest.

The concept of "just cause" is limited to three grounds for detention which are defined by the *Criminal Code*:

1. to ensure attendance in court
2. for the protection or safety of the public
3. to maintain confidence in the administration of justice.

Each of the three grounds is separate and independent from the others. There is no specific order in which the grounds are considered. The court decides which form of release to order and it is the court that determines and imposes conditions that are specific to the circumstances of the accused and the alleged offence and necessary to address the three grounds.

The Prosecutor should ensure that the bail hearing proceeds expeditiously and as effectively as possible. Wherever possible, the hearing should be conducted and completed on the first appearance of the accused in bail court. The Prosecutor should consider whether the hearing can be conducted by a factual summary and submissions without the necessity of calling evidence or by conducting a focused hearing dealing with only issues that are in dispute.

If the Prosecutor seeks an adjournment, it should be for as short a time as necessary. The reasons for the request should be stated in open court.

## **Factors to consider**

The Prosecutor should consider whether there is a reasonable prospect of conviction and whether it is in the public interest to proceed with the prosecution of the charges (see [Charge Screening](#) Directive). If the charge screening threshold is not met the charge should be withdrawn and the accused released. The Prosecutor should also consider whether a custodial sentence would be appropriate if the accused is subsequently found guilty. Detention should be rare if a custodial sentence is unlikely.

The Prosecutor must assess the circumstances of the alleged offence and the accused, including information relating to the victim, when determining a position on bail. This assessment must continue when new information is received. Information provided by the accused through counsel, may assist the Prosecutor in making a final determination on bail.

These factors must be considered by the Prosecutor regardless of whether the onus of showing why the accused must be detained, or not, is on the prosecution or the accused.

### *Circumstances of the accused*

1. the age of the accused
2. the presence or absence of a criminal record, including any convictions for violence, related offences and breach of court orders
3. a concern that the accused will interfere with the administration of justice (e.g. coercion of witnesses, destruction of evidence)
4. the presence or absence of outstanding charges in any jurisdiction, together with their nature and circumstances

5. the need for and the availability of supervision of the accused while on bail
6. any ties to the community
7. the availability of community supports.

The Prosecutor must consider the unique circumstances of Indigenous Peoples when an accused self-identifies as Métis, Inuit or First Nation. The Prosecutor should also consider the distance and remoteness of many Indigenous communities and the barriers that this creates for access to bail hearings and forms of release. A significant disadvantage is created since the accused is unlikely to have established connections or supports in the community in which the bail hearing is taking place. In these circumstances, seeking the detention of an Indigenous accused should remain an exceptional measure unless the release of the accused would jeopardize the safety and security of the victim or the public. Although the Prosecutor should keep in mind the principles referred to by the Supreme Court in *Gladue*, a *Gladue* report should not be requested by the Prosecutor for a bail hearing. Reference should be made to the [Indigenous Peoples Directive](#).

When determining a position on bail, Prosecutors should recognize the circumstances of vulnerable and disadvantaged accused, including racialized populations, the homeless, the poor or those suffering from mental illness or addictions. These accused may not have access to the type of accommodation, resources, networks or supports that commonly exist for other members of the community. Pre-trial detention should never be used as a substitute for mental health or other social measures.

#### *Circumstances and nature of the alleged offence*

1. whether the offence involved violence or threats of violence
2. whether serious bodily harm was reasonably foreseeable
3. whether the offence harmed the victim (physical, psychological or financial) and/or community
4. whether the incident violated the sexual integrity of a person
5. whether the victim has provided input through police or a victim services agency
6. whether a weapon was used or threatened to be used
7. whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable
8. the interests of the community, including the needs of the victim.

The Prosecutor should consider whether the offence involved a spouse/intimate partner. Spouse/intimate partner offences are often committed in a context where there is a pattern of assaultive and controlling behaviour. Violence may go beyond physical assault and may include emotional, psychological and sexual abuse that is intended to

induce fear, humiliation and powerlessness. The same general principles of bail apply to these cases, including the requirement for ongoing assessment of the strength of the Crown's case. Prosecutors should be sensitive to the needs of the victim and to the dynamics that exist in families where a partner is allegedly abused. The Prosecutor must be conscious of the potential increased risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public. Reference should be made to the [Intimate Partner Violence Directive](#).

Where the charge is an offence against the administration of justice, such as a breach of a court order, the Prosecutor should consider the extent of non-compliance, the seriousness of the alleged breach and any apparent reasons for the breach in determining her position on bail. The Prosecutor should also consider the gravity of the administration of justice offence and the underlying facts in proportion to the consequences of proceeding with the criminal charge.

Where an accused is arrested for breaching a condition of a release order and/or committing a new offence, the decision to cancel the previous release order should not be automatic but subject to consideration of the same factors set out above.

## **Options for release**

The *Criminal Code* permits a police officer to release an accused upon arrest. Where the police officer does not release the accused, the *Criminal Code* directs a court to release an accused on an undertaking without conditions unless the Prosecutor shows why a more onerous form of release or detention is warranted. There are certain offences for which the *Criminal Code* directs that the accused show why their detention in custody is not required pending trial.

There are several forms of release set out in the *Criminal Code*. The "ladder" principle requires that a justice not order a more onerous form of release unless the Prosecutor shows why a less onerous form of release is not appropriate. The "ladder approach" moves from the least restrictive to the most onerous form of release and permits the court to release in one of the following ways, with or without conditions:

1. an undertaking, with or without conditions
2. a recognizance without sureties with promise of money
3. a recognizance with sureties with promise of money
4. with Prosecutor's consent, a recognizance without sureties with deposit of money

5. a recognizance with or without sureties, and a deposit of money where the accused does not live within 200 kilometres of place of arrest.

In determining her position on bail, the Prosecutor should apply the ladder approach. The Prosecutor should consider the least restrictive bail that still meets any concerns that have been identified. The Prosecutor shall consider each rung of the “ladder” individually and shall reject it before moving to a more restrictive form of release. This should be done by the Prosecutor whether the onus of showing why the accused must be detained, or not, is on the prosecution or the accused.

Although most accused persons will be released by the police or at a bail hearing, given the importance of the protection of the public, the Prosecutor must seek an order that the accused be detained in custody where she believes that the release of the accused would jeopardize the safety and security of the victim or public, and that such risk cannot be appropriately mitigated by some form of community-based release with conditions.

### *Supervision*

In some circumstances, concerns about public safety or attendance in court could be addressed by supervision in the community rather than detention of an accused. Such supervision should only be considered where it is necessary and appropriate and where lesser forms of release would be inadequate to meet those concerns.

Supervision may be available through a Bail Verification and Supervision Program or by a surety. Community groups or organizations may also be able to perform a supervisory role.

The Bail Verification and Supervision Program may require the accused to report to the police or the program and assists the accused in abiding by any conditions set by the court. The program may also help in accessing other community services or support the accused person. The program should not be expected to ensure absolute compliance with the release.

A surety is a person who assumes responsibility for the accused’s compliance with their conditions of release by promising to pay a sum of money if the accused breaches any of those conditions. A recognizance with a surety is one of the most onerous forms of release and should not be automatic. The Prosecutor should not request a surety unless all the less onerous forms of release have been considered and rejected as inappropriate. If the Prosecutor has determined that a surety release should be requested, the surety approval process should be efficient, minimally intrusive and consistent with the principles of the *Criminal Code*. Although the surety approval

process is ultimately up to the court, as a best practice the Prosecutor should generally use an affidavit of the surety and use an out of court approval process where available.

### *Monetary component*

A surety or an accused may promise an amount of money (with or without deposit) that may be forfeited if the accused does not comply with the conditions of release, including not attending court.

The Prosecutor should not request a deposit of cash for the release of an accused if their surety has assets that can be promised. A recognizance with a promise of money is functionally equivalent to depositing money and has the same persuasive effect. Requiring a deposit of money should be relied on only in exceptional circumstances where a release on a recognizance with a surety is unavailable.

The amount of money promised must be within the means of the accused and their surety. The Prosecutor should not request an amount to be promised or deposited that is unattainable as that has the same effect as a detention order.

### *Conditions of release*

A court determines whether the accused should be released, with or without conditions and with or without supervision. The accused, the Prosecutor, sureties and a Bail Verification and Supervision Program may propose conditions of release for the court to consider. The court imposes conditions that are necessary and required in the interests of the accused and the safety and security of the victim or public.

The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the accused and the alleged offence. The Prosecutor should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply. The conditions recommended should:

1. be rationally connected to one of the three grounds for detention in custody
2. relate to the specific circumstances of the accused and the offence
3. be realistic (the accused will be able to comply with the conditions)
4. be minimally intrusive and proportionate to any risk.

There must always be a connection between bail conditions proposed and the circumstances of the alleged offence and the accused (for example, “no alcohol” or “no drug” condition is not appropriate where it is not connected to the offence). Where a connection exists, consideration must be given to crafting the least restrictive bail conditions that still meet public safety concerns (for example, no drinking outside your residence as opposed to a complete ban on alcohol consumption or possession). It is important to limit the number of conditions that are imposed to those that are necessary and appropriate. Any condition recommended should be specific to the case and none should be automatic.

Conditions of release shall not be imposed to change an accused’s behaviour or to punish an accused person. These conditions often relate to therapeutic or rehabilitative measures and are more appropriate following conviction. Conditions imposing a curfew or a condition “not to associate with unnamed persons having a criminal record” or a condition prohibiting attendance at a place may have the unintended consequence of preventing an accused seeing family, accessing support services or losing access to the area they normally lives. The Prosecutor should not request these conditions as a matter of routine.

## **Victims**

The *Criminal Code* directs that the court shall include in the record of the proceedings a statement that the safety and security of every victim of the offence was considered. The Prosecutor must communicate any concerns about the safety or security of any victims to the court.

The Prosecutor must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concerns for a victim’s safety, the Prosecutor must ensure efforts are made for bail notification to occur as soon as possible. On request, the victim must be provided with a copy of the court order.

Similar notification should be made to victims when there is a bail variation or bail review.

## **Bail variation**

The terms of a bail order may be varied on the consent of the accused and Prosecutor. In determining her position on a request to vary any condition in a bail order, a Prosecutor should consider whether there has been a change in circumstances that

warrants a variation to the condition subject to consideration of the same factors set out above.

## **Bail review**

The decision of a justice to release or detain an accused may be reviewed in the Superior Court of Justice if there is new evidence showing a significant change in circumstances, there has been an error in law or the decision is clearly inappropriate. The Prosecutor must obtain the prior approval of the Crown Attorney or designate to seek a bail review of a release order.

## Juries

A jury must be independent, impartial and competent. Impartiality requires the exclusion of those persons who may have a personal interest or connection to the case. It also requires the exclusion of those persons who are unable to put aside any biases, prejudices and tentative opinions relating to the case. Impartiality is reinforced through a process of randomly selecting eligible persons from the general population for jury duty. Competency is determined by eligibility criteria set out in the *Juries Act* and the *Criminal Code*.

Serving as a juror is both a civic duty and an important opportunity to contribute to the community. It also ensures that decisions of the court are grounded in community values. The process by which eligible citizens are randomly selected for jury duty is governed by law and is described on the Ministry of Attorney General website, [here](#). The random selection process promotes public confidence in the jury's verdict, and in the administration of criminal justice. It should also, to the extent possible, protect the legitimate privacy interests of prospective jurors.

It is important to protect actual impartiality and also maintain the appearance of an impartial jury during the course of a trial. The Prosecutor must seek to obtain a jury that is impartial, not a jury that is favourable to her position. The Prosecutor must not directly or indirectly communicate with any member of the jury except as permitted by law.

### Juror background checks

The pool of eligible persons from which a jury can be selected in court is called the jury panel. The Prosecutor must not request criminal record checks or other background checks on members of the jury panel. If the Prosecutor determines that criminal record checks or other background checks are necessary, the express written approval of the Crown Attorney and Director are required. Where criminal record checks or other background checks are conducted, the Prosecutor must disclose the results to defence counsel and the Director must notify the Assistant Deputy Attorney General- Criminal Law Division.

The Prosecutor must not conduct any informal inquiries (for example seeking input from the office staff or the police) into a prospective juror's background without judicial approval.

Where the Prosecutor obtains judicial approval to conduct an informal inquiry into a prospective juror's background, the Prosecutor must record the names of each person who is shown the panel list, and must disclose those names to the defence. The Prosecutor should advise each person who is shown the jury panel list that the sole reason the person is viewing the list is due to prior judicial authorization. The Prosecutor should also tell each person that their comments are to be reduced to writing on the jury panel list and that their comments will be disclosed to the defence.

## **Challenge of the jury roll or panel**

The *Juries Act* requires that one jury roll be prepared every year for each judicial district in Ontario. Once the jury roll is created for the judicial district, and certified as accurate and complete, Ontario's Provincial Jury Centre then uses a computer program to randomly select jury panels from the jury roll.

The jury roll or panel may be challenged prior to the selection of jurors on the grounds that the roll or panel is not representative including partiality, fraud or wilful misconduct or was prepared using improper procedures.

If the accused challenges the propriety or representativeness of the jury roll or panel, the Prosecutor must inform the Crown Attorney and Director. The Director must then notify the Assistant Deputy Attorney General-Criminal Law Division.

On the application, the Prosecutor should ensure that a proper evidentiary foundation for the challenge is placed before the court. This will require coordination and consultation with Court Services Division prior to proceeding with the application.

The Prosecutor must not challenge the propriety or representativeness of the jury roll or panel without the prior approval of the Crown Attorney and Director.

## **Safeguarding jury panel lists**

Jury panel lists contain confidential information about prospective jurors and must be securely stored at all times. During the course of the trial, the Prosecutor must ensure that the list is not left in public view. After the trial, the Prosecutor must ensure that the confidentiality of the list is maintained.

The jury panel list should not be destroyed. The list must be placed in a sealed marked envelope, and must be stored with the contents of the Crown Brief. The jury panel list should be securely retained for a period of one year after its use.

# **Mentally Ill Accused**

## **Prosecution Directives**

Mentally ill accused face unique challenges at each stage of the criminal justice process.

Mental disorders can take many forms and encompass any illness, disorder or abnormal condition that impairs a person's mind and its functioning. Mental disorders do not include temporary or self-induced states. The fact that a person has a mental disorder may be a relevant factor for consideration in a criminal proceeding.

In recognition of their particular circumstances, mentally ill accused may warrant special consideration within the criminal justice system, depending on the nature and circumstances of the offence and the background of the accused. The existence of a mental disorder may be relevant in determining whether an accused is eligible for diversion, determining a position on bail, whether a psychiatric assessment of the accused's mental condition is required, whether the accused may be exempt from criminal responsibility and the dispositions available at the conclusion of the criminal proceedings.

Any consideration given by Prosecutors to an accused's mental disorder and mental condition must always be consistent with maintaining public safety and public confidence in the administration of justice. In these circumstances, Prosecutors must be guided by the relevant provisions of the *Criminal Code*, the governing law and any relevant legislation including the *Mental Health Act*.

[Mentally Ill Accused - Alternatives to Prosecution](#)

[Mentally Ill Accused - Court Practices and Procedures](#)

[Mentally Ill Accused - Post Verdict Issues](#)

## **Mentally Ill Accused - Alternatives to Prosecution**

Community based sanctions may serve as an effective alternative to the prosecution of mentally ill accused. In some cases, the needs and interests of society can be better served through the exercise of prosecutorial discretion to withdraw or stay criminal charges upon an accused person's entry or completion of a comprehensive diversion program. A mentally ill accused is entitled to special consideration flowing from the fact that, their illness, disorder or impaired cognitive functioning may have played some role in the commission of the offence.

To the extent that it is consistent with public safety, accused persons suffering from a mental illness (including developmental disabilities and concurrent disorders) should have the same access to community justice programs as all other accused. This may require an emphasis on restorative and remedial measures, such as specialized treatment options, supervisory programs or counselling programs, as alternatives to prosecution. Prosecutors must only consider community based sanctions if a reasonable prospect of conviction exists and must not impose additional requirements on the accused person as a precondition to offering an alternative to diversion.

A community based program will hold the mentally ill accused accountable for criminal conduct by requiring the completion of rehabilitative programs that effectively respond to the nature of the offence, the accused, and the needs of the community. Once in a program, a plan will be created for the accused that will address the underlying causes that led to the commission of the offence.

In considering community based programs, Prosecutors should bear in mind that a purely medical approach (that may involve medication and/or psychiatric care) is not necessarily the preferred course for all mentally ill accused. Often, the provision of good housing and proper ongoing support in the community are, in themselves, an effective response. Alternative sanctions for mentally ill accused may also include community service work, an apology, and restitution.

This directive addresses diversion for mentally ill persons. For young persons, please see [Youth Criminal Justice - Extrajudicial Sanctions](#). For adults, please see [Community Justice Programs for Adults](#). For an Indigenous accused, please see [Indigenous Peoples Directive](#).

## **Ineligible offences**

Prosecutors must not refer any of the following offences to a community based program, regardless of the circumstances of the offence or the accused:

- murder, manslaughter, infanticide, criminal negligence causing death
- driving offences causing death or bodily harm
- aggravated assault
- simple impaired driving or driving with a prohibited blood alcohol concentration or refusing to provide a breath sample
- offences involving firearms
- criminal organization offences
- terrorism offences
- kidnapping
- voyeurism
- child abuse and child luring
- offences involving child pornography
- home invasions
- human trafficking offences
- robbery
- sexual assault cause bodily harm
- sexual interference and exploitation, invitation to sexual touching and incest
- any offences where the Attorney General's consent was obtained to initiate proceedings.

## **Presumptively ineligible offences**

In exceptional cases, the Prosecutor may refer the following presumptively ineligible offences to a community based program with the prior approval of the Crown Attorney or designate:

- hate-motivated offences [[Hate Propaganda and Hate Motivated Offences Directive](#)]
- intimate partner violence offences [[Intimate Partner Violence Directive](#)]
- criminal harassment
- publication etc., of intimate images without consent
- sexual assault.

## **Eligible offences**

The Prosecutor may refer any other offence to a community based program.

## **Factors to consider**

In determining if a community based sanction is an effective alternative to the prosecution of a presumptively ineligible offence or eligible offence for a mentally ill accused, the Prosecutor and Crown Attorney or designate must consider the following factors:

### *Background of the accused person:*

1. the age and health of the accused person including any mental health issues and psychiatric history
2. any prior findings of guilt or past involvement with community justice programs or specialized treatment
3. the nature and number of any such previous offences
4. any outstanding charges
5. the role of the accused person and their corresponding degree of responsibility in relation to the offence
6. whether the accused person has been previously victimized
7. any remorse and willingness to engage in community justice programs or an appropriate treatment program, including the likelihood of compliance
8. the degree that the mental illness can be said to have impacted the accused person's behavior and involvement in the offence

9. whether the accused person comes from a disadvantaged group
10. whether the accused person has been or is presently engaged with the mental health system
11. whether the accused self-identifies as Métis, Inuit or First Nation.

*The circumstances and nature of the offence:*

1. whether the offence is summary or indictable
2. whether the offence involves violence
3. whether the offence actually harmed the victim (physical, psychological or financial) and/or society
4. whether the incident affected the sexual integrity of a person
5. whether a weapon was used or threatened to be used
6. whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable
7. whether the offence was against the administration of justice, such as breach of a court order, and, if so, the extent of non-compliance
8. whether the offence involved malice, extortion, exploitation or revenge
9. whether the offence involved a breach of trust
10. whether the offence was motivated by bias, prejudice, or hate
11. the age of the victim
12. the views of the victim and/or their parents or legal guardians (if victim is a child), if available.

*Administration of justice considerations:*

1. public confidence in the administration of justice
2. the length and expense of a trial when considered in relation to the seriousness of the offence
3. the likely sentence upon conviction
4. the availability of an appropriate sanction, including culturally relevant programming options, which will hold the accused person accountable and focus on correcting the offending behaviour
5. frailties in the prosecution e.g. staleness of the case, or the technical nature of the offence
6. whether the consequences of the prosecution would be unduly harsh to the accused person, the victim or any witnesses in the case, owing to such factors such as age, health or the relationship between the parties
7. whether a just result is accelerated by a referral to a community justice program.

## Mentally Ill Accused - Court Practices and Procedures

An accused's mental illness may influence whether they are able to meaningfully participate in the criminal proceeding or whether they understood fully what they were doing at the time of the offence. If a mental illness renders the accused unable to participate in conducting their defence or instructing counsel, an accused may be found 'unfit to stand trial.' If a mental illness affects the accused's actions at the time of the offence such that they did not understand what they were doing or did not know what they were doing was wrong, the accused may be found 'not criminally responsible (NCR).

The *Criminal Code* sets out the legal requirements to determine fitness to stand trial and the finding of not criminally responsible.

### Judicial interim release (bail)

When determining a position on bail, Prosecutors should recognize the unique circumstances and inherent vulnerability of an accused suffering from a mental illness. The accused should be released or a bail hearing held at the earliest opportunity having regard to the requirements of the *Criminal Code*.

The Prosecutor must be aware that even a brief period of detention can have a disruptive impact upon an accused dealing with a mental illness. These accused may not have access to the type of accommodation, resources, networks or supports that commonly exist for other members of the community. Pre-trial detention should never be used as a substitute for mental health or other social measures. If a psychiatric assessment is being sought at the bail stage, detention in custody may be necessary while the accused waits for space in a hospital.

Conditions of release shall not be imposed to change a mentally ill accused's behavior or to punish the accused. These conditions often relate to therapeutic or rehabilitative measures and are more appropriate following conviction. The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to

the circumstances of the accused and the alleged offence. Any conditions recommended should be specific to the case and none should be automatic. The Prosecutor should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply. The accused's mental illness may impede the ability to understand and comply with conditions of release.

Reference should be made to the [Judicial Interim Release \(Bail\) Directive](#).

## **Appointment of counsel**

A mentally ill accused may require the assistance of counsel in the criminal proceedings yet not have the capacity to select and retain counsel. The *Criminal Code* and common law mandates a court to appoint counsel to assist an accused in these circumstances.

## **Psychiatric assessments**

A psychiatric assessment may be requested if there are reasonable grounds to believe that an assessment is necessary to determine an accused's ability to meaningfully participate in the criminal proceedings or to determine if the mental illness might have affected the accused's actions at the time of the offence. The psychiatric assessment will assist the court in determining fitness to stand trial or criminal responsibility. As the issue of fitness and criminal responsibility are distinct, a psychiatric assessment should be ordered to address each individually.

In requesting a court ordered psychiatric assessment of the mentally ill accused, Prosecutors should consider the following factors:

- the purpose of the assessment:
  - an assessment should be conducted for a stated purpose linked to the prosecution. An assessment must not be conducted for a purpose extraneous to the criminal law, such as placing the accused in a more favorable environment
- the time required to conduct the assessment:
  - an assessment ought to be concluded within a fixed and reasonable amount of time which is specified in the order
- the location of the assessment:
  - an assessment can be conducted in or out of custody.

## **Fitness to stand trial**

An accused person is presumed fit to stand trial. If a mental illness impedes an accused capability to conduct a defence due to an inability to communicate with counsel or to understand the nature, object or consequences of the proceedings, the proceedings will be halted until such time that the accused is mentally fit to stand trial.

The issue of fitness to stand trial can be raised at any time during the criminal proceedings. The Prosecutor or defence counsel who believes the accused may be unfit must bring this matter to the court's attention. The Prosecutor's ability to raise the issue of fitness is subject to limitations set out in the *Criminal Code*.

When the issue of fitness arises, the court must conduct an inquiry and render a decision on the accused's fitness.

### *Treatment disposition orders*

Upon an accused being found unfit, a Prosecutor may make an application to the court for a treatment order if there is evidence that the accused could return to a fit state within a short period of time. Only a Prosecutor can request a treatment order. The accused's consent to be treated is not a prerequisite for a treatment order. It is necessary to have the consent of the hospital or the person assigned responsibility by the court for the treatment prior to the court making the order. Prosecutors should consider the appropriateness of an out-of-court treatment order where public safety would not be compromised.

If a court is satisfied that the statutory criteria set out in the *Criminal Code* is met, an order directing that treatment be carried out for a specified period may be issued. If the accused becomes fit to stand trial following treatment, the criminal proceedings continue. If the accused remains unfit following treatment, jurisdiction over the accused will transfer to the Ontario Review Board.

### *"Keep Fit" orders*

Where an accused is found fit to stand trial and is detained in custody pending trial and there is a concern they may become unfit, an order may be made that the accused be detained in hospital rather than a correctional facility. In all cases where a "keep fit" order is made, Prosecutors should consider measures to expedite the trial, including bringing the trial date forward where feasible.

### *Unfit accused*

An accused that remains unfit to stand trial falls under the jurisdiction of the Ontario Review Board until the accused becomes fit to stand trial or until the court directs a stay of proceedings. Reference should be made to the [Mentally Ill Accused - Post Verdict Issues](#) Directive.

The Information containing the charges laid against the accused remains in court. Every two years, the Prosecutor shall establish the continued existence of evidence to support the elements of the offence that the accused would face at trial. If there is insufficient evidence, the accused shall be acquitted.

## **Not Criminally Responsible (NCR)**

An accused that satisfies the test for a verdict of not criminally responsible on account of a mental illness shall not be convicted or acquitted. The verdict of not criminally responsible recognizes the criminal act was a product of the accused's mental illness such that the accused should be treated, not punished. The *Criminal Code* recognizes that punishment is inappropriate and ineffective in these circumstances as the criminal act was not a product of any rational choice by the accused.

The Prosecutor's ability to raise this issue during the trial is limited to those cases where the accused has made his mental capacity an issue in the trial. Where the Prosecutor has reason to believe that an accused may be not criminally responsible, the Prosecutor must raise this issue following a finding of guilt. If an accused is found not criminally responsible and the court does not grant an absolute discharge, the accused falls under the jurisdiction of the Ontario Review Board. Reference should be made to the [Mentally Ill Accused - Post Verdict Issues](#) Directive.

### *Ancillary orders*

Upon a finding of not criminally responsible, the Prosecutor must consider whether a request should be made and make the application to the court for any of the following:

- weapons prohibition
- high-risk accused designation
- DNA Databank Order
- Sex Offender Information Registration Order
- forfeiture order
- High Risk Offender Flag.

The Ontario Review Board does not have the jurisdiction to make ancillary orders.

Reference should be made to the following Directives [Weapons Prohibitions and Forfeiture](#), [DNA Data Bank Orders](#), [Criminal Asset Forfeiture](#) and [High-Risk Offender National Flagging System](#).

## Mentally Ill Accused - Post Verdict Issues

An accused found either unfit to stand trial or not criminally responsible becomes subject to a comprehensive statutory process that determines when and under what conditions the accused person may be returned to the community. The process is aimed at protecting the public and treating the accused's mental illness. In Ontario, the Ontario Review Board (ORB) generally makes these decisions.

### Ontario Review Board (ORB)

Once a person is found unfit to stand trial or not criminally responsible the court may hold a disposition hearing or refer the matter directly to the ORB. The ORB is an independent specialized provincial tribunal with jurisdiction to make and review dispositions whose members are appointed by the lieutenant governor in council. The ORB consists of legal, medical and lay members. Its mandate is to make and review orders referred to as "dispositions" in respect of accused persons found unfit to stand trial or not criminally responsible. A "disposition" determines the terms and conditions of an accused's supervision by a psychiatric hospital and the accused's return to the community. The ORB has a legal duty to seek out all evidence it believes is necessary to make its decision and must treat public safety as the paramount factor of consideration.

The *Criminal Code* sets out timelines for when disposition hearings shall occur following a verdict of unfit to stand trial or not criminally responsible. The Attorney General is a party to the disposition hearings, and any appeals, and is represented by a Prosecutor.

The court or the ORB may conduct the initial disposition hearing. Thereafter and until the accused is absolutely discharged, the ORB conducts the annual disposition hearings.

In serious, lengthy and complex cases, the Prosecutor with carriage of the trial should when feasible attend the initial disposition hearing.

## **Appointment of counsel**

Where an unrepresented accused has been found unfit to stand trial or it is otherwise in the interests of justice, the court or ORB shall assign counsel to act for the accused either before or at the time of the hearing.

## **Victim notification**

The ORB is required to notify victims whenever a psychiatric assessment indicates a change in mental status of the accused that could provide grounds for an absolute or conditional discharge. The victim is also required to be notified, upon request, of any ORB hearing, any disposition of an ORB hearing and any escape of the accused from custody.

The victim is permitted to submit a Victim Impact Statement at any disposition hearing or a review of disposition order.

It is important that victims appreciate the process and purpose of the ORB. The Prosecutor should ensure that victims are informed of available victim services as facilitated by the Victim Witness Assistance Program (VWAP) or similar victim support services.

Reference should be made to the [Victims Directive](#).

## **Not Criminally Responsible (NCR) disposition hearings**

A verdict of not criminally responsible triggers an administrative process that is aimed at protecting the public and treating the accused's mental illness. This process involves regular disposition hearings to determine what further control over the accused is required. Public safety is always the paramount factor of consideration. An accused found not criminally responsible is subject to a period of indefinite detention regardless of how minor or serious the alleged offence. The gravity of the offence does not determine how long an accused remains under the control of the ORB. The ORB also considers the mental condition of the accused and the reintegration of the accused into society.

The following three dispositions are available at the initial disposition hearing and/or the annual disposition hearing for an accused who is not criminally responsible:

1. absolute discharge – where an NCR accused is found not to be a significant threat to the safety of the public, the person is no longer under the jurisdiction of the ORB and not subject to any conditions
2. conditional discharge – where an accused is discharged from the hospital and given conditions to do (or not do) certain things. An accused on a conditional discharge cannot be forced to return and remain at the hospital unless the hospital applies to the ORB to conduct a new disposition hearing
3. hospital detention order – where an accused is under the supervision of the hospital with conditions to do (or not do) certain things. An accused may reside at the hospital or in the community with the permission of the hospital. An accused on a hospital detention order is required to return to the hospital upon the request of the hospital.

## **Unfit disposition hearings**

The trial of an accused found “unfit to stand trial” cannot proceed until they become fit to stand trial or until the charges are terminated in court by a stay of proceedings, a withdrawal of the charges or an acquittal. The *Criminal Code* requires that disposition hearings be conducted to determine where and under what conditions an accused should be held who is found “unfit to stand trial”.

The following findings are available at the initial disposition hearing and/or the annual disposition hearing for an accused that is unfit to stand trial:

1. fit to stand trial – the accused shall be sent back to court where the court will determine if the accused is fit to stand trial. If the accused is fit to stand trial, the trial may proceed
2. unfit to stand trial – the accused can receive a disposition of either a conditional discharge or a hospital detention order
3. permanently unfit to stand trial –if the permanently unfit accused is determined not to pose a significant threat to society and it is in the interests of the proper administration of justice, a court may enter a stay of proceedings. Otherwise, the accused can receive a disposition of either a conditional discharge or a hospital detention order.

Once the Review Board is of the opinion that the accused has returned to a fit state, the accused is returned to court. The court will hold another fitness hearing to determine the issue of fitness. If the court determines that the accused is fit to stand trial, the trial will recommence. The Prosecutor must notify the Ontario Review Board that the accused has been found fit to stand trial.

## Offences Against Children

Offences against children include crimes of abandonment, abduction, neglect, physical abuse, sexual abuse and Internet child exploitation. These offences have devastating effects on the physical and psychological well-being of victims, their families and the community.

The Prosecutor must ensure that efforts are made, at all stages of the criminal proceedings, to provide the victim and/or where appropriate their parents or legal guardians, with whatever information or assistance is required to ensure full and fair participation in the criminal justice system. This includes the availability of the following:

- specialized victim's services facilitated by the Victim/Witness Assistance Program (V/WAP) or other similar victims' support services
- interpreters to assist the victim in communicating
- testimonial aids to assist the victim in providing evidence
- appointment of counsel to cross-examine the victim where the accused is self-represented
- access to independent legal representation for victims or witnesses on applications to access their private records under the *Criminal Code*.

Reference should be made to the following directives [Internet Child Exploitation, Victims, Publication Bans and Sealing Orders](#), [DNA Data Bank Orders](#), [Weapons Prohibitions and Forfeiture](#), [High-Risk Offender National Flagging System](#), [Judicial Interim Release \(Bail\)](#) and [Testimonial Aids and Accessibility](#).

### Judicial interim release (bail)

In offences against children, the Prosecutor must take a position on judicial interim release applying the general principles set out in the [Judicial Interim Release \(Bail\) Directive](#) including the requirement for ongoing assessment of the strength of the

Crown's case. The Prosecutor must be conscious of the potential risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public.

Where the accused is remanded in custody pending a bail hearing, detained or released on conditions, the Prosecutor should seek an order from the Court prohibiting the accused from having any contact with the victim, or where appropriate, any witnesses. The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the alleged offence and the accused.

In all cases involving a victim under the age of eighteen, the Prosecutor must seek a publication ban directing that the identity of the victim and any information that could disclose the identity of the victim not be published or transmitted in any way. Reference should be made to the [Publication Bans and Sealing Orders Directive](#).

The Prosecutor must ensure that efforts are made to notify the victim and/or where appropriate their parents or legal guardians of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Prosecutor must ensure that bail notification occurs as soon as possible. On request, the victim and/or where appropriate their parents or legal guardians must be provided with a copy of the court order.

## **Reporting concerns to the Children's Aid Society**

Prosecutors have a statutory obligation to report to child protection agencies any case where they have reasonable suspicion that children are, or may be, in need of protection.

## **Child homicide investigation and prosecution**

The death of a child under the age of 12 in suspicious circumstances raises many complex issues. The Child Homicide Resource Team provides advice during the investigation and prosecution of these cases. The assigned Prosecutor must consult with The Child Homicide Resource Team at the earliest opportunity.

## **Prosecution**

*Charge screening*

The Prosecutor should determine whether the full gravity of the criminal act is reflected in the offence charged and recommend a more appropriate charge be laid if necessary.

The following factors should be considered when determining the offence charged is appropriate to the circumstances and whether to proceed summarily or by indictment:

- the circumstances of the offence e.g. protracted sexual abuse; significant physical, emotional or psychological harm to the victim
- whether the offence is alleged to have occurred within 6 months of reporting
- the circumstances of the offender e.g. history of similar offences, position of trust/authority in relation to victim
- the circumstances of the victim including the impact on the victim of testifying twice (at a preliminary inquiry and trial) and special vulnerabilities (disabilities, age of victim)
- the potential range of sentence.

The Prosecutor should consider whether the accused should be flagged as a High Risk Offender or the subject of a Long Term Offender or Dangerous Offender Application. In those cases, the Prosecutor should consult with her Regional High Risk Offender Crown.

Reference should be made to the [Charge Screening Directive](#), [Dangerous/Long-term Offenders Directive](#) and [High-Risk Offender National Flagging System Directive](#).

## **Protecting the privacy of child victims**

Prosecutors must be sensitive to the privacy interests and needs of child victims at every stage of the prosecution.

The Prosecutor should consider the directions set out in the [Disclosure Directive](#) concerning the disclosure of sensitive materials.

### *Publication bans and other restrictions on public access*

In all cases involving a victim under the age of eighteen, the Prosecutor must seek a publication ban directing that the identity of the victim and any information that could disclose the identity of the victim not be published or transmitted in any way.

Where a concern exists that testifying publicly about a traumatic event may risk causing further trauma to a child victim, may inhibit testifying or may raise an issue respecting a

victim's safety, the Prosecutor may apply for an order excluding the public. The Prosecutor should have regard to the direction provided in the [Publication Bans and Sealing Orders Directive](#).

*Production of private records (third party records)*

In order to gain access to a victim's private information, such as their medical, psychiatric or personal records, the *Criminal Code* provides that the accused must establish that the private records are likely relevant to an issue at trial or to the competence of a victim to testify. The Prosecutor should engage V/WAP to assist the victim and/or where appropriate their parents or legal guardians in obtaining independent legal counsel to provide advice and represent their interests on the third party records application. The Prosecutor must not disclose victim's records absent a court order.

*Sexual abuse and/or activity*

The *Criminal Code* provides that evidence that a victim has been sexually abused or engaged in prior sexual activity is not admissible. This evidence cannot be used to assess the victim's credibility nor support an inference that the victim consented to the sexual activity.

Should the accused bring an application to have evidence of the victim being previously sexually abused or engaged in prior sexual activity admitted, the Prosecutor must advise the victim and/or where appropriate their parents or legal guardians that the victim is not required to testify at the hearing to determine the admissibility of the evidence. The Prosecutor must also advise the victim and/or where appropriate their parents or legal guardians that the *Criminal Code* prohibits publication of information provided on the application.

## **Cross-examination by a self-represented accused**

In cases where an accused person is self-represented, the Prosecutor must seek an order appointing counsel to conduct the cross-examination of the victim.

## **Expert evidence**

Before engaging an expert witness, the Prosecutor must obtain the prior approval of the Crown Attorney. Reference should be made to the [Expert Evidence Directive](#).

## **Testimonial aids**

Prosecutors should ensure that victims and witnesses under the age of 18 years, or their parents/legal guardian are informed of the availability of testimonial aids to assist them to communicate their evidence. Where appropriate, Prosecutors should apply for an order permitting the use of a testimonial aid. Reference should be made to the [Testimonial Aids and Accessibility Directive](#).

## **Resolution discussions and sentence**

The Prosecutor must ensure reasonable steps are taken to inform the victim and/or where appropriate their parents or legal guardians of a proposed resolution (e.g. guilty plea or proposed sentence) or that the charges will be withdrawn.

The Prosecutor must not negotiate a guilty plea in exchange for agreeing to forego a dangerous or long-term offender application without first consulting with the Regional High-Risk Offender Crown and her Crown Attorney.

Except with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- withdraw or stay proceedings in cases involving sexual abuse
- in cases involving sexual abuse, accept a plea to a lesser charge or non-sexual offence
- reduce a charge or elect summarily solely to allow for the imposition of a conditional sentence
- reduce or withdraw charge solely to avoid a mandatory minimum sentence or any ancillary orders.

### *Victim impact statement*

As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim and/or where appropriate their parents or legal guardians with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options.

### *Restitution*

The *Criminal Code* directs the court to consider making a restitution order and to ask the Prosecutor if reasonable steps have been taken to provide the victim and/or where appropriate their parents or legal guardians with an opportunity to indicate whether they are seeking restitution i.e. compensation for counselling. As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim and/or where appropriate their parents or legal guardians with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.

## **Ancillary orders**

The Prosecutor must seek the following orders if applicable and remind the court of all mandatory orders:

- DNA order
- *Sex Offender Information Registration Act* (SOIRA)
- Weapons Prohibition.

Depending on the circumstances of the offence and the offender, Prosecutors should consider making an application for a prohibition order that would restrict the offender's ability to interact with children under the age of 16, either in person or over the Internet.

Reference must be made to the following directives [DNA Data Bank Orders](#) and [Weapons Prohibitions and Forfeiture](#).

## Ontario's Witness Protection Program

The Ministry of the Attorney General operates Ontario's Witness Protection Program in cooperation with the Ontario Provincial Police and municipal police services in Ontario. The program represents one of the Ministry's most significant initiatives in the battle against serious and organized crime. It plays an important role in fulfilling the Ministry's commitment to improving support for victims of crime. The purpose of the program is to assist in protecting witnesses who have been (or may be) exposed to danger as a result of their cooperation in the investigation and prosecution of criminal offences in Ontario.

The need for witness protection often arises on an emergency basis. In such situations, police services have funds available to provide interim safety measures for the witness under the *Police Services Act*. Police services can apply to the program to receive reimbursement for protective measures implemented on behalf of a witness.

If there is an immediate concern for a witness's safety, the witness should call 911.

The disclosure of witness protection information is governed by a statutory privilege under the *Crown Witnesses Act*. The privilege pertains only to witness protection programs designated by regulation under the Act. The inappropriate disclosure of confidential witness protection information puts protected witnesses at risk and compromises the program's integrity. A person who discloses confidential witness protection information is guilty of a provincial offence.

All applications for admission to Ontario's Witness Protection Program must be made to the Ministry of the Attorney General, Crown Law Office – Criminal.

### Criteria for admission

Ontario's Witness Protection Program provides time-limited funding to assist in the protection, maintenance and relocation of a witness and/or family members where doing so is in the best interests of the administration of justice. Such an unusual measure may be appropriate where:

1. the life or health of the witness and/or family members is judged by the police to be in real danger as a result of the involvement of the witness in a prosecution
2. the case in which the witness is involved is a case of significance to the administration of justice e.g. murder, robbery, serious crimes of violence, organized crime
3. the witness is cooperating with the police and has agreed to provide truthful testimony that is a key element of the Crown's case
4. the witness's and/or their family members' circumstances allow them to freely participate in the program (e.g. not incarcerated, no longer an undercover agent etc.) and their behavior (e.g. ability and willingness to comply with program discipline) is such that they can benefit from protective measures without themselves posing a danger to the public while in the program.

As reflected in the criteria, the program exists to respond to the most serious of circumstances in very serious cases. It is designed as a last resort. Where alternatives are available, they should be utilized.

## **What the program provides**

Ontario's Witness Protection Program does not provide long-term financial assistance. It is a temporary relocation and assistance program only. The program also does not provide rewards or benefits in return for testimony. Depending on the circumstances of the witness and/or family members, the program may provide security advice as well as the following:

1. funding to cover the costs of relocation to a safe environment
2. funding for temporary rent, utilities, food and maintenance
3. assistance in obtaining social assistance benefits under the new name and in the new locale
4. funding to cover the costs of specifically approved security measures
5. where appropriate, funding to cover exceptional medical expenses including, where appropriate, psychological counselling
6. where appropriate, assistance in changing names and obtaining new identification documents
7. where appropriate, funding for time-limited and specifically approved upgrades to employment skills or education.

## **Application process**

Issues respecting the acceptance of a witness into the program, the determination of the nature and amount of assistance provided and the management of the witness are dealt with in an impartial and independent fashion by a local senior independent Prosecutor. The Prosecutor assigned to the prosecution must not be involved in this assessment and process except that she must confirm that the witness is willing and able to testify and that their anticipated testimony is a key element of the Crown's case.

The Prosecutor must not discuss witness protection matters with the witness except to the extent necessary to prepare them for their testimony. The level and type of assistance provided to the witness must not form part of any plea resolutions or other arrangements.

The senior independent Prosecutor will ensure that the Prosecutor and investigators have provided the witness protection officer with all of the information needed to complete an application for program assistance must review a witness protection application. The senior independent Prosecutor must certify, if appropriate, that the use of witness protection is in the best interests of the administration of justice.

The preparation of applications and handling of witnesses accepted into Ontario's Witness Protection Program, including the implementation of protective measures, is the responsibility of specialized provincial and municipal witness protection officers who are independent of the investigator of the underlying offence. Counsel in the Crown Law Office – Criminal with expertise in witness protection matters are assigned to review witness protection applications independent of the prosecution team. The approval of the Deputy Attorney General is required to enter the program.

The officer conducting an investigation involving a witness in need of protection will refer the witness's safety concerns to a designated witness protection officer within their police service. The witness protection officer will make an independent assessment of the witness's security needs.

## **Acceptance into program**

A witness who has been accepted in the program must sign a standard Letter of Acknowledgement (describing the general nature of the financial and other assistance approved for the witness) before any funds (interim protection assistance funds excepted) are disbursed by the police. The Prosecutor will be advised by letter from the reviewing counsel in the Crown Law Office – Criminal that the witness has been

accepted into the program and a copy of the Letter of Acknowledgement will be made available in the event that it is required as an exhibit.

## Police

Public safety and effective prosecution are best achieved by a close working relationship between Prosecutors and police that recognizes the independence of each organization. Police officers have sole responsibility and discretion over the investigation of a criminal offence and the laying of criminal charges except where the consent of the Attorney General is required by statute. Prosecutors have sole responsibility and discretion over the prosecution of criminal offences, including deciding whether to continue with criminal proceedings.

While independence is of fundamental importance, there is also a need for co-operation at all stages of an investigation and court proceedings. Prosecutors should encourage the police to seek advice concerning legal issues or the sufficiency of evidence relating to a criminal offence. Prosecutors may require the assistance of police in conducting further investigations.

This cooperative relationship of mutual respect and professionalism recognizes the distinct functions of the police and the Prosecutor. Both parties exercise discretion independently and objectively. This independence and objectivity are essential elements of the Prosecutor's role as "Minister of Justice" which is fundamental to the proper administration of justice.

### Advice to the police

#### *General legal advice*

Police often seek legal advice from Prosecutors in relation to general police investigative practices that could impact upon the admissibility of evidence in future prosecutions. In order to ensure consistence of advice, where the police seek a legal opinion on an issue that may have general application, the request for advice must be forwarded to the Crown Attorney, who may direct the request to the Director.

#### *Case specific legal advice*

Police often seek legal advice from Prosecutors concerning a specific investigation or an ongoing prosecution. It is appropriate for Prosecutors to provide this legal advice. Prosecutors should ensure they have received sufficient information before providing advice. Prosecutors should take care not to dictate to the police or purport to direct the police investigation. Generally speaking, legal advice provided to the police is not binding.

Prosecutors should avoid any conduct that blurs the distinction between the investigative and prosecutorial functions of the Prosecutor and the police, such as direct involvement in statement taking or attending a crime scene, in order to supervise the gathering of evidence. Prosecutors should avoid attending a crime scene until the investigation is complete.

#### *Disclosure of advice provided to the police*

As a general rule, the Prosecutor has an obligation to disclose all information in its possession or control unless that information is irrelevant or privileged. This rule includes communications between the Prosecutor and the police.

Legal advice provided by the Prosecutor to the police may not be disclosed based on a public interest privilege, solicitor-client privilege or other privilege. Therefore, care should be taken in vetting disclosure to ensure that privileged information is not inadvertently disclosed.

Any request or application to obtain disclosure of privileged information should be brought to the attention of the Crown Attorney.

## **Police as witness**

### *Allegations of dishonesty*

It is critical to the administration of justice that police officers' statements made under oath be truthful. The vast majority of police officers testify in an honest and straightforward manner and it is rare for judges to make negative comments about the truthfulness of a police officer's testimony. However, where concerns about the truthfulness of a police officer's statement arise, the Prosecutor has a responsibility to take action.

Where the Prosecutor becomes aware of credible and reliable information that an officer has been deliberately untruthful under oath, the Prosecutor must direct the matter to the Crown Attorney. Additionally, the Prosecutor must alert the Crown Attorney where

there is a judicial finding or comment that an officer has been deliberately untruthful under oath.

The Crown Attorney must forward all cases where there has been a judicial finding or comment that an officer has been deliberately untruthful under oath to the Director within 30 days, unless the issue is under appeal. In circumstances where the Prosecutor has advised the Crown Attorney of credible and reliable information to believe an officer has been deliberately dishonest under oath, in cases other than those involving judicial comments, the Crown Attorney must assess the circumstances to determine if there are grounds to believe the officer has been deliberately untruthful under oath. If so, the matter should be forwarded to the Director.

The Director must consider all the circumstances in reviewing the information and decide whether the matter should be forwarded to the police. In that case, a copy of relevant transcripts and materials relied upon must be forwarded to the Chief of Police for the relevant police service. The Director may delegate to the Crown Attorney the ability to refer the matter directly to the police. The Crown Attorney must advise the Director prior to referring the matter to a police service. Whether or not a referral has been made to the police, the Director must advise the Assistant Deputy Attorney General - Criminal Law Division who will track the number of referrals and non-referrals.

#### *Allegations of other police misconduct*

The above reporting regime also applies where the Prosecutor becomes aware of credible and reliable information that the officer has engaged in criminal misconduct, such as excessive use of force or there has been a judicial finding or comment that an officer has engaged in criminal misconduct.

The Prosecutor must not herself conduct an investigation but may engage an independent officer to investigate the criminal misconduct. In some circumstances it will be appropriate for the Director to refer or have the file referred to the Special Investigations Unit (SIU) for investigation.

#### *Disclosure of police disciplinary records*

The police have an obligation to provide and the Prosecutor has a duty to disclose:

- findings or allegations of police misconduct that relates to the subject matter of the offence for which the accused is charged, and/or
- findings or allegations of serious police misconduct that could reasonably bear on the case against the accused.

Serious police misconduct that is not related to the incident for which the accused is charged or has no bearing on the case against the accused should be reviewed by the Prosecutor to determine whether it should be disclosed.

## **Police training**

The involvement of Prosecutors in police training can best assist the police in their efforts to produce high quality investigations, to lay appropriate charges and to prepare thorough briefs. Prosecutors are encouraged to assist the police in their training on investigative procedures and emerging issues and developing areas of the law. Providing this guidance and training is beneficial to the administration of justice as a whole.

Prosecutors who receive requests to assist in police education and training should advise the Crown Attorney or Director of the request.

## Private Prosecutions

A person has the right to have criminal process issued from a Justice of the Peace by swearing an Information alleging reasonable and probable grounds that another person committed a criminal act.

The *Crown Attorney's Act* directs that the Crown watch over private criminal prosecutions and where necessary, assume the conduct of the proceedings, to ensure that they are pursued in the interests of the administration of justice. The statutory right of a person to lay an Information and the right and duty of the Attorney General to supervise a criminal prosecution and to intervene and take over a private prosecution are fundamental parts of the criminal justice system.

### Process for private information

#### *Step 1: receipt of the information*

A person who has reasonable grounds to believe that another person has committed a criminal offence may provide that information to a Justice of the Peace in order to have the person brought to court. A standard form is available for anyone to fill out and submit to the Justice of the Peace.

The person who completes the form should provide details of the alleged offence and the names, addresses, and telephone numbers of any witnesses whose evidence will be relied upon.

It is important that the person indicate if the police have been involved and if there were prior attempts made to commence related criminal proceedings.

The Justice of the Peace will review the completed form and determine whether it satisfies the statutory requirements. Where the Justice of the Peace is satisfied that these requirements have been met, they shall direct the preparation of the Information. The "Information" is a document that sets out the allegations of criminal conduct. The person laying the information will be asked to swear an oath or affirm the truth of the

contents of the Information. Where the allegations of the person do not meet these requirements, an Information will not be prepared.

If an Information is prepared and sworn or affirmed, a Justice of the Peace will select a date for an *ex-parte* hearing, known as a *pre-enquete*. At the *pre-enquete*, the Justice of the Peace or a Judge of the Ontario Court of Justice will determine whether a summons or a warrant will issue to compel the appearance of the persons named in the information to answer the charge.

### *Step 2: notice of pre-enquete hearing*

The *Criminal Code* provides that in order for process to issue, or criminal proceedings to commence, the Crown Attorney's Office must receive a copy of the private Information and reasonable notice of the *pre-enquete* hearing. Further, a Prosecutor shall have an opportunity to attend the hearing. The Prosecutor does not have jurisdiction to withdraw an Information before the *pre-enquete* hearing.

### *Step 3: the pre-enquete hearing*

At the *pre-enquete*, the presiding Justice of the Peace or Judge of the Ontario Court of Justice shall hear and consider the allegations of the person, as well as the evidence of any witnesses. The court shall give the Prosecutor an opportunity to cross-examine the person's witnesses, to call witnesses and to present any relevant evidence at the hearing. The Prosecutor's appearance at the hearing does not mean that the Attorney General has intervened in the proceeding.

At the end of the *pre-enquete* hearing, the presiding justice will determine whether there was sufficient evidence for the case to proceed. If there is sufficient evidence for the case to proceed, the justice will issue a summons or warrant to compel the appearance of the accused to answer to the charge. If there is insufficient evidence for the case to proceed, the proceedings will be concluded.

## **Role of the Prosecutor at the *pre-enquete* hearing**

Absent exceptional circumstances, the Prosecutor must attend the *pre-enquete hearing*. The Prosecutor's attendance is required for several reasons, including the following:

- preventing proceedings that are not in the interest of the administration of justice
- preventing the use of criminal proceedings for malicious or unfair purposes
- preventing potential abuses of the court system

- ensuring the efficient allocation of court resources
- to identify countercharge situations, where the police in a separate proceeding have criminally charged an individual and now that same person wishes to bring privately laid charges against the victim from the initial case
- to become aware of justice prosecutions, where the allegations are against a police officer, a Crown, or other justice official or public figure
- to identify intimate partner violence cases, whether as a new charge or as a charge related to an existing police laid charge
- to ensure that in cases where disclosure of the privately alleged information could cause irreparable harm to a person's reputation or livelihood, an appropriate publication ban is sought
- to identify cases that raise significant legal or policy issues
- to prevent cases proceeding where the law requires the Attorney General's consent to the laying of an Information, such as the laying of charges against a young person. A list of those offences may be found in the [Attorney General Consent and Delegation](#) Directive.

## **Carriage of the prosecution**

If the justice issues Process, the Prosecutor must screen the charge according to the [Charge Screening](#) Directive. The Prosecutor should contact the police prior to screening the charge to determine if there was a police investigation and if so whether the Prosecutor has all the material in the police's possession. The Prosecutor should determine whether further investigation is required. Once any further investigation has been completed, if the Prosecutor is of the view that there is no reasonable prospect of conviction, or that the prosecution is not in the public interest, the Prosecutor must withdraw the charge.

If the Prosecutor is of the view that the prosecution should continue, a decision should be made as to whether the prosecution should be conducted by the person who brought forward the proceeding or the Prosecutor. The Prosecutor must intervene if the prosecution involves allegations of intimate partner violence, allegations against a young person and indictable offences.

In all other cases, the Prosecutor may exercise discretion to take over the prosecution, having regard to the following factors:

- public interest
- interests of individual victims, witnesses and accused parties

- the need to make the best use of the valuable time and resources of all parties involved and courts
- the need for timely and ongoing disclosure to the accused person.

If the Prosecutor intervenes, the Prosecutor should follow the obligations set out in the [Disclosure](#) Directive. The Prosecutor should remind the private prosecutor that the accused is entitled to disclosure of the evidence to be used against them including the evidence outlined during the *pre-enquete* hearing.

### **Charges laid against Crown agencies**

Any allegations by private citizens of misconduct against Crown Ministries, agencies and their employees for violations of occupational health and safety, environmental protection and similar legislation must be referred to the Director who must advise the Assistant Deputy Attorney General – Criminal Law Division.

## Professionalism

Prosecutors are local Ministers of Justice and as such have an obligation to discharge their responsibilities with honour and integrity. A Prosecutor must act fairly and dispassionately. Prosecutors must make decisions in a manner that is objective and consistent with the highest standards of professionalism. A Prosecutor shall be courteous, civil, and act in good faith with all persons with whom she has dealings in the course of her professional responsibilities. The conduct of the Prosecutor should always reflect favourably on the administration of justice, and inspire the confidence, respect and trust of the community.

All Prosecutors in the province of Ontario are subject to the *Rules of Professional Conduct of the Law Society of Ontario*.

The independence of the prosecution service is fundamental to the justice system. It is important that Prosecutors avoid circumstances where the perception of their independence is undermined. Prosecutors must avoid real or perceived conflicts of interest. Conflicts may arise as a result of a connection to a person or entity, either in their personal life or at work.

### Conflict of interest

A conflict of interest may arise in any situation where a Prosecutor's private interests are actually or may be reasonably perceived to be in conflict with her public service responsibilities. Prosecutors must not undertake any actions that would reasonably appear to be inconsistent with their professional obligations or the exercise of their prosecutorial discretion. Prosecutors must disclose to the ethics executive (Deputy Attorney General), any situation of actual or potential conflict of interest. [Office of the Conflict of Interest <http://www.coicommissioner.gov.on.ca/?lang=en>].

There may be times where a Prosecutor has a relationship with a participant in a case that may reasonably undermine the public's perception of the Prosecutor's independence. It is important to avoid any reasonable perception that a person being

investigated or prosecuted might receive preferential treatment because of the relationship that person has with a Prosecutor or her office.

The Ministry of the Attorney General may retain independent counsel on a case-by-case basis when the administration of justice and public confidence in the administration of justice requires it. Where a Prosecutor becomes aware of a conflict or a reasonably perceived conflict involving a person being investigated or prosecuted or a witness in any such proceeding, the Prosecutor must bring the case to the attention of her Crown Attorney. The Crown Attorney must determine whether there is a conflict, and if so, whether the case will be prosecuted by another member of the office, a Prosecutor in another office from the same region, or whether to contact the Director to determine the most appropriate course of action. In some instances the Assistant Deputy Attorney General-Criminal Law Division will make arrangements for an independent Prosecutor to assume carriage of the case.

## **Complaints process**

A member of the public who wishes to make a complaint about the conduct of a Prosecutor may write her Crown Attorney (or Director if the complaint is about the Crown Attorney). Upon receipt of the complaint about a Prosecutor's conduct, the Crown Attorney must record the information received and should acknowledge receipt within 5 business days. The complaint will be reviewed as soon as practicable. A full response should be provided in a timely manner. If the response cannot be provided in a timely way, a written explanation for the delay should be provided to the complainant.

## **Law Society complaints**

A Prosecutor who is notified that a formal complaint has been made against her to the Law Society of Ontario must inform her Crown Attorney without delay. The Crown Attorney must inform the Director, who in turn must notify the Assistant Deputy Attorney General – Criminal Law Division. A formal response to the Law Society of Ontario should be provided by the Assistant Deputy Attorney General – Criminal Law Division. Prosecutors must keep their Crown Attorney apprised of the status of the complaint including the final disposition.

## **Conduct of defence counsel**

If a Prosecutor believes that a formal complaint to the Law Society of Ontario is warranted in respect of conduct of a defence counsel, she must immediately inform the

Crown Attorney who in turn must notify the Director. The Director must bring the matter to the attention of the Assistant Deputy Attorney General – Criminal Law Division. In appropriate circumstances, a formal complaint may be forwarded to the Law Society of Ontario by the Assistant Deputy Attorney General – Criminal Law Division.

### **Counsel as a witness**

A Prosecutor who receives a subpoena, or has been asked to testify in any case, should immediately inform her Crown Attorney.

A circumstance may arise where a Prosecutor determines that the interests of justice require that counsel for the accused provide evidence. In these circumstances, the Prosecutor must obtain the prior approval of the Crown Attorney and Director before seeking that evidence.

### **Civil lawsuits or charges**

Prosecutors who are the subject of a lawsuit, a charge under the *Criminal Code*, other federal legislation, or a serious provincial offence (e.g. Part III offences under the *Provincial Offences Act*) must inform their Crown Attorney without delay. The Crown Attorney must inform the Director, who must notify the Assistant Deputy Attorney General – Criminal Law Division. Prosecutors must keep their Crown Attorney apprised of the status of the proceedings including the final disposition.

## **Publication Bans and Sealing Orders**

Public access to the justice system is a hallmark of a democratic society. Open courts allow everyone to see that justice is administered in a principled manner in accordance with the rule of law.

The use of publication bans and sealing orders is an exception to the open court principle. Publication bans prevent information from being published in any document, broadcast or transmitted in any way. Sealing orders restrict access to courts and court documents in limited circumstances.

The appropriate use of publication bans, applications to prohibit or restrict access to court exhibits and to exclude the public may be necessary to maintain integrity of the process, ensure security, protect privacy or prevent trauma or intimidation of witnesses. A sealing order may be necessary to protect interests essential to the administration of justice such as the integrity of ongoing police investigations or confidential information.

Publication bans may be automatic, mandatory upon application or ordered at the discretion of the court. Sealing orders may be automatic or made at the discretion of the court.

### **Factors to consider**

The Prosecutor should consider all the circumstances when determining whether to seek a publication ban, sealing order, or exclusion of the public. Relevant factors may include the following:

- encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice system
- safeguarding the interests of witnesses under 18 years of age
- enabling witnesses to give a full and candid account when testifying
- protecting witnesses from intimidation or retaliation

- whether there are effective alternatives to making the order
- potential negative effects of an order.

## **Publication bans**

### *Sexual offences*

#### *Identity of the victim*

The *Criminal Code* directs that in sexual offences the court shall make an order prohibiting the publication of any information that could identify the victim (or witness under the age of 18) upon application of the Prosecutor, the victim or any witness.

The Prosecutor must seek an order prohibiting the publication of any information that could identify a victim (or a witness under the age of eighteen) at the earliest opportunity. If the victim of a sexual offence wishes to have their identity known, the issue of revoking the publication ban can be revisited at any stage in the proceedings.

#### *Sexual history*

The *Criminal Code* prohibits publication of information and evidence tendered on an application to admit evidence of a victim's sexual history in cases involving sexual offences. Publication of the decision and reasons of the court is also prohibited unless the judge orders that they may be published, after taking into account the victim's right to privacy and the interests of justice or if the evidence is found to be admissible.

#### *Production of private records (third party records)*

The *Criminal Code* prohibits publication of information and evidence tendered on an application for production of records containing private information in relation to a victim or witness in cases involving sexual offences. Publication of the decision and reasons of court is also prohibited unless the judge orders that they may be published, after taking into account the interests of justice and the privacy interests of the person to whom the record relates.

Reference should be made to the [Sexual Offences Against Adults Directive](#).

### *Child pornography*

The *Criminal Code* directs that the court shall make an order prohibiting the publication of any information that could identify a witness who is under the age of eighteen years or any person who is the subject of a representation, written material or a recording that constitutes child pornography. Prosecutors must apply for a sealing order in respect of any exhibit containing material alleged to be child pornography. Reference should be made to the [Internet Child Exploitation Directive](#).

### *Youth Criminal Justice*

The *Youth Criminal Justice Act* prohibits the publication of any information that could identify any accused young person under 18 years of age. The *Youth Criminal Justice Act* also prohibits the publication of any information that could identify a person under 18 years of age who was a victim of, or appeared as a witness in connection with, an offence allegedly committed by a young person. Reference should be made to the [Youth Criminal Justice - Resolution Discussions and Sentencing Directive](#).

### *Victim under age eighteen*

The *Criminal Code* directs that in all offences involving a victim who is under the age of 18 the court shall make an order prohibiting the publication of any information that could identify the victim, upon application of the Prosecutor or the victim.

The Prosecutor must seek a court order prohibiting the publication of any information that could identify a victim who is under the age of eighteen at the earliest opportunity.

Reference should be made to the [Offences against Children Directive](#).

### *Judicial interim release (bail)*

Upon application of the accused, the *Criminal Code* directs that the court shall make an order prohibiting the publication of evidence taken, representations made and the decision of the court, until the accused has been discharged at a preliminary inquiry or the trial of the accused has ended.

Upon application of the Prosecutor, the *Criminal Code* directs that the court may make an order prohibiting the publication of evidence taken, until the accused has been discharged at the preliminary inquiry or the trial of the accused has ended.

### *Preliminary inquiry*

The *Criminal Code* prohibits the publication of evidence pertaining to the existence or nature of any admission or confession tendered at a preliminary inquiry until an accused has been discharged after the preliminary inquiry or the trial has ended.

Upon application of the accused, the *Criminal Code* directs that the court shall make an order prohibiting the publication of evidence taken, until the accused has been discharged at the preliminary inquiry or the trial of the accused has ended.

Upon application of the Prosecutor, the *Criminal Code* directs that the court may make an order prohibiting the publication of evidence taken, until the accused has been discharged at the preliminary inquiry or the trial of the accused has ended.

### *Jury trials*

The *Criminal Code* prohibits the publication of evidence heard in the absence of the jury prior to the commencement of the jury's deliberations.

Upon application by the Prosecutor or on its own motion, the court may prohibit publication of the identity of a juror or any information that could disclose the juror's identity.

### *Discretionary publication bans*

In all other offences, the *Criminal Code* permits the court to consider banning publication of any information that could identify a victim over 18 years of age and a witness of any age at any stage of the prosecution. Further, publication bans may also be ordered in relation to justice system participants in cases involving criminal organization, terrorism, and certain *Security of Information Act* offences.

Prior to seeking a discretionary publication ban under the provisions of the *Criminal Code*, the Prosecutor should consider the open court principle and the factors as set out in the *Criminal Code*. Discretionary publication bans are only sought in exceptional circumstances where the grounds can be clearly articulated.

The Prosecutor, victim or witness shall make written application, with notice to the accused, the media and any other affected person. The court may make the order if the court is of the opinion that the order is in the interest of the proper administration of justice.

Similarly, with notice to the media and any other affected person, written applications for publication bans can also be made under the common law.

### *Requests by victim to revoke the publication ban*

There may be occasions when a victim over the age of eighteen seeks to revoke the publication ban. A judge has the authority to lift the publication ban only when the Prosecutor and victim both consent to revoke the ban. Prior to consenting to revoke a publication ban, the Prosecutor should consider all the circumstances including the following:

- nature of the publication ban and circumstances of the case
- the wishes of the victim
- whether the victim has had an adequate opportunity to assess all of the ramifications of the publication of their identity
- publication of the victim's name might tend to identify other victims or witnesses, who want protection of the publication ban
- publication of the victim's identity might prejudice the prosecution or might otherwise have an adverse effect on the administration of justice.

### **Sealing orders**

A sealing order prohibits access to information by anyone other than the parties identified in the order. A sealing order may be mandated by the *Criminal Code* or imposed at the discretion of the court.

The *Criminal Code* provides that all documents relating to an application for a wiretap authorization are subject to a mandatory sealing order. The *Criminal Code* provides that the court issuing a search warrant or other judicial order may seal the supporting material.

In determining if a sealing order should be requested or an existing sealing order lifted, the Prosecutor must consider if the order is necessary to:

- protect an ongoing police investigation
- protect the identity of a confidential informer (see: [Confidential Informers Directive](#))
- protect intelligence-gathering techniques
- protect the interests of innocent parties
- protect privacy interests.

The Prosecutor must also consider whether a partial or time limited sealing would be appropriate.

## **Court exhibits**

Judicial documents and court exhibits, including Victim Impact Statements, are generally accessible to the public [\[link\]](#). The Prosecutor should seek to restrict access in any case where public access to court exhibits may undermine the right to a fair trial, violate privacy interests or interfere with the administration of justice. A sealing order must be sought to restrict access to exhibits containing child pornography.

## **Exclusion of the public**

The *Criminal Code* permits the court to order the exclusion of the public from the courtroom for all or part of criminal proceedings. In determining if the public should be excluded from the courtroom, the court shall consider all the circumstances including society's interest in encouraging the reporting of offences and the participation of victims and witnesses in criminal proceedings and the ability of the witness to give a full and candid account.

Prior to seeking an order to exclude the public, the Prosecutor should consider whether effective alternatives to seeking the order are available in the circumstances. Reference should be made to the [Testimonial Aids and Accessibility Directive](#).

## Sexual Offences against Adults

Sexual offences involve violations of sexual integrity, privacy and autonomy that can have enduring and substantial effects upon victims. These crimes pose a serious threat to individual and public safety and must be prosecuted vigorously.

Rape myths, misogyny and stereotypes about the nature of sexual offences and of victims of sexual offences must not influence any aspect of the criminal case. Prosecutors play an important role in preventing those distortions and harmful effects on victims and the integrity of the administration of justice. Each region has a designated “Sexual Violence Crown”, who is also a member of the Sexual Violence Advisory Group. The work of this group includes education, training, mentorship and enhanced community outreach.

The Prosecutor must ensure that efforts are made, at all stages of the criminal proceedings, to provide the victim with whatever information or assistance is required to ensure full and fair participation in the criminal justice system. This includes the availability of the following:

- specialized victim’s services facilitated by the Victim/Witness Assistance Program (V/WAP) or other similar victims’ support services
- interpreters to assist the victim in communicating
- testimonial aids to assist the victim in providing evidence
- appointment of counsel to cross-examine the victim where the accused is self-represented
- access to independent legal representation for victims or witnesses on applications to access their private records under the *Criminal Code*.

Reference should be made to the following directives Victims, Publication Bans and Sealing Orders, DNA Data Bank Orders, Weapons Prohibitions and Forfeiture, High-Risk Offender National Flagging System, Intimate Partner Violence, Judicial Interim Release (Bail), and Testimonial Aids and Accessibility.

## **Sexually Transmitted Infections and HIV Exposure Cases**

Prosecutions for HIV exposure are guided by the law and the medical science. The Supreme Court of Canada has said that in certain circumstances a failure to disclose one's HIV status will be a criminal offence. The Supreme Court of Canada held that a person living with HIV has an obligation to disclose to their sexual partner their HIV status if there is a realistic possibility of transmission. Whether there is a realistic possibility of transmission will depend on the facts of the case and the medical knowledge. There is no realistic possibility of transmission in cases where a condom is used and there is a low HIV viral load. According to a review by the Public Health Agency of Canada, if a person living with HIV is on antiretroviral therapy and has maintained a suppressed viral load for six months, there is also no realistic possibility of transmission. In these circumstances a failure to disclose does not result in criminal liability for exposure to HIV.

Cases dealing with sexually transmitted infections like HIV raise many complex medical and legal issues. There is no cure for HIV, but with treatment it is a chronic, manageable condition. The ministry has a group of experienced Prosecutors who are available to provide advice in this area. The Advisory Group is familiar with developments in the medical science and the risk of transmission. A Prosecutor assigned to a case involving HIV exposure must consult with the STI Advisory Group at the earliest stage possible.

### **Judicial interim release (bail)**

In sexual offences against adults, the Prosecutor must take a position on judicial interim release applying the general principles set out in the Judicial Interim Release (Bail) Directive including the requirement for ongoing assessment of the strength of the Crown's case. The Prosecutor must be conscious of the potential risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public.

Where the accused is remanded in custody pending a bail hearing, detained or released on conditions, the Prosecutor should seek an order from the Court prohibiting the accused from having any contact with the victim, or where appropriate, any witnesses. The Prosecutor must ensure that any conditions she recommends on a bail release are necessary and appropriate to the circumstances of the alleged offence and the accused.

At the bail stage, the Prosecutor must seek a publication ban directing that the identity of a victim or a witness and any information that could disclose the identity of the victim or witness not be published or transmitted in any way. If the victim wishes to have her identity known, the issue of lifting the publication ban can be revisited at any later stage in the proceedings. Reference should be made to the Publication Bans and Sealing Orders Directive.

The Prosecutor must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Prosecutor must ensure that bail notification occurs as soon as possible. On request, the victim must be provided with a copy of the court order.

## **Prosecution**

### *Charge screening*

The Prosecutor should determine whether the full gravity of the criminal act is reflected in the offence charged and recommend a more appropriate charge be laid if necessary.

The following factors should be considered when determining the offence charged is appropriate to the circumstances and whether to proceed summarily or by indictment:

- the circumstances of the offence e.g. protracted sexual abuse; significant physical, emotional or psychological harm to the victim
- whether the offence is alleged to have occurred within 6 months of reporting
- the circumstances of the offender e.g. history of similar offences, position of trust/authority in relation to victim
- the circumstances of the victim including the impact on the victim of testifying twice (at a preliminary inquiry and trial) and special vulnerabilities (disabilities, health, age of victim)
- the potential range of sentence.

The Prosecutor should consider whether the accused should be flagged as a High Risk Offender or the subject of a Long Term Offender or Dangerous Offender Application. In those cases, the Prosecutor should consult with her Regional High-Risk Offender Crown.

Reference should be made to the Charge Screening Directive, Dangerous/Long-term Offender Directive and High-Risk Offender National Flagging System Directive

## Protecting privacy

Prosecutors must be sensitive to the privacy interests of victims at every stage of the prosecution. Privacy of victims of sexual offences is protected by publication bans and laws restricting access to their private records and sexual history.

The Prosecutor should consider the directions set out in the Disclosure Directive concerning the disclosure of sensitive materials.

### *Publication bans*

The *Criminal Code* directs that the court shall prohibit the publication of any information that could identify the victim or witness, upon application. Reference should be made to the Publication Bans and Sealing Orders Directive.

### *Production of private records (third party records)*

In order to gain access to a victim's private information, such as their medical, psychiatric or personal records, the *Criminal Code* provides that the accused must establish that the private records are likely relevant to an issue at trial or to the competence of a victim to testify. The Prosecutor should engage V/WAP to assist the victim in obtaining independent legal counsel to provide advice and represent their interests on the third party records application.

The Prosecutor must not disclose victim's records absent a court order unless the victim has expressly waived her right to privacy over those records. The victim is entitled to independent legal advice about their right to privacy. The validity of any waiver will depend on the circumstances.

If the victim chooses not to be represented by counsel, the Prosecutor should make the victim aware that the *Criminal Code* prohibits publication of information provided on the application.

### *Sexual history*

The *Criminal Code* provides that evidence that a victim has engaged in prior sexual activity with the accused or with any other person is not admissible. This evidence cannot support an inference that the victim consented to the sexual activity nor can it be used to assess the victim's credibility.

Should the accused bring an application to have evidence of the victim's sexual history admitted, the Prosecutor must advise the victim that they are not required to testify at

the hearing to determine the admissibility of their sexual history. The Prosecutor must also advise the victim that the *Criminal Code* prohibits publication of information provided on the application.

## **Cross-examination by a self-represented accused**

In cases where an accused person is self-represented, the Prosecutor must seek an order appointing counsel to conduct the cross-examination of the victim.

## **Expert evidence**

Before engaging an expert witness, the Prosecutor must obtain the prior approval of the Crown Attorney. Reference should be made to the Experts Evidence Directive.

## **Testimonial aids**

Prosecutors should consider whether a victim's ability to communicate their evidence would be facilitated by the use of testimonial aids or other means that enable the evidence to be better understood. Where appropriate, Prosecutors should apply for an order permitting the use of a testimonial aid. Reference should be made to the Testimonial Aids and Accessibility Directive.

## **Resolution discussions and sentence**

The Prosecutor must ensure reasonable steps are taken to inform the victim of a proposed resolution (e.g. guilty plea or proposed sentence) or that the charges will be withdrawn.

The Prosecutor must not negotiate a guilty plea in exchange for agreeing to forego a dangerous or long-term offender application without first consulting with the Regional High-Risk Offender Crown and her Crown Attorney.

Except with the prior approval of the Crown Attorney or designate, the Prosecutor must not:

- withdraw or stay proceedings
- accept a plea to a lesser charge or non-sexual offence
- reduce or withdraw charge solely to avoid a mandatory minimum sentence or any ancillary orders.

### *Victim impact statement*

As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options.

### *Restitution*

The *Criminal Code* directs the court to consider making a restitution order and to ask the Prosecutor if reasonable steps have been taken to provide the victim with an opportunity to indicate whether they are seeking restitution i.e. compensation for counselling. As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.

### **Ancillary orders**

The Prosecutor must seek the following orders if applicable and remind the court of all mandatory orders:

- DNA order
- *Sex Offender Information Registration Act (SOIRA)*
- Weapons Prohibition.

Reference should be made to the following directives DNA Data Bank Orders and Weapons Prohibitions and Forfeiture.

## **Testimonial Aids and Accessibility**

The justice system strives to foster the participation of victims and witnesses in the court process. Prosecutors have an important role to play in identifying those witnesses who may require assistance to fully access the criminal justice system, or to communicate their evidence to the court. Assistance may be provided to victims and witnesses who may not be able to fully access the criminal justice system, or to understand it or be understood by the other participants, due to language, age, or any impairment of an intellectual, emotional, physical or sensory nature.

### **Accessibility**

Prosecutors must ensure that efforts are made so that victims and witnesses are provided with full and fair access to, and participation in, criminal proceedings. Prosecutors should be alive to barriers that may impede the involvement of victims or witnesses. Barriers might include:

- attitudinal barriers about people with disabilities
- communication barriers that occur because of a lack of accommodation
- informational barriers making available accommodations difficult to access or find
- physical barriers preventing people with physical disabilities from accessing the courthouse or courtroom
- sensory barriers preventing people who are blind or deaf, or who have a severe vision or hearing impairment from accessing court proceedings.

Prosecutors should consider whether victims and witnesses require assistance to communicate or otherwise participate in the court process. Where appropriate, the Prosecutor should ensure the victim or witness is informed about accommodations that are available at the earliest opportunity.

Prosecutors must bring accessibility and accommodation needs relating to criminal prosecutions and witnesses to the attention of the Accessibility Lead in their office. The Accessibility Lead is responsible for responding to accessibility requests and will facilitate contact with the Court Services Division Accessibility Coordinator.

Prosecutors should also ensure that interpreters are requested where appropriate. In all cases Prosecutors should seek to use language appropriate to the age and understanding of the victim or witness.

## **Testimonial aids**

Victims have the right to request testimonial aids and publication bans. Prosecutors should consider whether a victim or witness's ability to communicate their evidence would be facilitated by the use of testimonial aids or other means that enable the evidence to be better understood. Where appropriate, Prosecutors should apply for an order permitting the use of a testimonial aid.

The *Criminal Code* provides a number of measures that can be invoked in particular cases to increase the ability of a witness in a criminal proceeding to provide evidence. Depending on the circumstances of the offence, and the circumstances of a witness, including their age and ability, the measures may include:

- the services of a support person
- the use of a screen or closed circuit television
- the use of pre-recorded video evidence
- the use of affidavit evidence
- holding proceedings in camera
- an order banning publication that might identify the victim
- an order enabling witnesses to testify using a pseudonym
- preventing cross-examination by self-represented accused.

Reference should also be made to the Directives on [Publication Bans and Sealing Orders](#) and [Victims](#).

## Victims

Victims of crime should be treated with courtesy, candour, respect and dignity. The rights of victims to information, protection, participation and restitution are recognized by the *Canadian Victims Bill of Rights* and the *Ontario Victims' Bill of Rights*. Prosecutors must display sensitivity, fairness and compassion in their dealings with victims.

A victim is a person who has suffered physical or emotional harm, property damage or economic loss as a result of the commission of a criminal offence. In cases where, the victim is deceased or incapable of acting on their own, the Prosecutor should deal with the individual who is acting on the victim's behalf.

The Prosecutor must ensure that efforts are made to inform victims of available victim services. The Ministry of the Attorney General Victim/Witness Assistance Program provides information, assistance, and support to the most vulnerable victims of crime. The providing of information enhances their understanding of, and participation in, the criminal court process.

Victims have the right to convey their views about decisions to be made that affect their rights under the *Canadian Victims Bill of Rights* and to have those views considered.

Reference should also be made to the [Sexual Offences against Adults](#), [Offences against Children](#) and [Intimate Partner Violence](#) and [Indigenous Peoples](#) Directives.

### Information provided to the victim

Sensitivity to the perspective of victims, the nature of their victimization, their privacy interests, and their personal security must be considered at every stage of the prosecution.

Where necessary, the Prosecutor should be available to discuss the case with the victim. If the victim is required to testify, the Prosecutor should prepare the victim and determine whether any testimonial aids or accommodations are needed.

The Prosecutor must ensure that efforts are made to advise the victim of significant information throughout the proceedings. This will include:

- the judicial interim release of an accused including the conditions of release
- the detention of the accused and any non-communication order
- the availability of publication bans to protect the victim's privacy
- the availability of testimonial aids to assist the victim in providing evidence
- the availability of interpreters
- a proposed resolution (e.g., a guilty plea and proposed sentence)
- that the charges will be withdrawn
- the availability of counsel to cross-examine the victim where the accused is self-represented
- an application brought by the accused to obtain the victim's private records and the victim's right to independent legal advice
- an application brought by the accused to admit evidence of the victim's previous sexual activity
- any appeals brought by the accused or the Prosecutor and the progress of those appeals.

## **Resolution discussions and sentencing**

As soon as feasible, the Prosecutor must ensure reasonable steps are taken to inform the victim of a proposed resolution (e.g. a guilty plea or proposed sentence) or that the charges will be withdrawn.

### *Victim impact statements*

The *Criminal Code* directs the court to ask the Prosecutor if reasonable steps were taken to provide the victim with an opportunity to prepare a victim impact statement. As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim with the opportunity to prepare a Victim Impact Statement, and inform the victim of their right to present it to the court and their other options.

### *Community impact statements*

The *Criminal Code* provides that in determining sentence the court must consider any statement prepared by an individual on a community's behalf describing the harm or

loss suffered by the community as the result of the commission of the offence and the impact of the offence on the community.

### *Restitution*

The *Criminal Code* directs the court to consider making a restitution order and to ask the Prosecutor if reasonable steps have been taken to provide the victim with an opportunity to indicate whether they are seeking restitution. As soon as feasible after a finding of guilt, the Prosecutor must ensure reasonable steps are taken to provide the victim with an opportunity to indicate whether the victim is seeking restitution for their losses and damages.

# Youth Criminal Justice

## Prosecution Directives

The *Youth Criminal Justice Act (YCJA)* governs the prosecution of young persons aged 12 to 17 who are alleged to have committed criminal offences. The youth criminal justice system is intended to protect the public by:

1. holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person
2. promoting the rehabilitation and reintegration of young persons who have committed offences
3. supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behavior

Further the principles of the *YCJA* require that the criminal justice system for young persons be distinct from that of adults and must acknowledge a presumption of diminished moral blameworthiness or culpability of youth.

Prosecutors must ensure that all decisions taken at every stage of the youth justice system, from diversion to sentencing, conform to these and other principles in the *YCJA* and legal requirements of the *YCJA*.

[Youth Criminal Justice - Extrajudicial Sanctions](#)

[Youth Criminal Justice - Court Practices and Procedures](#)

[Youth Criminal Justice - Resolution Discussions and Sentencing](#)

## Youth Criminal Justice - Extrajudicial Sanctions

The *YCJA* includes extrajudicial sanctions (EJS), which are non-court measures used to hold a young person accountable for criminal conduct. These are post-charge programs designed to provide a timely method for young persons charged with a criminal offence to admit responsibility for their criminal behaviour and participate in meaningful interventions that hold them accountable. Young persons are entitled to different considerations flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment.

A notation of completion of EJS remains on a young person's youth court record for two years, and may be considered by a youth justice court in future proceedings including when assessing the appropriateness of a custodial disposition.

The local Youth Justice Committee or the Ministry of Children and Youth Services administers EJS programming. The programming will address the young person's offending behavior through the imposition of individually tailored meaningful consequences. In appropriate cases, young persons will make restitution or reconcile with the victims, without the necessity of formal judicial proceedings. Prosecutors must only consider EJS if a reasonable prospect of conviction exists and must not impose additional requirements on the accused person as a precondition to offering EJS.

This directive addresses diversion for young persons. For adults, please see [Community Justice Programs for Adults](#). For an adult suffering a mental illness, please see [Mentally Ill Accused - Alternatives to Prosecution](#). For an Indigenous young person, please see [Indigenous Peoples](#) Directive.

### Ineligible offences

Prosecutors must not refer any of the following offences for extrajudicial sanctions, regardless of the circumstances of the offence or the offender:

- murder, manslaughter, infanticide, criminal negligence causing death
- driving offences causing death or bodily harm

- aggravated assault
- simple impaired driving or driving with a prohibited blood alcohol concentration or refusing to provide a breath sample
- offences involving firearms
- criminal organization offences
- terrorism offences
- kidnapping
- voyeurism
- child abuse and child luring
- home invasions
- human trafficking offences
- robbery
- sexual assault cause bodily harm
- sexual interference and exploitation, invitation to sexual touching and incest
- any offences where the Attorney General's consent was obtained to initiate proceedings.

## **Presumptively ineligible offence**

In exceptional cases, the Prosecutor may refer the following presumptively ineligible offences for extrajudicial sanctions with the prior approval of the Crown Attorney or designate:

- hate-motivated offences [[Hate Propaganda and Hate Motivated Offences Directive](#)]
- intimate partner violence offences [[Intimate Partner Violence Directive](#)]
- criminal harassment
- offences involving child pornography
- publication etc., of intimate images without consent
- sexual assault.

## **Eligible offences**

The Prosecutor may refer any other offence to extrajudicial sanctions.

## **Factors to consider**

In determining if extrajudicial sanctions is an appropriate non-court measure to hold a young person accountable for a presumptively ineligible offence or eligible offence, the Prosecutor and Crown Attorney or designate must consider the following factors:

### *Background of the young person*

1. the age of the young person
2. any prior findings of guilt or past involvement with EJS
3. the nature and number of any such previous offences
4. any outstanding charges
5. the role of the young person and their corresponding degree of responsibility in relation to the offence
6. whether the young person had been previously victimized
7. any remorse and willingness to engage in EJS or an appropriate treatment program
8. any mental health concerns, and the degree that the concerns can be said to have impacted the young person's behaviour
9. whether the young person comes from a disadvantaged group
10. whether the young person has been or is presently engaged with the child welfare system
11. whether the young person self-identifies as Métis, Inuit or First Nation.

### *The circumstances and nature of the offence*

1. whether the offence is summary or indictable
2. whether the offence involves violence
3. whether the offence actually harmed the victim (physical, psychological or financial) and/or society
4. whether the incident affected the sexual integrity of a person
5. whether a weapon was used or threatened to be used
6. whether there was an intention to cause or attempt to cause substantial property damage or loss, and if so, whether the damage was reasonably foreseeable
7. whether the offence was against the administration of justice, such as breach of a court order, and, if so, the extent of non-compliance
8. whether the offence involved malice, extortion, exploitation or revenge
9. whether the offence involved a breach of trust
10. whether the offence was motivated by bias, prejudice or hate
11. whether the offence involved any type of bullying including cyber-bullying
12. the age of the victim

13. the views of the victim and/or their parents or legal guardians (if victim is a child), if available.

*Administration of justice considerations*

1. public confidence in the administration of justice
2. the length and expense of a trial when considered in relation to the seriousness of the offence
3. the likely sentence upon a finding of guilt
4. the availability of an appropriate sanction, including programming options, to hold the young person accountable for their offending behaviour and focus on correcting the offending behavior
5. frailties in the prosecution e.g. staleness of the case, or the technical nature of the offence
6. whether the consequences of the prosecution would be unduly harsh to the young person, the victim or any witnesses in the case, owing to such factors such as age, health or the relationship between the parties
7. whether a just result is accelerated by a referral to EJS.

## Youth Criminal Justice - Court Practices and Procedures

### Judicial interim release (bail)

The *YCJA* contains a unique bail regime, distinct from the *Criminal Code* regime for adults that recognizes the special circumstances and inherent vulnerability of youth.

Pre-trial detention should never be used as a substitute for child protection, mental health or other social measures. While protection of the public remains a paramount concern in any bail decision made by the Prosecutor, wherever possible, young persons should be managed in the community. At the same time, young persons who pose a risk to public safety may be detained.

The *YCJA* directs that a detention order may be lawfully imposed in only two situations:

1. the young person has been charged with a serious offence or
2. the young person has a history that indicates a pattern of conduct evidenced either by outstanding charges or by findings of guilt.

A young person is presumed innocent and the Prosecutor must be aware of the impact of even a brief period of detention in custody upon a young person. Even a brief period of detention in custody affects the mental, social and physical life of a young person and their family. The Prosecutor must consider the following additional factors when determining a position on bail:

1. the nature and seriousness of the offence
2. the young person's prior youth court record and/or any outstanding charges (or other relevant conduct)
3. whether the victim was a child
4. the safety of any witnesses or victims
5. concern that the young person will not appear in court if released in the community
6. evidence of a "substantial likelihood that the young person will, if released from custody, commit a serious offence"

7. public confidence in the administration of justice
8. the adequacy of the proposed plan of release, including the suitability of any proposed community support programs, a surety, or a responsible person
9. whether the Prosecutor will seek a custodial sentence if the young person is found guilty after trial
10. the needs of Indigenous young persons
11. young persons with special requirements and
12. the unique vulnerabilities of young persons presently engaged with the child welfare system, including their inability to access sureties or responsible persons, through no fault of their own.

The Prosecutor must ensure that efforts are made to notify the victim of any release order, the conditions of release, including non-communication and any order detaining the accused. In all cases where there is reason to have concern for a victim's safety, the Prosecutor must ensure that victim notification occurs as soon as possible. On request, the victim must be provided with a copy of the court order.

Reference should be made to the [Judicial Interim Release \(Bail\) Directive](#) for further direction on Options and Conditions for Release.

## **Bail de novo**

The *YCJA* provides that either the defence or the Prosecutor may bring an application for a new bail hearing before a youth justice court judge only if the original order was made by a justice of the peace. This application, for a bail de novo, is distinct from an application for a bail review. No new information is required and there is no deference to the justice of the peace.

The Prosecutor may bring an application for a bail de novo hearing before a youth justice court judge only with the prior approval of the Crown Attorney or designate.

## **Referral to child welfare agencies**

Prosecutors have an obligation under the *Child and Family Services Act* that directs them to immediately contact a Children's Aid Society when they have reasonable grounds to suspect a child has been or is likely to be a victim of physical, sexual or emotional harm.

In addition to this obligation, the Prosecutor should bring concerns about a young person's need for child protection to the court's attention at the earliest opportunity. The *YCJA* provides for the court at any stage of the proceedings to refer the young person to a child welfare agency for an assessment to determine whether the young person is in need of child welfare services.

## **Election as to mode of trial**

In cases involving homicide or where an adult sentence is sought, the *YCJA* directs that a young person shall elect the mode of trial and have the option to have a trial in the Ontario Court of Justice before a judge without a jury or in the Superior Court of Justice with a judge alone or with a judge and jury.

The *YCJA* directs that if a young person elects to be tried by in the Ontario Court of Justice before a judge without a jury or in the Superior Court of Justice with a judge alone, the Attorney General may require the young person to be tried by a court composed of a judge and jury in the Superior Court of Justice. If a Prosecutor determines a jury trial would be appropriate the Attorney General's consent must be obtained.

The Prosecutor must have the approval of her Crown Attorney or designate and the Assistant Deputy Attorney General - Criminal Law prior to commencing the process to seek the Attorney General's consent.

## **Appointment of counsel by court order**

The *YCJA* states that a young person "has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person." It is important that young persons retain counsel as early as possible to ensure their rights are protected.

In addition to obtaining private counsel, there are three avenues for a young person to access publicly funded representation. First, they may utilize the services of duty counsel. Second, they may apply to Legal Aid Ontario for representation. Third, they may apply to a youth justice court judge for an order appointing publicly funded counsel if Legal Aid Ontario has denied their application.

When determining whether to accept an offer of extrajudicial sanctions, young persons are not entitled to court ordered publicly funded counsel and so may rely on the services of duty counsel. Prosecutors must oppose applications for court ordered publicly

funded counsel when a decision on whether or not to accept an offer of EJS remains outstanding.

Prosecutors should remind the youth justice court of the following factors that should be considered when an application is made for court ordered publicly funded counsel:

- the financial circumstances of the young person and their parents or guardians and
- whether the Prosecutor is seeking a custodial disposition if the young person is found guilty of the offences before the court.

Prosecutors should ensure that issues relating to the appointment of counsel are resolved quickly.

## **Mental health concerns**

Where Prosecutors have concerns about the mental health needs of a young person, they should refer the young person to the local Youth Mental Health Court Worker or some other similar service at the earliest opportunity. These workers provide specialized support to young persons and their families and will assist them in connecting to community-based mental health resources and services.

Prosecutors should also consider whether a court-ordered mental health assessment is appropriate and request it without delay. These assessments are prepared by qualified medical professionals and provide the youth justice court with a comprehensive assessment of mental health needs that may be relevant to the young person's offending behaviour. They assist Prosecutors and the youth justice court to identify the most appropriate resources available to foster the young person's rehabilitation and reintegration into society.

## **Accessing youth records**

Youth records are protected by the privacy regime set out in Part VI of the *YCJA*. That regime establishes basic rules for protecting the identity of young persons, has prohibitions for the disclosure of records except as authorized by the *YCJA*. It also establishes timelines within which youth records may be accessed. Youth records may be disclosed only in accordance with these timeline provisions, to persons authorized by the *YCJA*.

Where the access period has expired, a formal application shall be brought before a youth justice court judge to access the records.

If within the access period a party requests youth records in the possession of the Prosecutor, the Prosecutor must determine if the records could be released if redacted. In determining whether to provide the documents requested the Prosecutor must also have regard to the following factors:

1. if the requester is lawfully entitled to access under the *YCJA*
2. the purpose for which the records are being requested
3. whether the records relate to an ongoing prosecution or a completed prosecution
4. whether disclosure of the records might adversely affect the ability of the Crown's office to continue an ongoing or pending prosecution
5. whether the records are necessary to make full answer and defence
6. the privacy interests of the affected parties contained in the records
7. safety concerns for any persons named in the records and
8. the nature of the offences to which the records relate.

## Youth Criminal Justice - Resolution Discussions and Sentencing

### Resolution discussions and sentencing

The sentencing regime for young persons in the *YCJA*, including specific sentencing principles, is distinct from that of adults. The *YCJA* places a general emphasis on community-based dispositions for young persons and adult sentencing provisions such as mandatory minimum sentences do not apply.

The *YCJA* further directs that a youth justice court shall not commit a young person to custody unless:

1. the young person has committed a violent offence
2. the young person has failed to comply with non-custodial sentences
3. the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or both under this Act or
4. in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would inconsistent with the purpose and principles of sentencing under the *YCJA*.

Where lawfully available, Prosecutors may seek a custodial sentence for a young person where a non-custodial sentence would be inadequate to hold the young person accountable for their actions. Prosecutors must consider the background of the young person and the circumstances and nature of the offence.

Other factors to be considered include the availability of appropriate programming options, both in the community and in custodial centres and the location of open and secure custody facilities and their proximity to the young person's family and support network.

Reference should be made to the [Victims Directive](#).

## **Adult sentences**

Young persons' found guilty of an offence committed when they were at least 14 years of age are eligible to be sentenced as an adult for offences punishable by a sentence of at least two years' incarceration.

The Prosecutor must seek an adult sentence for those serious violent offences defined in the *YCJA* as murder, attempted murder, manslaughter and aggravated sexual assault. If, in the opinion of the Prosecutor, a youth sentence would be appropriate, the Prosecutor must obtain the approval of the Crown Attorney and Director prior to agreeing to the youth sentence.

The Prosecutor may seek an adult sentence, with the prior approval of the Crown Attorney, for all other cases where the Prosecutor determines the maximum youth sentence would be insufficient to hold the young person accountable for their actions.

## **DNA orders**

DNA orders are applicable to young persons' found guilty of criminal offences. For the purpose of DNA collections, the *Criminal Code* designates eligible offences as either compulsory primary offences, other primary offences or secondary offences.

Prosecutors must remind the youth justice court of its obligation to make a DNA order for each primary designated offence.

Prosecutors should request a DNA order for each secondary designated offence. In determining whether to seek a DNA order for these offences, the Prosecutor must consider the principles of the *YCJA*.

## **Weapons prohibition orders**

A weapons prohibition order for a period not exceeding two years is mandatory for young persons' found guilty of certain offences in the *Criminal Code*. The Prosecutor must request such an order when the young person is found guilty of any of these offences.

A weapons prohibition order for a period not to exceed two years may be imposed if the young person is found guilty of some offences in the *Criminal Code*. The Prosecutor may request such an order when the young person is found guilty of any of these offences.

## **Lifting the ban on publication of a young person's identity**

The *YCJA* prohibits the publication of information that would identify a young person dealt with under the act. However, the ban may be lifted in certain circumstances.

First, if the young person receives an adult sentence, the ban on publication is lifted automatically pursuant to the legislation.

Secondly, in exceptional circumstances, when a young person is found guilty of a violent offence, and is sentenced as a youth, Prosecutors may request the lifting of the ban on publication. The exception to lifting the ban on publication is available only where the young person is deemed a high risk to re-offend violently and lifting the ban is necessary to protect the public.

If, in the opinion of the Prosecutor, such exceptional circumstances exist, the Prosecutor must obtain the prior approval of the Crown Attorney or designate to request the lifting of the publication ban.

Reference should be made to the [Victims Directive](#).

**Type of Document:** COVID-19 Recovery

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## COVID-19 Recovery

The effects of the COVID-19 pandemic have put significant pressure on the criminal justice system, including court closures and delays.

The community relies upon Prosecutors to pursue charges that enhance public safety and promote public confidence in the administration of justice and the rule of law.

All accused have the right to be tried within a reasonable time. Prosecutors must therefore review each case in accordance with the overall direction of the Manual and make reasonable efforts to minimize delays caused by the COVID-19 pandemic. Where it is consistent with public safety, Prosecutors should also consider all available and appropriate sanctions and make best efforts to resolve cases as early as possible to move them out of the justice system.

The Prosecutor must act with objectivity, independence and fairness in each case to ensure principled decisions are made. Decisions made by Prosecutors in the proper exercise of their discretion will be supported by the Attorney General.

### Charge Screening

A charge may only proceed if there is a reasonable prospect of conviction and it is in the public interest. This standard must be applied to all cases and at all stages. Where there is no reasonable prospect of conviction or there is no public interest to proceed, the Prosecutor must withdraw the charge.

Reference should be made to the [Charge Screening Directive](#).

#### *Reasonable prospect of conviction and the impact of the COVID-19 pandemic*

In accordance with the Prosecutor's continuing obligation to assess reasonable prospect of conviction at all stages of the prosecution, the Prosecutor should consider any frailties in the prosecution that may have been exacerbated by the COVID-19 court restrictions or any other COVID-19 impacts.

For example, a Prosecutor should consider the impact of any lengthy delays, the ability of witnesses to participate in a hearing in-person or remotely and access to appropriate technology.

*Public interest and the impact of the COVID-19 pandemic*

If there is a reasonable prospect of conviction, the Prosecutor must then consider whether it is in the public interest to continue the prosecution. No one factor is determinative when assessing the public interest, but consideration should be given to the public interest factors in the [Charge Screening Directive](#), including the gravity or relative seriousness of the offence, the prevalence of the type of offence in the community, the criminal history of the accused and the circumstances and views of the victim including any safety concerns.

The Prosecutor should also consider the following:

1. the impact of the COVID-19 pandemic on an accused, victim or witness in light of their age, physical health, mental health or special vulnerability
2. the disproportionate impact of the COVID-19 pandemic on racialized, marginalized, and Indigenous communities (e.g. an increase in the frequency of discriminatory or hate-related offences during the COVID-19 pandemic)
3. the disproportionate impact of the COVID-19 pandemic on vulnerable accused persons, including racialized, marginalized and Indigenous accused (e.g. not having access to accommodations or supports that normally exist)
4. whether the offence was motivated by the COVID-19 pandemic (e.g. taking advantage of closed businesses or people's fear of infection)
5. whether the charge is an offence against the administration of justice, such as a breach of court order, where the restrictions imposed by the COVID-19 pandemic impacted an accused's ability to comply with the court order
6. the length, delay and expense of a trial when considered in relation to the seriousness of the offence and specifically taking into consideration the current COVID-19 court restrictions and future limitations on court operations.

Reference should be made to the [Charge Screening Directive](#).

## Community Based Sanctions (Diversion)

In some cases, the needs and interests of society can be better served through the exercise of prosecutorial discretion to withdraw or stay criminal charges after the completion of a comprehensive diversion program. Community based sanctions, such as Direct Accountability for adults, extrajudicial sanction programs for young persons and Indigenous Restorative Justice Programs develop a plan that will allow the accused to take responsibility for their actions, address the root causes of the problem, and reintegrate them into the community in a positive way.

In determining whether a community based sanction is an effective alternative to a formal prosecution, the Prosecutor and Crown Attorney or designate must consider the factors outlined in the following Directives: [Community Justice Programs for Adults](#), [Indigenous Peoples](#), [Mentally Ill Accused: Alternatives to Prosecution](#) and [Youth Criminal Justice: Extrajudicial Sanctions](#). The factors outlined include but are not limited to the background of the accused (nature and number of previous offences, any outstanding charges, past involvement with community justice programs), the circumstances of the offence (whether it involves violence, the level of harm to the victim, views of the victim) and public confidence in the administration of justice.

The Prosecutor and Crown Attorney or designate should also consider the following factors:

1. impact of the COVID-19 pandemic on the accused, including loss of job, health consequences, additional child-care and education responsibilities, working from home or significant financial constraints
2. the disproportionate impact of the COVID-19 pandemic on vulnerable accused persons, including racialized, marginalized and Indigenous accused (e.g. not having access to accommodations or supports that normally exist)
3. whether the offence was motivated by the COVID-19 pandemic (e.g. taking advantage of closed businesses or people's fear of infection)
4. frailties in the prosecution e.g. staleness of the case, including the delay in prosecution as a result of the COVID-19 court limitations
5. whether a just result is accelerated by a referral to a community-based sanction taking into particular consideration any delays caused by the COVID-19 pandemic.

## Alcohol Impaired Driving Resolutions

In reviewing alcohol impaired driving cases, Prosecutors may consider the impact of the COVID-19 pandemic as an exceptional circumstance justifying the withdrawal of the *Criminal Code* driving offence in exchange for a guilty plea to the [Highway Traffic Act](#) (HTA) offence of careless driving.

Where the exceptional circumstance justifying a careless driving resolution is the impact of the COVID-19 pandemic, an accused is ineligible for the resolution if any of the following deemed aggravating factors under the [Criminal Code](#) and other factors are present:

- bodily harm or death resulted
- the accused's blood alcohol concentration is equal to or more than 120 mg within two hours after operating a vehicle
- the accused has a prior criminal or HTA record for similar offences
- the accused is prohibited or suspended from driving under a federal or provincial act
- a collision or significant bad driving was reported
- the accused has a prior HTA 'warn' or 'ADLS' licence suspension
- the accused was being paid for driving at the time
- a person under the age of 16 years was a passenger in the vehicle
- the accused refused to provide a breath or blood sample
- the accused was driving a large motor vehicle
- the impairment was caused by drugs or a combination of drugs and alcohol.

A decision to accept a careless driving resolution must be approved by the Crown Attorney or designate. The protection of the public is the primary concern at every stage of the prosecution of impaired driving offences.

Where a careless driving resolution is approved, the Prosecutor should consider seeking a \$1000 fine and a [Provincial Offences Act](#) (POA) probation order with a condition requiring that an ignition interlock device be installed in the offender's vehicle or other driving restrictions. The Prosecutor should also consider as a term of a probation order a condition requiring the accused to complete the [Back on Track Program](#) remedial measures program.

Reference should be made to the [Impaired Driving Directive](#).