Manitoba
Department of Justice
Prosecutions

Guideline No. 2:INI:1.1

Policy Directive

Subject: ***Laying and Staying of Charges***
(including Withdrawing or Forbearing to Lay Charges)
Date: April 2001

POLICY STATEMENT:

The twofold test for prosecutorial discretion to proceed with or to instruct that charges be instituted is:

1. Whether or not there exists a reasonable likelihood of conviction, and

2. Whether or not there exists a public interest in proceeding.

Similarly, the test for exercising the discretion to stay charges is whether there continues to be a reasonable likelihood of conviction and whether there continues to be a public interest in proceeding. During the course of a preliminary hearing or in preparing for a trial, the Crown's case may be materially different than the initial assessment. Therefore, the requirement to meet the charging standard continues throughout the prosecution.

"REASONABLE LIKELIHOOD OF CONVICTION"

In the assessment of the evidence, a bare *prima facie* case is not enough: the evidence must demonstrate that there is a reasonable likelihood of conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. Crown Attorneys are to make this evaluation impartially and according to law.

A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown Attorneys should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the likelihood of a conviction.

THE PUBLIC INTEREST:

The Crown Attorney must also consider whether the public interest requires a prosecution. This is a difficult judgment call which must be taken with appropriate care and discretion. A general rule can be found in the words of Lord Shawcross, endorsed by his successors in the office of Attorney General of England and Wales, and echoed in the Marshall Inquiry (1990):

> It has never been the rule in this Country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should…prosecute wherever it appears that the offence or the circumstances of its commission is or are of such a character that prosecution in respect thereof is required in the public interest. That is still the dominant consideration.

When making an assessment of the public interest, it is necessary to carefully balance a variety of interests, some of which may be in conflict. These include the need for respect for the rule of law, the interests of the victim or victims and protection of the public. The following are some specific factors which should be considered:

i) the triviality of the alleged offence or the fact that it is of a "technical" nature only; broadly speaking, the graver the offence, the less likely there will be a public interest that will permit a disposal other than prosecution.

ii) the physical health, mental health, special infirmity or other medical condition of the alleged offender or witness; this must be balanced against the nature of the alleged offence and concerns of the victim;

iii) the staleness of the alleged offence;

iv) the degree of culpability of the alleged offender (particularly in relation to the other alleged parties to the offence);

v) the likely effect of a prosecution on public order and respect for the rule of law including the necessity of maintaining confidence in the legislature, courts and the administration of justice.

vi) the obsolescence or obscurity of the law;

vii) whether an acquittal would or might produce consequences contrary to the public interest; For example, an unsuccessful prosecution involving hate literature will probably give it increased and undesirable notoriety. Such decisions are to be made by Senior Management of the Crown

viii) the availability and efficacy of any alternatives to prosecution, within or associated with the criminal justice system, in the light of the purposes of the

criminal sanction. These include pre-charge mediation, post-charge mediation and restorative justice options;

ix) the prevalence of the alleged offence and any related need for deterrence or denunciation;

x) consideration of the victim including the entitlement of the victim or any person to compensation, forfeiture or reparation and the victim's attitude toward proceeding with the prosecution (note the exception to this when dealing with domestic violence - Policy2:DOM:1 and 2:DOM:1.1);

xi) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so (refer to Policy 2:IMM:1 – Immunity Arrangements);

xii) whether the consequences of any resulting conviction would be unduly harsh or oppressive; this is to be balanced against the effect on the victim.

However, when considering the latter factor, it must be remembered that the criminal justice system is to be regarded as the primary method by which society deters, denounces and penalizes criminal conduct. Accordingly, no regard should be had to the following:

i) the possible effect on the personal or professional circumstances of the alleged offender;

ii) the existence of other non-criminal proceedings or penalties (e.g., professional discipline) in respect of the alleged offence and the effect of those proceedings on the circumstances or reputation of the alleged offender;

iii) the public notoriety of the alleged offence and the effect of that notoriety on the circumstances or reputation of the alleged offender.

iv) the possible embarrassment that would result to the offender from a prosecution.

It is a basic principle of justice that all persons shall be treated equally. Therefore, a decision whether or not to commence or continue criminal proceedings must not be influenced by the following:

a) the alleged offender’s irrelevant personal characteristics, including:

i) ancestry, including colour and perceived race;
ii) nationality or national origin;
iii) ethnic background or origin;
iv) religion or creed, or religious belief, religious association or religious activity;
v) age (unless some mitigating medical condition is present);
vi) sex;

vii) sexual orientation;
viii) marital or family status;
ix) source of income;
x) political belief, political association or political activity;
xi) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

b) the Crown Attorney's personal feelings concerning the victim or the alleged offender;

c) any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or

d) the possible effect on the personal or professional circumstances of those responsible for the prosecution decision.

PROCEDURE – Laying Charges:

The following guidelines apply to the laying of charges:

1. Where available, charges for all non-custody matters are reviewed by the Crown Attorney at the pre-charge screening level and a recommendation is made to the police as to the appropriate charge(s) to be laid.

2. Charges for accused in custody are laid by police, subject to consultation with the Crown Attorney in appropriate cases.

3. The police have the right and responsibility to lay an information charging an individual with an offence, subject to the Crown Attorney's right to withdraw or stay a charge after it has been laid.

4. The ultimate discretion to pursue a prosecution rests with the Crown Attorney.

5. In any case of possible perception of conflict of conduct or perception of bias, outside counsel should be retained at the earliest possible opportunity in the process.

6. No Crown Attorney shall disclose the fact of a police investigation, other on a need to know basis within the prosecution service, so as to maintain confidentiality and secrecy respecting the identity of a person who is the subject of a police investigation.

7. Crown Attorneys are to respond to any request from the police for consultation concerning the drafting of an information charging a person with an offence, in a timely way.

8. Police officers should be encouraged to consult with a Crown Attorney concerning the drafting of charges, particularly in difficult, sensitive and complex cases.

PROCEDURE – Staying Charges:

The statutory and common law basis for the exercise of discretion to stop or prevent prosecutions is found in the *Criminal Code* and in the leading authorities of Blasko v. R. [1976] 33 C.R.N.S. 227 (Ont.); K. Chasse, "The Crown's Power to Withdraw Charges" (1976), 33 C.R.N.S. 218; and R. v. Karpinski (1957) 117 C.C.C. 241 (S.C.C.). See generally: C. Sun "The Discretionary Power to Stay Proceedings" (1973-74), 1 Dal.L.J. 482.

Where the Crown Attorney decides not to undertake or to stop a prosecution by reason of a public interest factor, a notation of this decision **must** be placed in the file relating to the case in question. Where reasons of the public interest and the administration of justice do not demand otherwise, and the stay or withdrawal occurs in a court of record, the reasons therefor shall be stated by the Crown Attorney.

Before terminating a prosecution the Crown Attorney should, where possible, consult with the investigator and/or the victim of the alleged offence. The final decision as to whether a prosecution will be terminated or will continue rests with the Crown Attorney.

RATIONALE:

The laying of charges is to be governed by a high standard of care. It is a decision which "should only be taken after a very careful decision of all the available evidence, calmly, and in the light of day because a wrong decision can have pretty disastrous consequences" (Peter Barnes D.P.P., London, cited by Edwards (1984) at p. 410).

Of all the decisions which have to be made by those with the responsibility for the conduct of criminal or quasi-criminal cases, by far the most important is the initial one as to whether or not a charge should be laid. Naturally, the degree of importance depends to some extent on the gravity of the offence but a wrong decision either way can have disastrous consequences affecting not only the suspect but, in certain circumstances, the whole community. If a guilty person is not charged, he or she may go on to cause untold further harm; yet, if an innocent person is charged, that person and his or her family may be seriously affected even if the offence is comparatively minor and he/she is ultimately acquitted. These same consequences may flow when charges are stayed or withdrawn.