



Location: [Home](#) → [Crim](#) → [Cpm](#) → Crown Policy Manual - 2005

Services

- [Office of the Attorney General](#)
- [access: defence](#)
- [Articling Opportunities](#)
- [Child Support](#)
- [Civil Case Management](#)
- [Contingency Fees](#)
- [Court Addresses](#)
- [Court Fees](#)
- [Family Justice](#)
- [Getting a Lawyer/Legal Aid](#)
- [Going to Court](#)
- [Jury Duty](#)
- [Legislation](#)
- [Mandatory Mediation](#)
- [Ontario Justice International](#)

Crown Policy Manual - 2005



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[site](#).

Role Of The Crown & The Crown Policy Manual

1. [Preamble to the Crown Policy Manual](#) - (PDF)
2. [The Crown Policy Manual: Access & Structure](#) - (PDF)

Professionalism, Independence And

- [Post and Prejudgment Interest Rates](#)
- [Power of Attorney](#)
- [Publications](#)
- [Simplified Procedure](#)
- [Small Claims Court](#)
- [Supervised Access](#)
- [Victims and Witnesses](#)

Accountability

1. [Crown & Defence Counsel as Witness, Litigant or Subject of Complaint to Law Society of Upper Canada](#) - (PDF)
2. [Media Contact By Crown Counsel](#) - (PDF)
3. [Police: Relationship With Crown Counsel](#) - (PDF)

Case Management

1. [Aboriginal Justice](#) - (PDF)
2. [Charge Screening](#) - (PDF)
3. [Community Justice](#) - (PDF)
4. [Resolution Discussions](#) - (PDF)

Victim Standards And Practice

1. [Victims of Crime](#) - (PDF)

Fairness In Criminal Justice Process

1. [Disclosure](#) - (PDF)
2. [In-Custody Informers](#) - (PDF)
3. [Physical Scientific Evidence](#) - (PDF)

Specific Types Of Prosecution

1. [Child Abuse, internet - based and other Offences Involving Children](#) - (PDF)
2. [Dangerous, Long term & High Risk Offenders](#) - (PDF)
3. [Domestic Violence \(See below: Spouse/ Partner Offences\)](#) - (PDF)
4. [Firearms](#) - (PDF)
5. [Hate Crime & Discrimination](#) - (PDF)
6. [Impaired Driving and Road Safety](#) - (PDF)
7. [Mentally Disordered / Developmentally Disabled Offenders](#) - (PDF)
8. [Proceeds of Crime](#) - (PDF)
9. [Sexual Offences](#) - (PDF)
10. [Spouse/Partner Offences](#) - (PDF)
11. [Youth Criminal Justice Act](#) - (PDF)

Procedural Issues And Trial Practice

1. [Appeals by the Crown](#) - (PDF)
2. [Appeals: Conceding Defence Appeals & Responding to New Evidence](#) - (PDF)
3. [Attorney General's Consents](#) - (PDF)
4. [Bail Hearings](#) - (PDF)
5. [Direct Indictments](#) - (PDF)
6. [DNA Databanking Legislation](#) - (PDF)

7. [Extradition](#) - (PDF)
8. [Sentencing](#) - (PDF)
9. [Stay and
Recommencement of
Proceedings](#) - (PDF)
10. [Transfer of Charges
to Other Jurisdictions](#)
- (PDF)
11. [Witnesses](#) - (PDF)

| [central site](#) | [feedback](#) | [search](#) | [site map](#) | [français](#) |
| [What We Do](#) | [News](#) | [Courts](#) | [Family Law](#) | [Legislation](#) | [Native Affairs](#) |



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Embedded Secure Document

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PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

THE CROWN POLICY MANUAL: ACCESS & STRUCTURE

PRINCIPLES

The Ministry of the Attorney General is committed to ensuring public access to the Crown Policy Manual. The Crown Policy Manual is a comprehensive compilation of all prosecution policies and memoranda that provide the Attorney General's instructions as to how Crown counsel are to perform their duties. A principle purpose of the Crown Policy Manual is to provide guidance to Crowns in the exercise of their independent prosecutorial discretion. As parts of the Manual are accessible to the public, it is a vehicle to provide a measure of transparency and thus, public accountability. The public is able to see the instructions that the Attorney General gives Crown counsel, thereby preventing any suggestion of secret or arbitrary direction.

STRUCTURE OF THE MANUAL

The Manual is divided into three components:

Policies: Policies are issued by the Attorney General. These policies provide brief, clear statements of principle and broad general guidance on important areas of Crown practice and discretion. They provide the overall vision and philosophy of the Attorney General as to how prosecutions are to be handled and systemic concerns dealt with. Policies are clarified, supplemented and kept current by detailed practice memoranda and confidential legal memoranda.

Practice Memoranda: Practice memoranda are issued by the Assistant Deputy Attorney General (Criminal Law Division). Practice memoranda provide specific policy direction and detailed legal and practical guidance to Crown counsel.

Confidential Legal Memoranda: Confidential legal memoranda are issued by the Assistant Deputy Attorney General (Criminal Law Division). These memoranda supplement policies and practice memoranda with detailed legal advice and guidance. Confidential legal memoranda are privileged.

ACCESS TO THE MANUAL

Policies and Practice Memoranda: Policies and Practice Memoranda are not considered to be confidential. They can be shared with members of the public, the defence bar, judiciary and others as appropriate. These policies and memoranda are listed on the Ministry of the Attorney General website, and may be made available to the public in hard copy, upon request.

Confidential Legal Memoranda: As Confidential Legal Memoranda provide legal advice to Crown counsel, they are considered to be confidential and privileged. Confidential Legal Memoranda must not be distributed outside the Criminal Law Division without permission of the Assistant Deputy Attorney General (Criminal Law Division).

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

CROWN AND DEFENCE COUNSEL AS WITNESS, LITIGANT or SUBJECT OF COMPLAINT TO LAW SOCIETY OF UPPER CANADA

PRINCIPLES

If Crown counsel are subpoenaed to be witnesses in a case in which they had a professional involvement, they should immediately seek the advice of their Crown Attorney.

Crown counsel who are themselves the subject of a proposed lawsuit, or charge under the *Criminal Code*, other federal legislation, a serious provincial offence such as under Part III of the *Provincial Offences Act*, or a complaint to the Law Society of Upper Canada, must immediately bring the matter to the attention of the Crown Attorney who in turn will notify the Regional Director of Crown Operations (DCO). The DCO shall then bring this matter to the attention of the Assistant Deputy Attorney General, Criminal Law Division, (ADAG). A formal response to a complaint to the LSUC should be forwarded by the ADAG, after thorough consultation and review by the DCO and the ADAG, in consultation with Crown counsel whose conduct is the subject of the complaint. In all cases, Crown counsel must keep their direct supervisor apprised of the status of any outstanding charge, lawsuit or complaint, including, in the case of a criminal charge, whether or not a conviction was registered.

If Crown counsel intends to call defence counsel as a witness in matters involving a client or former client, Crown counsel must first consult with the Crown Attorney and obtain the approval of the Regional Director of Crown Operations. Similar approval must be obtained prior to attempting to admit evidence relating to a pre-trial resolution or other resolution discussion.

If Crown counsel consider that a formal complaint to the Law Society of Upper Canada is warranted in respect of conduct of a defence counsel, they must immediately bring the matter to the attention of the Crown Attorney who in turn will notify the Regional Director of Crown Operations (DCO). The DCO shall then bring this matter to the

attention of the Assistant Deputy Attorney General, Criminal Law Division, (ADAG). After thorough consultation with Crown counsel, review by the DCO and the ADAG, and in appropriate circumstances, the formal complaint to the LSUC should be forwarded by the ADAG.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

MEDIA CONTACT BY CROWN COUNSEL

PRINCIPLES

Public confidence in the administration of criminal justice is enhanced by the availability of appropriate and timely information concerning cases and the criminal process. Crown counsel have an important role to play in this regard. It must be recognized, however, that in their role as “Ministers of Justice”, Crown counsel have a responsibility to relate to the media and the public in a manner that differs from other lawyers and other citizens. Generally, when making public statements, Crown counsel should be courteous, dispassionate, free from provocative rhetoric, and measured in their responses.

Public statements by counsel should not compromise the perception of impartiality and the ability to function as public servants with quasi-judicial responsibilities. When speaking or writing as private citizens, counsel must be mindful of the oath of loyalty, confidentiality and the provisions of the Public Service Act relating to political comment. In particular,

- Any media inquiry may be referred directly to the Ministry of the Attorney General Communications Branch
- While it is appropriate for Crown counsel who are directly involved in a case to provide public information in response to inquiries from the media, Crown counsel must not compromise a police investigation or disclose confidential information, and must scrupulously avoid any possible interference with the right of an accused person to a fair trial
- While it is appropriate for Crown counsel to explain matters of criminal procedure and to relate prosecution policy, as it is found in the Crown Policy Manual, to their prosecutions, Crown counsel must refrain from making general policy statements that could compromise the Attorney General in executing his/her responsibilities in regard to policy development

- Crown counsel should refrain from expressing personal opinions on any aspect of a prosecution
- Crown counsel must not initiate contact with the media without having obtained the prior approval of the Crown Attorney for the jurisdiction. .

PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

POLICE: RELATIONSHIP WITH CROWN COUNSEL

PRINCIPLES

Crown counsel and police agencies have separate responsibilities in the criminal justice system. They are required to work in partnership to enforce criminal laws effectively. The working relationship between police and crown counsel should reflect mutual respect and professionalism. These are fostered by appropriate recognition of the boundaries between the investigative and prosecutorial functions.

Police have the sole responsibility for charging decisions except where the consent of the Attorney General is required by statute. Crown counsel are solely responsible for determining whether a charge is to proceed once it has been laid.

Police may seek advice from Crown counsel concerning legal issues arising in the investigation of offences. Crown counsel may ask the assistance of police in conducting further investigations and providing further information. Each agency has a role to play, independent of the other, and neither agency is subordinate. This independence is fundamental to the maintenance of their role as “Ministers of Justice”, and is essential to the proper administration of justice.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

ABORIGINAL JUSTICE

PRINCIPLES

The history of aboriginal peoples separates them from all other minority groups in Canadian society and mandates special legal and constitutional status. The rights of aboriginal people are recognized and affirmed in The Constitution Act 1982 and the Canadian Charter of Rights and Freedoms. Despite their unique status, aboriginal people have been historically disadvantaged.

Aboriginal people have experienced years of dislocation, deprivation of economic opportunity and enforced familial disruption through the use of residential schools. For many, this has translated into low incomes, high unemployment, lack of opportunities, lack of education, loneliness, and community fragmentation. The disproportionate rate of suicide, imprisonment and substance abuse among the aboriginal population is, in part, a testimony to the wrongs suffered by the aboriginal people over decades.

Many aboriginal offenders have been subject to systemic and direct discrimination. Traditional sentencing ideals of deterrence, separation, and denunciation are, for many aboriginal people, far removed from their understanding of sentencing. Most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. Aboriginal people have a fundamentally different perspective on the process of achieving justice – one that emphasizes community healing and community based sanctions.

In recognition of their particular circumstances, culture, and history of marginalization and discrimination, aboriginal people warrant special, and sometimes differential, consideration within the criminal justice system. Depending on the circumstances of a particular case and the background of the offender, this may require an emphasis on restorative justice and remedial measures, rather than incarceration. In reflection of this principle, the Criminal Code requires a different methodology for assessing a fit sentence for an aboriginal offender, in order to achieve a truly fit and proper sentence in the

particular case. The fundamental purpose of s.718.2(e) of the Criminal Code is to treat aboriginal offenders fairly by taking into account their differences.

Aboriginal people are entitled to be treated fairly by the criminal justice system, in accordance with their special circumstances. Crown counsel should recognize and take into account the unique systemic or background factors that may have contributed to an aboriginal person's criminal conduct. As well, Crown counsel should also consider procedures and sanctions appropriate in the circumstances of the offender because of his or her particular aboriginal heritage or connection. The maintenance of social harmony, safety and stability, within aboriginal communities, and as between these communities and non-aboriginal communities, should be a significant consideration of Crown counsel, in cases involving an aboriginal offender.

Crown counsel should maintain a flexible and open approach to all criminal matters arising in the aboriginal community and should work with the aboriginal community to ensure that the ultimate dispositions represent the wisest possible choices in terms of community safety and social harmony, in both the short and the long term.

Aboriginal Community Justice Programs: In recognition of the unique historical, cultural and socio-economic position of aboriginal people in contemporary Canadian society, and to give effect to their legal and constitutional entitlements, Aboriginal Community Justice Programs (ACJP) should be developed. This should be done in consultation with the aboriginal community. ACJP play an important part in ensuring fair and equal treatment for aboriginal Offenders. Crown counsel have a critical role in ensuring that such programs are just, adequately safeguard the community and meet the needs of victims, as well as offenders.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

CHARGE SCREENING

PRINCIPLES

The decision to continue or terminate a prosecution can be one of the most difficult for Crown counsel to make. The community relies upon Crown counsel to vigorously pursue provable charges while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction. Every charge must be screened in accordance with the charge screening standards of "reasonable prospect of conviction" and "public interest" as outlined in this policy and in Memoranda issued by the Assistant Deputy Attorney General (Criminal Law Division). Further background information about charge screening may be obtained from "Report of the Attorney General's Advisory Committee on Charge Screening Disclosure and Resolution Discussions (the Martin Committee Report)".

Crown counsel are to screen every charge as soon as practicable after the charge arrives at the Crown's office and prior to setting a date for preliminary hearing or trial. The Crown Attorney in each jurisdiction is to set up a protocol for all charges to be screened.

The obligation to screen a charge is ongoing as new information is received by Crown counsel in preparation for and during the conduct of bail hearings, pre-trials, preliminary hearings, trials and appeals.

Reasonable Prospect of Conviction: When considering whether or not to continue the prosecution of a charge the first step is to determine if there is a reasonable prospect of conviction. This test must be applied to all cases. If the Crown determines there is no reasonable prospect of conviction, at any stage of the proceeding, then the prosecution of that charge must be discontinued.

The threshold test of "reasonable prospect of conviction" is objective. This standard is higher than a "prima facie" case that merely requires that there is

evidence whereby a reasonable 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.

Public Interest: If there is a reasonable prospect of conviction, then Crown counsel must consider whether it is in the public interest to discontinue the prosecution, notwithstanding the existence of a reasonable prospect of conviction. The public interest factors must only be considered after the threshold test, a reasonable prospect of conviction has been met. No public interest, however compelling, can warrant the prosecution of an individual if there is no reasonable prospect of conviction.

Scope of Policy: All cases, including child abuse, sexual assaults and spouse/partner offences, must be screened in accordance with the "reasonable prospect of conviction" and "public interest" standards. The personal, professional or "political" consequences of a screening decision should never affect Crown counsel's judgment. Nor should stereotypes about certain categories of witnesses such as child witnesses, witnesses with mental disabilities and complainants of spouse/partner abuse or sexual offences, affect Crown counsel's judgment. Since this is an area of discretion where reasonable people will differ, it is always advisable to consult with experienced colleagues when faced with a difficult charge screening decision. Crown counsel will be supported by the Ministry when they make difficult judgment calls in the proper exercise of their discretion.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

COMMUNITY JUSTICE

PRINCIPLES

For the purpose of this document, community justice provides for the resolution of some types of criminal matters using resources found outside the formal justice system. Community justice processes can supplement or entirely replace the procedures of the formal criminal justice system in some cases including, but not limited to, those involving mentally disordered and/or developmentally disabled offenders.

In many locations across Ontario, community justice programs have been established. These programs offer alternative means of resolving criminal matters that do not require formal adjudication in the court system. The Ministry of the Attorney General endorses community justice programs and encourages and supports Crown Attorneys offices to participate in developing community justice processes to address local needs and conditions.

When, properly resourced and implemented, community justice programs can help fulfill community and individual needs to:

- More actively participate in the justice process
- Accelerate just results
- Promote a sense of community safety
- Encourage concrete action aimed at preventing future offending behaviour
- Allow victims to have meaningful participation in the justice process with safety and dignity
- Encourage offenders to accept responsibility for their actions
- Offer victims reparation for the harm they have suffered.

A justice system open to the use of these complementary programs should allow quicker resolution of offences, permitting the courts, Crown Attorneys offices, and police services to use their resources effectively.

Crown Attorneys offices are encouraged to cooperate in enabling the development of local community justice processes that suit their communities. As the needs and community resources of jurisdictions vary, it is not possible to provide a standard model for all communities. In particular, eligibility criteria for referrals to community justice programs may vary among programs and communities. Generally speaking, however, crimes involving violence, other than minor non-spouse/partner offences, will not be eligible for community justice as an alternative to adjudication.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

RESOLUTION DISCUSSIONS

PRINCIPLES

Resolution discussions are an essential part of the criminal justice system in Ontario. When properly conducted, they provide a form of dispute resolution that can benefit all of the participants in that system including victims, witnesses, the accused, counsel, police, and the people of Ontario. The proper administration of justice, including consideration of the public interest, is the primary concern of any resolution discussion.

The term “resolution discussion” refers to the process during which defence and Crown counsel discuss the evidence and likely outcome of a criminal prosecution with a view to achieving results that advance the administration of justice. Resolution discussions encompass much more than simply plea negotiations. Resolution discussions include any discussion between counsel aimed at resolving any issues that a criminal prosecution raises.

In conducting resolution discussions, Crown counsel should attempt to balance the interests of the victim, the protection of the public, and the rights of the accused in the framework of the optimal use of limited resources. Reference may be made to the preamble of the Crown Policy Manual for a more detailed discussion of the role of Crown counsel.

A resolution agreement with respect to charges and/or sentence should adequately reflect the public interest and the gravity of the provable offence or offences. Crown counsel should ensure that the interests of the victim are considered in reaching a resolution.

There are some fundamental principles of resolution discussions that are binding directives:

- Crown counsel must not accept a guilty plea to a charge knowing that the accused is innocent

- Crown counsel must not knowingly accept a guilty plea to a charge when a material element of that charge can never be proven unless that fact is fully disclosed to the defence
- Crown counsel must not purport to bind the Attorney General's right to appeal any sentence
- Unless there are exceptional circumstances, Crown counsel must honour all agreements reached during resolution discussions.

PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

VICTIMS OF CRIME

PRINCIPLES

Crown counsel owe victims a special responsibility of candor and respect. Crown counsel are both advocates for the prosecution and “Ministers of Justice”. While a criminal prosecution is not aimed solely at pursuing the victim’s interests but rather at promoting the public interest, Crowns should display sensitivity, fairness and compassion in their dealings with victims.

To the degree that is consistent with this dual role, Crown counsel should ensure that the interests of victims, including harm suffered by them and their privacy interests, are considered at every stage in the prosecution.

Victims should have access to information about the court process, including victim/witness assistance, and the status of the case in which he or she is involved.

Access to General Information: Crown counsel should promote victims’ understanding of the structure and operation of the criminal justice system and the role of the victim. The Crown Attorney in each jurisdiction should facilitate victims’ access to information by:

- Providing copies of available pamphlets or other written material about the criminal justice system
- Directing victims to other resources, such as publications and websites.

Access to Case Specific Information: In cases where serious emotional, physical or psychological harm has occurred to the victim or to the victim’s family, the Crown Attorney in each jurisdiction should ensure:

- A system is in place to identify these cases, and

- Victims are informed in a timely fashion of matters, that potentially affect their security, and of significant changes in the status of the case.

Victims with Special Needs: Where a victim has special needs, particularly communications needs, Crown counsel should make every effort to ensure that full access to, and participation in, the criminal justice system is accorded that victim. Victims with special needs include those individuals who, because of age, or any impairment of an intellectual, emotional, physical or sensory nature, are unable, without assistance, to fully access the criminal justice system, or to understand or be understood by the participants in the system.

PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

DISCLOSURE

PRINCIPLES

Crown counsel must make disclosure according to law. Proper disclosure to the defence, of information in the Crown's possession, is one of the underpinnings of the fair trial process. The law also provides, however, for limited or delayed disclosure in order to protect privileges and other interests (for example, protection of witnesses). Thus, tensions can arise between the duty to disclose and the co-existing duty to protect those other interests.

Crown counsel should consult about difficult decisions: Disclosure decisions can have permanent impacts upon trials of accused persons and rights of third parties. Improper disclosure may result in mistrials, retrials, stays of proceedings and lawsuits. Many areas of the law of disclosure continue to develop. Where Crown counsel propose to give, withhold or delay disclosure for reasons which are not recognized by current caselaw or statute, they must have the approval of their Crown Attorney, who, in turn, should consult with the Regional Director of Crown Operations.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

IN-CUSTODY INFORMERS

PRINCIPLES:

Experience has demonstrated substantial risks to the proper administration of justice may arise from the use of in-custody informers as witnesses. Crown counsel must be aware of the dangers of calling in-custody informers as witnesses. An in-custody informer can only be called as a witness at a preliminary inquiry with the permission of a Regional Director of Crown Operations. An in-custody informer can only be called as a witness at trial with approval of an In-Custody Informer Committee.

In all cases, the guiding principle is that in custody informers will only be tendered as prosecution witnesses where this evidence is justified by a compelling public interest, founded on an objective assessment of reliability.

In-custody informer evidence requires a rigorous, objective assessment of the 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.

A principal purpose of this policy is to help prevent miscarriages of justice, which can occur when in-custody informers falsely implicate accused persons.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

PHYSICAL SCIENTIFIC EVIDENCE

PRINCIPLES

Physical scientific evidence often plays an important role in the determination of criminal liability. Counsel for both the prosecution and the defence routinely use such evidence in support of their cause. For Crown counsel, a number of issues arise respecting how such evidence is gathered, tested, and presented. These issues include:

- The delineation of Crown counsel's duties of disclosure
- The nature of the relationship between the Crown and experts providing opinion evidence for the prosecution
- When and how to obtain forensic evidence, and
- The manner in which such evidence should be presented to the court.

The ultimate objective of the Crown in putting forward scientific evidence is to ensure that such evidence is presented to the court with no more and no less than its legitimate force and effect. The scientist should inform Crown counsel of any limitations on the inferences that can be reliably drawn from such evidence and Crown counsel must make every effort to ensure that those limitations are fully impressed upon the trier of fact. As in all matters, Crown counsel should be guided by the general duty to see that justice is done in the circumstances of the particular case.

This policy has been jointly prepared and adopted by the Ministry of the Attorney General and the Centre of Forensic Sciences.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

CHILD ABUSE, INTERNET – BASED AND OTHER OFFENCES INVOLVING CHILDREN

PRINCIPLES

Our children are the future. Every effort must be taken to keep them safe from harm. Although still largely hidden, the incidence of child abuse is widespread in Canada. It permeates every segment of our society. Offences involving children are, by their very nature, extraordinarily serious and are to be prosecuted as vigorously and diligently as any other serious criminal offence.

Offences involving children include not only direct physical or sexual abuse, but also child pornography, abduction including parental abduction, the use of the internet to lure or exploit children, and offences in which children are witnesses to spousal violence or other traumatic events

Special Needs of Children: Children are the most vulnerable of all victims in the criminal justice system. There is an automatic power imbalance between the adult perpetrator and child victim, often associated with a position of trust. These crimes frequently have crippling effects on the psychological and emotional well being of the victim.

The Crown Attorney for each jurisdiction is to have in place a set of “best practices” or a protocol that includes:

- Involvement of the Victim Witness Assistance Program at the earliest opportunity to support the child
- Best efforts to expedite trials of offences involving children
- Early assignment of full-time Crown counsel who remains with the case until final disposition

- Steps to make the trial process comfortable and respectful for the child
- Applications for DNA databank orders
- Use of appropriate testimonial aids and other legal tools
- Full sentencing submissions, including information on factors relevant to the case such as victim impact information and use of section 161 Criminal Code prohibition orders. The sentencing submissions should emphasize the child's safety and protection as well as the protection of other children and the public interest.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

**DANGEROUS, LONG TERM AND
HIGH RISK OFFENDERS**

PRINCIPLES

Protection of the public is the paramount consideration in dealing with potential dangerous, long-term and high risk offenders.

The protection of the public requires Crown counsel to carefully assess all potential dangerous and long-term offenders to determine whether an application should be made to the Court for an order declaring them to be a dangerous or long-term offender. The Attorney General must personally consent before such an application may be brought. Crown counsel must be mindful that any resolution discussions, concerning such offenders, must be tentative in nature as they are subject to the Attorney General's consent.

In appropriate cases, where there are reasonable grounds to believe that an offender will commit a serious personal injury offence, Crown counsel should also carefully consider whether the offender should be required to enter into a recognizance, with conditions, pursuant to the provisions of the *Criminal Code*. The Attorney General must consent before such an application may be brought.

The Ministry of the Attorney General is committed to identifying high risk offenders who, in the opinion of Crown counsel, pose an ongoing serious threat to society. To that end, a system for flagging these offenders ensures that Crown counsel have access to full background materials about those offenders who pose an ongoing serious threat to society. Crown counsel are to identify such individuals and send relevant materials to the Provincial Coordinator who will keep the information on file, and make those materials available to counsel in subsequent cases involving that offender.

PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

SPOUSE/PARTNER OFFENCES **Also Referred to as DOMESTIC VIOLENCE**

PRINCIPLES

Domestic Violence is not a private family matter – Domestic Violence offences are criminal acts and should be prosecuted as vigorously as other serious criminal matters. Spousal abuse is a prevalent social problem which affects all of us, including children who have witnessed or been exposed to domestic violence. Spouse/partner offences are often committed in a context where there is a pattern of assaultive and controlling behaviour. This violence goes beyond physical assault and often includes emotional, psychological and sexual abuse that is intended to induce fear, humiliation and powerlessness.

In prosecuting cases of spousal abuse, Crown counsel should be sensitive to the dynamics that exist in families where a spouse is abused. In addition to fear for their personal safety and that of their children, victims of these offences may be under intolerable pressure on account of financial considerations, the need for childcare, disapproval of family members, or fear of being ostracized by the community.

Victims of these offences and their children should be able to live as safely as other members of society. At all stages of the prosecution, including bail hearings, the safety of victims and their families is a paramount factor for Crown counsel to consider in the exercise of discretion.

SCOPE OF POLICY

This policy addresses the prosecution of crimes involving the use of physical or sexual force, actual or threatened, in an intimate relationship! Intimate relationships include those between opposite sex and same sex partners. They vary in duration and legal formality, and include current and former dating, common law and married couples.

Scheduling and Assignment of Cases: The Crown Attorney for each jurisdiction is to ensure that a system is in place to identify these cases. In those jurisdictions where domestic violence courts exist, a small team of Crown counsel will have carriage of all spouse/partner prosecutions and continuity of counsel should be maintained until the conclusion of the case. Although not all cases of spousal abuse can be assigned in all jurisdictions, it is important that all of these cases be given priority in scheduling.

Charge Screening and Resolution Discussions: The policies and practice memoranda on charge screening and resolution discussions apply to cases of spousal abuse just as they do to all other types of charges. The public interest factors in these cases, however, should be weighed in light of the predominant need to protect the victim. Given the prevalence and danger of spouse/partner abuse and the dangers inherent in it, it will usually, although not always, be in the public interest to proceed with these prosecutions in cases where there is a reasonable prospect of conviction.

Counsel should exercise caution in evaluating requests from the victim for withdrawal of charges. Given the dynamics that exist in families where a spouse is abused, victims may be reluctant to continue a prosecution and be under intolerable pressure to withdraw

Sentencing: In cases of spousal abuse, Crown counsel should ensure that full submissions are made at sentencing hearings, including victim impact, and that the court is made aware of all factors relevant to the protection and safety of the victim, the victim's family, and the public.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

FIREARMS

PRINCIPLES

Protection of the public, and communities, is the primary focus of the Ministry's firearms policy. Easy access to guns is a factor in violent crime, gang-related crime, accidents and suicides. Indeed, there is a general perception that the use of firearms and weapons in crimes is on the rise. A reduction in the availability and proliferation of firearms and other weapons should have a positive impact on the incidence of violence in our society. At all stages of the prosecution, from bail to sentencing, the prosecution of firearms offences should be premised on providing the greatest protection to the community, not on considerations of expediency.

The gravity of firearms offences is highlighted by mandatory minimum sentences for offences involving the use of a firearm. In any case involving the use of a firearm, whether or not the offence carries a minimum period of incarceration, denunciatory and deterrent sentences should be sought.

While the use of a firearm in any criminal offence is a serious matter, guns play a frequent and fatal role in spousal violence*. Almost fifty percent of women killed by their husbands were shot to death.

A designated firearms Crown counsel is available in each region for advice.

* *Domestic Violence*

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

HATE CRIME AND DISCRIMINATION

PRINCIPLES

Hate crimes are offences that 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.

Hate crimes, regardless of the form they take, are by their nature, very serious offences. There is a very strong public interest in the successful prosecution of hate crime. These crimes are serious because of the following harmful impacts:

- **Impact on the Individual:** Hate crimes have a tremendous impact on the individuals who are victimized. In addition to the psychological and emotional harm caused by hate crime, and its repercussions on the identity and feelings of self-worth of the victim, the degree of violence involved in hate-motivated offences is normally much more extreme than in non-hate crimes
- **Impact on the Target Group:** Hate crime has a general terrorizing effect on the target group to which the victim belongs, because its occurrence makes them all feel vulnerable to victimization
- **Impact on Other Vulnerable Groups:** Hate crimes have a negative impact on other vulnerable groups that share minority status or identify with the targeted group, especially if the hate motivation is based on an ideology or doctrine that covers a number of the groups that live within the community
- **Impact on the Community as a Whole:** This, perhaps, is the greatest evil of hate crime. Hate crime can end up dividing people in society. In a multicultural society like Canada, where all groups are to live together in harmony and equality, hate crime is an anathema. Any occurrence of hate crime is a negation of the fundamental values of Canada.

Each region should have a particular Crown counsel who is designated as the “hate crime” coordinator.

Criminal Sanctions for Hate Crime: Describing a criminal offence as a hate crime does not require that the offence be motivated entirely by hate or bias against a victim because of his/her membership in a group. Even a crime partially motivated by hate or bias may be construed as a hate crime and treated as such. Although the Criminal Code has specific provisions relating to hate crime, offences need not be specifically designated as such, in order to qualify as hate crimes.

Crown counsel should be mindful of the following ways in which hate-motivated crime can be addressed:

- Within the Criminal Code are specific hate-crime offences, and provisions for forfeiture and seizure of hate-related material, requiring the consent of the Attorney General
- Within the mischief section of the Criminal Code is the offence of mischief to religious property that is motivated by bias, prejudice or hate
- Other criminal offences that are motivated by hate, could be hate crimes. Crown counsel should be vigilant about recognizing crimes as hate crimes
- Hate motivation is an aggravating factor in respect of sentence at common law and pursuant to the provisions of the Criminal Code.

Victim Impact: Given the nature of hate crime and the onerous effects it has on the victim, target groups and the community at large, the presentation of evidence relating to such effects may be particularly helpful at the sentencing phase of proceedings. Community-based organizations often have access to expertise and are usually in a position to provide relevant information that may assist in the sentencing process.

**PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL**

CROWN POLICY MANUAL

March 21, 2005

IMPAIRED DRIVING AND ROAD SAFETY

PRINCIPLES

Impaired driving offences are matters of grave concern to the community and should be prosecuted as vigorously as any other criminal offence.

These offences require special sensitivity on the part of Crown counsel when dealing with cases where serious bodily harm or death has occurred. In these cases, Crown counsel should ensure that the victim or family members are aware of significant changes in the status of the case, including dates for trial, plea or sentence and that they have an opportunity to prepare a victim impact statement.

The dual charge screening standard of reasonable prospect of conviction and public interest applies to drinking and driving offences. As the commission of these offences poses a substantial threat to the safety of the public, it will almost always be in the public interest to proceed with the prosecution.

Provided that there is a reasonable prospect of conviction and it is in the public interest to prosecute, Crown counsel must not withdraw these charges, unless there are exceptional circumstances. Approval to discontinue the prosecution must be obtained from the local Crown Attorney or designated counsel.

Deterrence and denunciation are the primary sentencing principles in cases involving impaired driving offences.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

MENTALLY DISORDERED/DEVELOPMENTALLY DISABLED OFFENDERS

PRINCIPLES

Mentally disordered or developmentally disordered people often come into contact with the criminal justice system. These offenders should not be subjected to more onerous consequences than the general population, solely as a function of their disorder/disability.

In recognition of their particular circumstances, mentally disordered or developmentally delayed offenders may warrant special consideration within the criminal justice system, depending on the nature and circumstances of the offence and the background of the offender. This may require an emphasis on restorative and remedial measures, such as specialized treatment options, supervisory programs or community justice programs, as alternatives to prosecution. To the extent consistent with public safety, and in appropriate circumstances, offenders with mental disorders, and those who are developmentally delayed, should be given access to alternatives to prosecution.

Protection of the public, including the victim, if any, is the paramount consideration in the assessment of whether alternatives to prosecution are appropriate. No single factor will be determinative; however Crown counsel should consider the seriousness of the offence, public safety, and whether the consequences of prosecution would be unduly harsh, among other factors.

PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

PROCEEDS OF CRIME

PRINCIPLES

The Attorney General supports the use of Proceeds of Crime legislation. It is important to remove illicitly obtained profits from criminals and to preserve property obtained by crime for forfeiture.

In order to give proper effect to this important law enforcement tool, Crown counsel must adhere to the practice and procedure set out in the legislation, when seizing or restraining property. Crown counsel should also be mindful of the following:

- All requests for undertakings of the Attorney General, with respect to the payment of damages or costs in relation to the making, issuance and execution of the order, must first be approved by the Crown Attorney and Regional Director of Crown Operations
- Use of the proceeds of crime legislation should focus on organized criminal activity being conducted for profit. This will include, but is not limited to, offences committed by criminal organizations
- At sentencing, restitution, compensation and restoration take priority over forfeiture. Crown counsel should ensure that any restrained property is used to satisfy any restitution orders to victims of crime before a forfeiture order is sought or made
- As the Criminal Code provisions provide no guarantee of recovery of losses, victims should be advised that they may seek independent legal advice concerning possible civil remedies.

PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

SEXUAL OFFENCES

PRINCIPLES

Protection of the public through vigorous prosecution: Sexual offences present an ongoing serious threat to public and individual safety. It is essential that the sanctions of the criminal justice system be fully utilized through the vigorous prosecution of provable offences.

Awareness of unfair and inaccurate myths and stereotypes that taint perceptions about the dynamics of sexual offences: Despite recent advancements, both in the law and in social values, views about the dynamics of sexual offences are still permeated by long-entrenched myths and stereotypes. Crown counsel play an important role in combating the harmful effects that these distortions can have on the pursuit of justice.

Sensitivity to the perspective and special needs of victims of sexual offences: Sexual offences are unique because they involve violations of sexual integrity and autonomy. It is the potentially devastating effect that these offences have upon victims that distinguishes them in terms of their relative gravity and the public interest implications of prosecution. Sensitivity to the perspective of victims, their privacy interests and, in particular, the deeply personal and degrading nature of their victimization, must underscore all aspects of prosecutorial action.

Disclosure: Complainants often have an expectation of privacy in their discussions with Crown counsel. Accordingly, the complainant should be informed of the Crown's duty to disclose the content of those communications to the defence.

Protocols: In cases of serious sexual assault¹ the Crown Attorney in each jurisdiction should ensure:

¹ The term "serious sexual assault", as used here, should be interpreted broadly but generally connotes cases involving significant physical or psychological harm to the victim. For example,

- A system is in place to identify these cases
- Crown counsel is assigned carriage of the case at an early stage in the proceedings
- Best efforts are made to give these cases priority in trial scheduling
- Victims are informed of court dates and matters that potentially affect their security, including bail conditions. This information function may be performed by VWAP or the police
- Unless there are exceptional circumstances, victims of serious sexual offences should be informed of proposed resolutions wherever possible, and in advance of the matter being heard in court, or reported in the media.

Sentencing: In cases of sexual assault and other sexual offences, Crown counsel should ensure that full submissions are made at sentencing hearings, including victim impact, and that the court is made aware of all factors relevant to the protection and safety of the victim and the public.

this would include cases involving: sexual intercourse or other direct genital contact; bodily harm and/or the use of weapons; victims of tender years; special needs victims; protracted sexual abuse; a breach of trust or abuse of authority by the offender. These principles apply to all cases of serious sexual assault.

**PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL**

CROWN POLICY MANUAL

March 21, 2005

YOUTH CRIMINAL JUSTICE ACT

PRINCIPLES

Prosecution of young persons aged 12 to 17 who commit criminal offences is governed by the Youth Criminal Justice Act ("YCJA"). The principles of the youth criminal justice system are set out in s. 3(1) of the YCJA as follows:

- Prevent crime by addressing the circumstances underlying a young person's offending behaviour
- Rehabilitate young persons who commit offences and reintegrate them into society, and
- Ensure that a young person is subject to meaningful consequences for his or her offence

in order to promote the long-term protection of the public.

To further these goals, the YCJA sets out a distinct, separate criminal justice system for young persons, including the use of extrajudicial sanctions in appropriate cases. "Extrajudicial sanctions" is a term used in the YCJA. It consists of a program of alternative measures, including youth justice committees. These alternatives to the formal justice system are designed to provide an effective and timely response in holding young persons accountable for their offending behaviour. Any program of alternative measures authorized for the purposes of the YOA, including youth justice committees, is deemed to be a program of extrajudicial sanctions under the YCJA.

Prosecutors must ensure that all dealings with youth cases conform with the principles and legal requirements of the youth justice system as set out in the YCJA.

PROVINCE OF ONTARIO
MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

APPEALS BY THE CROWN

PRINCIPLES

Important governing principles in the decision to appeal on behalf of the Crown are prudence and restraint. Not every unfavorable ruling, judgment or sentence can or should be appealed. The right of the Crown to appeal is circumscribed by law. Even if the legal criteria for an appeal are met, a Crown appeal will not be launched unless a thorough and considered review of the circumstances of the case, the state of the law and considerations of the public interest, has been conducted. The public interest is an overriding consideration in deciding to launch a Crown appeal.

Crown counsel having carriage of an appeal should ensure that victims are informed of matters that potentially affect their security, including bail conditions, and that they are advised in a timely fashion, and in advance of the media, of significant changes in the status of the case.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

CONCEDING DEFENCE APPEALS AND RESPONDING TO NEW EVIDENCE

PRINCIPLES

In rare cases, Crown counsel, reviewing a defence appeal against conviction and/or sentence, may determine that the appeal should be allowed. This decision may be based on new evidence that was not available to the defence at trial.

The decision to concede an appeal decision is a complex and difficult one. It must be based on:

- A thorough appreciation of the dual role of Crown counsel as strong advocates for the prosecution, as well as “Ministers of Justice”, with a duty to ensure that the criminal justice system operates fairly for all
- A comprehensive and rigorous analysis of the strengths and weaknesses of the case, and
- A determination that fairness and the interests of justice are best served by conceding the appeal.

The concession of an appeal may have a profound impact on the key participants in the trial process and, most particularly, on complainants, victims and their families. Unless there are exceptional circumstances, Crown counsel must keep the complainant or victim’s family informed of any decision to concede a defence appeal.

This policy applies equally to:

- Conviction appeals in indictable matters being heard in the Court of Appeal for Ontario
- Summary conviction matters in the Superior Court of Justice and the Court of Appeal for Ontario, and
- All appeals to the Supreme Court of Canada.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

ATTORNEY GENERAL'S CONSENTS

PRINCIPLES

As a precondition to the institution of certain steps in criminal proceedings including, but not limited to, initiating specific prosecutions, restarting a prosecution where jurisdiction has been lost, preferring a direct indictment, laying informations in support of specific recognizances to keep the peace, and initiating dangerous and long-term offender applications, the consent of the Attorney General, as Chief Public Prosecutor of the Province of Ontario is required. In certain instances, the consent required is either that of the Attorney General or the Deputy Attorney General.

In making decisions to consent or refuse to consent to certain steps in criminal proceedings, consideration of the public interest is paramount. The Attorney General and Deputy Attorney General exercise this discretion in a just, honourable and conscientious manner, unmoved by irrelevant considerations or partisan motives. Individual cases must be assessed rigorously, objectively and dispassionately.

The Attorney General has the power to delegate and in certain instances, has delegated the power to consent to the Assistant Deputy Attorney General, the Director of Crown Operations, the Crown Attorney or to Crown counsel. In all instances where the Attorney General has delegated consent, the decision to consent or to refuse to consent must be made in the same way, and on the same basis, that the Attorney General exercises this discretion.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

BAIL HEARINGS

PRINCIPLES

Decisions about bail are some of the most important and challenging that Crown counsel make. These decisions require that Crown counsel balance the following interests:

- Protection of the community including victims and other individuals
- The reputation of the administration of justice and public perception of the criminal justice process
- Society's interest in ensuring that accused persons attend court
- The liberty interests of the accused.

In exercising discretion in this area, Crown counsel has the task of weighing conflicting interests. While all of the factors listed above must be accorded serious consideration, given the potential for tragedy at the bail hearing stage of the process, protection of the public including victims must be the primary concern in any bail decision made by Crown counsel.

The May/Illes, Hadley and Yeo Inquests arose out of situations where accused persons were released on bail and subsequently committed murder/suicide. In the course of these inquests, issues surrounding bail hearings, including the conduct of Crown counsel and the exercise of Crown discretion, came under careful scrutiny.

Although speed is essential in operating an efficient and effective court system, Crown counsel should exercise particular care in conducting bail hearings. It is at this early stage of the proceedings that Crown counsel's discretion is of paramount importance. While it is important that efforts be made to improve the efficiency of bail courts, this

efficiency should not be achieved at the expense of public safety or fairness to the accused.

Crown counsel should seek the detention of the accused where either the circumstances of the accused or the allegations raise serious concerns about risk of harm to the public or to specific people in the event that the accused is released. Crown counsel should not consent to the release of an accused where there are serious safety concerns unless the Crown is satisfied that terms of release address those concerns.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

DIRECT INDICTMENTS

PRINCIPLE

The Criminal Code permits the Attorney General or Deputy Attorney General to send a case directly to trial:

- If the accused has not been given the opportunity to request a preliminary inquiry, or
- If a preliminary inquiry has commenced but not been concluded, or
- After an accused has been discharged at a preliminary inquiry.

This power is an extraordinary one and is used infrequently in Ontario.

Generally, counsel may make a request for the Attorney General's consent to a direct indictment where there exist compelling circumstances which require, in the interests of justice, that the matter be brought to trial forthwith, bearing in mind the strength of the Crown's case and the seriousness of the charge.

Before requesting the Attorney General or Deputy Attorney General's consent, Crown counsel must have concluded that there is a reasonable prospect of conviction and that the continuation of the prosecution is not contrary to the public interest.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

DNA DATABANKING LEGISLATION

PRINCIPLES

A strong and effective DNA data bank tremendously benefits the criminal justice system. It not only assists law enforcement agencies in identifying persons who have committed crimes but also serves to exclude innocent persons who are wrongfully suspected. The provisions have a number of broad purposes including:

- To deter potential repeat offenders
- To promote the safety of the community
- To detect when a serial offender is operating
- To assist in solving old cases
- To streamline investigations
- To assist the innocent by early exoneration or exoneration of those wrongfully convicted.¹

Experience in other jurisdictions has demonstrated that the more profiles included in a DNA databank, the more effective it is.²

In weighing the competing interests of security of the person, privacy of the individual and the public interest in a strong and effective data bank, an appropriate balance is important. The Ontario Court of Appeal has given us guidance on situations in which a DNA databank order is appropriate.³

¹ *R. v. P.R.F.* (2001), 161 C.C.C. (3d) 275, 57 O.R. (3d) 475, *R. v. Briggs* (2001), 157 C.C.C. (3d) 38, 55 O.R. (3d) 417 (Ont.C.A.) (leave to appeal to S.C.C. refused).

² The United States and Great Britain are two examples of this

³ *R. v. P.R.F.* *supra* note 1.

On balance, I would expect that in the vast majority of cases it would be in the best interests of the administration of justice to make the order under s.487.051(1)(b) and s. 487.052, as the case may be. This follows simply from the nature of the privacy and security of the person interests involved, the important purposes served by the legislation and, in general, the usefulness of DNA evidence in exonerating the innocent and solving crimes in a myriad of situations.

The Supreme Court of Canada has concluded that the DNA warrant provisions pass constitutional muster, and in doing so commented on the usefulness of DNA evidence in the investigation and prosecution of crime.⁴

The Ontario Crown Attorney system has demonstrated leadership in seeking DNA databank orders. Crowns should continue this tradition of making requests in appropriate cases, thus supporting the DNA databank and ultimately, the administration of criminal justice.

⁴ See *R. v. S.A.B.* (2003) 2 S.C.R. 678, 178 C.C.C. (3d) 193.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

EXTRADITION

PRINCIPLES:

Extradition refers to the diplomatic process by which one state arranges for the return of a fugitive found in another state in respect of a crime committed within the jurisdiction of the requesting state. Such formal requests may relate to those accused of crimes, as well as convicted offenders with outstanding sentences. Extradition is not necessarily the only available avenue for the delivering of persons from one state to another. In some circumstances, measures such as deportation may yield the same result.

The Extradition Act has application to requests made by foreign states for the surrender of fugitives within Canada's territory, as well as requests made by Canada for the return of accused and convicted offenders to Canada.

A request for extradition should begin with an inquiry by a police force to the local office of the Crown Attorney where the offence is likely to be prosecuted. Since a request for extradition by the Minister of Justice to the foreign jurisdiction warrants that a prosecution will proceed for the identified offences, a firm commitment in that regard, usually in writing from the appropriate Crown Attorney, is necessary. In assessing whether a request for extradition should be made, the following factors should be given careful consideration:

- Whether the Crown has a sufficiently strong case to support the extradition request
- Whether the general circumstances of the case warrant the initiation of extradition proceedings

- Whether the Crown will be seeking a relatively substantial period of imprisonment upon conviction, usually a penitentiary term
- In those cases where a substantial period of incarceration is not contemplated, whether there is a significant and pressing public interest in securing the return of the accused to Canada for prosecution.

Once the case has been reviewed by the appropriate Crown Attorney's office, and a commitment to prosecute is reached, a request is then made to the Deputy Director at the Crown Law Office – Criminal having responsibility for extradition files.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

SENTENCING

PRINCIPLES

Appropriate sentences contribute to respect for the law and the maintenance of a just, safe and peaceful society. The objectives of sentencing include: denunciation, general deterrence, specific deterrence, separation of the offender from society where necessary, rehabilitation, reparation to victims and the community, and a promotion of responsibility in offenders and the acknowledgment of harm done to victims and the community.

Crown counsel should balance the purpose and principles of sentencing in making effective submissions to the court. Pre-sentence reports and/or psychiatric assessments should be requested, where appropriate. Crown counsel should consider whether expert or *viva voce* evidence ought to be provided to the court on sentencing.

Victims should be given an opportunity to be heard at the sentencing hearing through victim impact statements. Reference should be made to the practice and confidential legal memoranda on victim impact statements.

In ensuring that principles and purposes of sentencing are achieved, Crown counsel should make the most effective use possible of all of the provisions in the *Criminal Code* which might assist in the protection and safety of the victim and other members of society, including:

- Mandatory or discretionary firearms/weapons prohibition and forfeiture orders
- Orders to protect children
- Although not a matter of sentence, DNA orders on primary and secondary designated offences

- Proceeds of crime orders
- Effective probation conditions which focus on rehabilitation of the offender, the safety of the victim, the safety of the public and conditions which acknowledge the responsibility of the offender for harm done to the community
- Effective conditions on conditional sentence orders which not only focus on rehabilitation, protection of the victim, safety of the public, and responsibility of the offender but also include punitive sanctions which are restrictive of the offenders liberty
- Restitution and compensation orders
- Driving prohibition orders
- Dangerous or long-term offender orders.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

STAY AND RECOMMENCEMENT OF PROCEEDINGS

PRINCIPLES

The Attorney General has the power to stay charges set out in an information or indictment.

The power to consent to an Attorney General stay has been delegated to all Crown counsel. The stay of a criminal offence that has resulted in death must be approved by the Crown Attorney or the Director of Crown Operations, or, in the Crown Law Office – Criminal, the Deputy Director – Trials or the Director. Similarly the decision to stay a charge in response to a judicial ruling must be approved by the Crown Attorney or, in the Crown Law Office – Criminal, the Deputy Director – Trials or the Director. In cases where it is not possible to seek approval prior to entering the stay, counsel must report the fact that they sought a stay after the fact.

The power to recommence a stayed charge has been delegated to the Director of the Crown Law Office – Criminal, and the Directors of Crown Operations, as the case may be, who, in turn, may wish to consult with the Director of Crown Law Office – Criminal in appropriate cases.

Crown counsel should ensure that the use of this discretionary power is consistent with the proper administration of justice.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

TRANSFER OF CHARGES TO OTHER JURISDICTIONS

PRINCIPLES

The Attorney General's consent to transfer charges will be granted where the appropriate procedure has been followed, the victim in serious cases has been notified, the accused agrees to plead guilty (and consents to the transfer) and where the transfer of the charges is in the public interest.

Transfer of Charges outside the Province

- Transfers of charges outside Ontario require the consent of the Attorney General
- The Attorney General delegates this function to designated counsel in the Crown Law Office – Criminal
- Further information or advice regarding the transfer procedures may be obtained from designated counsel.

Transfer of charges within the Province

Transfers within the Province require the consent of the Attorney General, however, that power to consent has been delegated to the Crown Attorney of each jurisdiction.

PROVINCE OF ONTARIO
MINISTRY OF ATTORNEY GENERAL

CROWN POLICY MANUAL

March 21, 2005

WITNESSES

PRINCIPLES

Witnesses are an important part of every prosecution. The justice system strives to foster their participation in the justice process. Many of the policies and memoranda in the Crown Policy Manual impose responsibilities on Crown counsel to make early contact with witnesses and victims. In the case of young or otherwise vulnerable witnesses, Crown counsel have a special responsibility for their preparation for court and treatment in court.

Occasionally, witnesses may have to be made aware that their interests, while important and requiring sensitivity on the part of Crown counsel, are not synonymous with the public interest in criminal justice.

Victim/Witness Assistance: The Victim Witness Assistance Program plays a leading role in ensuring that community based services for victims and witnesses are appropriate, complementary and coordinated. While services may vary, coordination and cooperation between victim witness staff and the Crown is essential to the provision of quality services to victims and witnesses of crime. Although the Program's primary role is to provide service to victims and witnesses, in so doing, Victim/Witness staff provide invaluable assistance to Crown counsel.

Witness Interviews: The administration of justice is best served by a trial process that strives to ensure that witnesses provide complete, honest and independent evidence. Properly conducted witness interviews can contribute significantly to that goal. While it is impossible to interview all witnesses in all cases, the effective prosecution of serious or sensitive cases often requires Crown counsel to interview witnesses.

When interviewing witnesses, Crown counsel should be mindful of the need to preserve the integrity of the evidence and to safeguard against suggestive techniques that can improperly influence a witness' testimony.

Witness Assistance and Relocation: In certain rare circumstances, a witness may jeopardize his or her safety as well as the safety of his or her family by providing evidence in court.

In those limited and rare circumstances, the Witness Assistance and Relocation Program provides funding to assist in the maintenance and relocation of a witness and/or family members. The program does not provide rewards or benefits in return for testimony.