

**Ontario Ministry of the Attorney General
Criminal Law Division**



720 Bay Street
Toronto, Ontario M5G 2K1
Phone: (416)326-2615
Fax: (416)326-2063

720 rue Bay
Toronto, Ontario M5G 2K1
Télé : (416)326-2615
Télééc. : (416)326-2063

PM [2005] No. 22

**PRACTICE MEMORANDUM
To Counsel, Criminal Law Division**

Date: March 31, 2006

Subject: **Mentally Disordered/Developmentally Disabled Offenders: Diversion**

Synopsis: Mentally disordered and developmentally disabled offenders offer a unique challenge to Crown counsel. These individuals may be fit to stand trial and not exempt from criminal responsibility by law, yet mentally deficient to a degree that compels consideration of alternatives to formal adjudication. Equally, it may be in the public interest to stay charges in cases involving the unfit or a potentially not criminally responsible (NCR) offender. On the other hand, protection of the public, including the victim, if any, is the paramount consideration in this context.

This memorandum provides guidance to Crown counsel in respect of alternatives to formal adjudication for these offenders. It sets out the offences that are eligible for treatment options and supervisory programs and suggests some methods of implementing these alternatives to prosecution. Reference should also be made to policy and practice memoranda on Charge Screening, Victims of Crime, Community Justice and *YCJA* Extrajudicial Sanctions. **This memorandum replaces *Diversion of Mentally Disordered Accused DIV-1* and attachments.**

Table Of Contents

- 1. Introduction**
- 2. Protocols**
- 3. Eligibility of Offences**
 - a. Offences that are not eligible (Class III)*
 - b. Offences that are presumptively eligible (Class I)*
 - c. Other offences (Class II)*
- 4. Prerequisites to Implementing Treatment Plan Options / Supervisory Programs or Other Alternative Measures**
- 5. Factors to Consider**

6. Possible Measures and Processes for Mentally Disordered/Developmentally Disabled Offenders

7. Procedure

- a. Timing of the stay of proceedings:*
- b. Adjournments*
- c. Authority to stay and recommence proceedings*
- d. Proceedings that are not stayed*

8. Psychiatric Assessments

- a. Criminal Code*
- b. Mental Health Act*
 - i. Authority to make order
 - ii. Prerequisites and conditions of a *MHA* order
 - iii. Limitations on use of report
 - iv. Applications by family members
 - v. Community treatment orders for mentally disordered accused

Opinion and Advice

1. Introduction

To the extent possible, accused persons with mental disorders and those who are developmentally disabled should be given the same access to community justice programs, as all other accused. They 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 disabled 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.

Moreover, in cases involving minor offences and no risk to public safety, where the offender is incapable of complying with a community justice initiative because of the offender's disorder/disability, it will often be in the public interest to simply withdraw the charge

This memorandum may be cross-referenced to the policy and practice memorandum on Community Justice. In the event of any conflict between this practice memorandum and that on Community Justice, this memorandum applies.

Reference should also be made to the policy and practice memorandum on YCJA Extrajudicial Sanctions. In the event of any conflict between this practice memorandum and that on YCJA Extrajudicial Sanctions, the latter applies.

2. Protocols

The Crown Attorney for each jurisdiction should develop a local protocol to address options for the disposition of cases involving mentally disordered or developmentally disabled offenders.

In jurisdictions where there is a Mental Health Court Support Services program, the Crown Attorney for the jurisdiction shall develop a protocol respecting the referral of offenders to the program, and the sharing of information between the Crown and mental health workers. In determining appropriate time lines for referral and assessment of these cases, the Crown Attorney should involve the local judiciary, legal aid, the defence bar, police and other interested parties.

Practices vary widely across the province from formal diversion programs, which utilize professional mental health workers where they are available, to *ad hoc* case-by-case evaluations and special handling by Crown counsel. Generally speaking, protocols should address the treatment and/or rehabilitation needs of offenders.

For a more detailed discussion of disposition options, reference may be made to section 6 below on Possible Measures and Processes for Mentally Disordered/Developmentally Disabled Offenders.

3. Eligibility of Offences

a. Offences that are not eligible (also known as Class III for purposes of other practice memoranda)

The following classes of offences will not be eligible for treatment plans or supervisory programs as an alternative to prosecution, regardless of the circumstances of the alleged offence or the accused:

- **murder, manslaughter, infanticide, criminal negligence causing death;**
- **causing death or bodily harm by dangerous or impaired driving;**
- **any offence causing serious bodily harm;**
- **simple impaired driving or driving with a prohibited blood alcohol concentration;**
- **offences involving firearms;**
- **criminal organization offences;**
- **kidnapping;**

- spouse/partner offences¹
- child abuse;
- offences involving child pornography
- sexual offences including sexual assault, interference and exploitation, invitation to sexual touching and incest;
- specific hate offences²
- home invasions;
- perjury;

b. Offences that are presumptively eligible (also known as Class I for purposes of other practice memoranda)

The following offences are presumptively eligible for consideration, depending on the circumstances of the offence and the accused, especially for, but not necessarily restricted to, first offenders:

- theft and possession under \$5,000
- joyriding

¹ The policy on Spouse/Partner Offences defines these offences as follows:

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. 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.

In the context of this broader definition, these crimes include, but are not limited to:

- assault;
- sexual assault; threatening death or bodily harm;
- attempted murder;
- criminal harassment;
- forcible confinement;
- mischief to property;
- offences involving harm or threats to harm children, other family members, pets and property;
- failure to comply with any order made under the *Criminal Code* in the context of a spouse/partner offence;
- breaches of orders in family law proceedings.

² Reference may be made to the practice memorandum on Hate Crimes for the scope of these offences.

- mischief under \$5,000
- fraud and false pretenses under \$5,000
- food, travel and accommodation frauds
- causing a disturbance

c. Other offences (also known as Class II for purposes of other practice memoranda)

All other offences are eligible in the discretion of Crown counsel. The decision about eligibility will depend on Crown counsel's assessment of:

- the circumstances of the offence,
- the circumstances of the accused ,and
- the needs of the community, including the victim.

The more an offence resembles an ineligible offence, the less likely it is to be acceptable for a program of treatment or supervision. The more it resembles a presumptively eligible offence, the more likely it is to be acceptable.

Minor *non-spouse/partner* assaults (i.e. without injuries or weapons) and property offences where the value in question does exceed \$5,000 are examples of the kinds of charges that may be acceptable. Offences involving greater violence and/or injury or offences in which a weapon was used will not usually be suitable for diversion to a treatment or supervisory program as an alternative to formal criminal court proceedings.

4. Prerequisites to Implementing Treatment Plan Options / Supervisory Programs or Other Alternative Measures

While mentally disordered or developmentally disabled offenders may warrant special consideration within the criminal justice system, alternative measures for these offenders should respect the rights of the victim, the community at large and the accused person. Protection of the public, including the victim, if any, is the paramount consideration in any decision to stay the charge in this context. In addition, before agreeing to a treatment plan or supervisory program which is intended to result in charges being stayed, Crown counsel should be satisfied that, at a minimum, the following criteria are met:

- there is a reasonable prospect of conviction of the offence charged and that the prosecution is not barred at law;
- it is in the public interest, as defined in the practice memorandum on Charge Screening, to discontinue the prosecution;

- the offender's involvement is voluntary, in that the accused, or substitute decision maker, knows of the right to counsel and the right to a trial on the merits;
- the accused, defence counsel, or substitute decision maker is aware that, if the accused is charged with subsequent offences, Crown counsel may seek to introduce evidence of the accused's participation in the treatment or other alternative measures program to which the accused is being diverted, as well as the allegations underlying the current charges; i.e. that in the event of subsequent charges, the Court may be informed of the prior diversion of the accused and the subject matter of the prior charges, subject to the usual rules of evidence;
- if diversion measures include the mentally disordered offender attending at a mental health facility or physician's office or clinic, confirmation³ that the facility or physician considers the offender a suitable candidate and that the treatment plan can begin within a reasonable period of time.

Admission of responsibility for the act constituting the offence *is not* a prerequisite to eligibility for alternatives to prosecution, as the offender may not have the mental capacity to do so.

5. Factors to Consider

In considering whether to divert charges, Crown counsel should bear in mind that a purely medical approach (which may involve medication and/or psychiatric care) is not necessarily the preferred course for all mentally disordered or developmentally disabled offenders. Often, the provision of good housing and proper ongoing support in the community are, in themselves, an effective response.

Although no single factor will necessarily dictate eligibility or ineligibility, the following factors should be taken into consideration by Crown counsel in deciding whether to exercise the discretion to stay a charge in this context:

- the need to maintain public confidence in the administration of justice;
- public safety, including the potential harm to the public posed by the offender's non-compliance with supervision or treatment;
- the relative seriousness of the alleged offence (including considerations of the injury to victims and the number of victims);
- the victim's views and any information regarding victim impact, including a victim impact statement;

³ Confirmation need not necessarily take the form of a psychiatrist's letter or an ongoing pre-existing relationship with a psychiatrist, depending on the particular circumstances of the case.

- the offender's criminal record, including withdrawals, stays, outstanding charges, and prior diversions;
- any prior psychiatric record;
- current mental status and any current psychiatric assessment;
- in jurisdictions where there are mental health court support workers, the likelihood of compliance with any direction or plan suggested by the worker;
- information from, and views of, the immediate family, substitute decision-maker and/or institutional care-giver;
- frailties in the prosecution, e.g. staleness, technical nature of offence;
- whether the consequences of the prosecution would be unduly harsh to the offender, the victim or witnesses in the case, owing to factors such as age, health or relationship to other parties in the case.

6. Possible Measures and Processes for Mentally Disordered/Developmentally Disabled Offenders

Among the disposition options that may be considered for mentally disordered/developmentally disabled offenders eligible for diversion are the following:

- admission to a hospital for assessment;
- referral to a psychiatrist/mental health worker, or to an agency with expertise in mental disorders/developmental disabilities;
- a supervision, care or treatment plan, including a community treatment order under the *Mental Health Act* (see section 7, *infra*) offered by family, legal guardian, substitute decision-maker, community facility, or counsel;
- admission to a program suited to the developmentally disabled offender which addresses the need for individual deterrence and rehabilitation;
- establishing support in the community, including adequate housing and ongoing contact with social/community worker;
- counselling sessions which focus on individual deterrence and rehabilitation;
- community service work;
- an apology to the victim or others affected;

- restitution or compensation to the victim or the community;
- stay of the charge, if the apprehension/charge has had sufficient impact on the offender, or the offender has already taken restorative measures, or intervention such as treatment or counselling, and/or the offence(s) is(are) being adequately addressed in the community. *Reference should be made to the discussion below on the authority of Crown counsel to stay and recommence proceedings.*

7. Procedure

a. Timing of the stay of proceedings

Once Crown counsel has decided to approve a treatment plan or supervisory program, the charge(s) may be stayed. While a stay of the proceedings should not be contingent or conditional on the successful completion of a supervisory program or treatment plan, in order to address potential risks of re-offending, it may be in the public interest to defer the stay until the offender is stabilized. Crown counsel should be satisfied that the offender:

- has been stabilized in the community, or
- has been accepted in the recommended program or institution

prior to staying a charge. Similarly, if there are concurrent concerns about alcohol or other substance abuse, Crown counsel should be satisfied that these concerns are being addressed, prior to the stay being entered. No final decision regarding a stay need be made until the offender is stabilized.

b. Adjournments

In jurisdictions that have mental health court support workers, an adjournment should be requested to allow the mental health court support workers time to:

- assist in stabilizing the offender's mental status,
- organize a treatment plan, and/or
- ensure good housing and support in the community.

Although adjournments should be relatively short, more than one may be required, depending on the circumstances. (See discussion above on timing of the stay of proceedings).

c. Authority to stay and recommence proceedings

The Attorney General has delegated the power to stay proceedings, under section 579 of the *Criminal Code*, to all Crown counsel. The authority to recommence proceedings is delegated to

all Crown counsel only when the reason for the recommencement is the failure of an accused to comply with a condition of diversion, alternative measures or restorative justice.

However, when proceedings against mentally disordered or developmentally disabled offenders have been stayed, in accordance with this policy and practice memorandum, Crown counsel should not re-institute proceedings, absent exceptional circumstances. Where exceptional circumstances exist, Crown counsel must obtain the consent of the Crown Attorney prior to re-instituting the prosecution.

Reference should be made to the practice memorandum on Stay and Recommencement of Proceedings.

d. Proceedings that are not stayed

In cases where Crown counsel has determined that the accused will not be diverted and the prosecution must continue, community planning, treatment or supervision options should be considered at the sentencing hearing. Involvement in a treatment or other remedial program should also be considered in mitigation of sentence.

8. Psychiatric Assessments

a. Criminal Code

Absent grounds to order a psychiatric assessment of an accused for fitness to stand trial or criminal responsibility, an accused should not be assessed pursuant to section 672.11 of the *Criminal Code*. Although such orders are rare, a Court may order a psychiatric assessment in cases of alleged infanticide, pursuant to section 672.11(c).

b. Mental Health Act

Crown counsel may determine that a psychiatric assessment (or short-term admission to hospital for in-custody accused) may be an advisable option to determine whether diversion is appropriate for a mentally disordered/developmentally disabled accused charged with eligible offences. Where a mental disorder is apparent in an accused, short of causing unfitness to stand trial or an issue with respect to criminal responsibility, and the administration of justice would benefit from further information that may be gained from a psychiatric assessment of the accused, Crown counsel should consider requesting the Court consider the provisions of the *Mental Health Act (MHA)*.

i. Authority to make order:

A judge (not a justice of the peace) may make a discretionary order that an accused person be examined at a psychiatric facility pursuant to sections 21 and 22 of the *MHA*.⁴

⁴ Section 21 applies to an accused that is not in custody and section 22 applies to an accused that is in custody.

The Ontario Court of Appeal has noted, with respect to sections 21 and 22 of the *MHA*, that an assessment and report can be used for various purposes:

*“The provisions, by virtue of their language, were drafted so that a court could require an accused person ... to be assessed, and a report prepared for the court's review. Quite obviously, the court would be informed by the use of the report, and use the information contained in the report for various purposes.”*⁵

There is some authority to suggest that the Courts ought not to make such an order to assist in determining whether to order interim release, absent the accused's consent.⁶ However, such an order would likely be on consent, if it were being requested to determine whether an accused ought to be diverted because of a mental disorder or developmental disability. Clearly such an order may be made for the purpose of providing information on sentencing.⁷

When requesting an order pursuant to sections 21 or 22 of the *MHA*, Crown counsel should advise the court of the purpose in making the request.

ii. Prerequisites and conditions of a *MHA* order:

- To order an assessment, the judge *must have reason to believe that the accused suffers from a mental disorder*. Therefore, the Crown and/or defence must be prepared to establish this in order to obtain the order. “*Mental disorder*” is defined in the *MHA* as “*any disease or disability of the mind*”.
- The judge *must ascertain that the psychiatric facility is available to the accused prior to making such an order* (see section 23). In some jurisdictions the Crown may be expected to determine the availability of a psychiatric facility for the judge. Defence counsel or duty counsel or a court support worker may also ascertain the availability of a psychiatric facility for the accused.
- A specific order from the court is required in order to ensure that the person who is in custody is transported and admitted to the psychiatric facility. As there is no provision in the *Criminal Code* for such orders, an order in Form 8 under the *Mental Health Act* is required to permit transportation and admission to the mental health facility. Such orders must be worded so that they are to be in force for “not more than” a short period stated in the order.

⁵ *R. v. Lenart* (1998), 123 C.C.C.(3d) 353 (Ont.C.A.), at paragraph 30.

⁶ *R. v. Lawrie*, [1996] O.J. No. 3750 (Ont. Gen. Div.).

⁷ *Lenart, supra*.

- An in-custody accused may not be remanded for more than two months for the purpose of a *MHA* assessment.
- When such an order is made, “*the senior physician*” of the facility *must report in writing* to the judge as to the mental condition of the accused.

iii. Limitations on use of report:

Should an order for a psychiatric assessment be made under the *MHA*, Crown counsel should be aware that there are strict limits on the use that can be made of any pre-conviction psychiatric report generated.⁸

iv. Applications by family members:

Crown counsel should be aware that a family member may make an application to a Justice of the Peace, pursuant to section 16 of the *Mental Health Act*, for a psychiatric examination. This order may be directed to the police in the jurisdiction and shall direct that the person be taken to a psychiatric facility or other health facility where he or she may be detained for examination. However, when an accused person is detained pursuant to an order of a Criminal Court, that order will take precedence over an order obtained under the *Mental Health Act*.

The Justice of the Peace may make the order on several grounds, including

- that the person (the accused in this case) has threatened or attempted or is threatening or attempting to cause bodily harm to himself , *and*
- that there is reasonable cause to believe that the person is suffering from a mental disorder that will likely result in serious bodily harm to himself or to another person.

v. Community treatment orders for mentally disordered accused:

Bill 68, also known as “Brian's Law” (*Mental Health Legislative Reform Act, 2000*), which amended the *Mental Health Act* and the *Health Care Consent Act*, was proclaimed on December 1st, 2000. This legislation introduced the concept of consent based community treatment orders for those persons who exhibit a cyclical pattern of admission to a psychiatric facility, stabilization, release and relapse.

⁸ See *R. v. MacDonald*, [2000] O.J. No. 1833 (Ont. S.C.J.)

A community treatment plan developed by the offender, the offender's family or substitute decision-maker, or counsel, in consultation with the offender's physician, that is supervised as required under this legislation, may provide a suitable alternative to prosecution in appropriate cases.

Only a physician may initiate or renew such orders, and only in circumstances where the criteria specified in the legislation are met. Therefore, it will not ordinarily be Crown counsel who propose this option. However, Crown counsel should be aware that these orders exist and familiarize themselves with the applicable sections of the *Mental Health Act* (sections 33.1 to 33.9).

Attachment: None

Contact Person: Criminal Law Policy Branch
416-314-2955

Signed by:
Paul Lindsay
Assistant Deputy Attorney General
Criminal Law Division

Practice Memoranda are not considered to be confidential and may be given to defence counsel or other interested persons, upon request.

MANDATORY LANGUAGE

In jurisdictions where there is a Mental Health Court Support Services program, the Crown Attorney for the jurisdiction shall develop a protocol respecting the referral of offenders to the program, and the sharing of information between the Crown and mental health workers. In determining appropriate time lines for referral and assessment of these cases, the Crown Attorney should involve the local judiciary, legal aid, the defence bar, police and other interested parties.

The following classes of offences will not be eligible for treatment plans or supervisory programs as an alternative to prosecution, regardless of the circumstances of the alleged offence or the accused:

- **murder, manslaughter, infanticide, criminal negligence causing death;**
- **causing death or bodily harm by dangerous or impaired driving;**
- **any offence causing serious bodily harm;**

- **simple impaired driving or driving with a prohibited blood alcohol concentration;**
- **offences involving firearms;**
- **criminal organization offences;**
- **kidnapping;**
- **spouse/partner offences;**
- **child abuse;**
- **offences involving child pornography**
- **sexual offences including sexual assault, interference and exploitation, invitation to sexual touching and incest;**
- **specific hate offences;**
- **home invasions;**
- **perjury;**

However, when proceedings against mentally disordered or developmentally disabled offenders have been stayed, in accordance with this policy and practice memorandum, Crown counsel should not re-institute proceedings, absent exceptional circumstances. Where exceptional circumstances exist, Crown counsel must obtain the consent of the Crown Attorney prior to re-instituting the prosecution.