



*Manitoba  
Department of Justice  
Public Prosecutions*

*Guideline No. 2: MEN:1*

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

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## **POLICY STATEMENT**

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

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

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

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

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

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

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

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

### **RATIONALE:**

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