

Arresting officers should select an offence which accurately reflects the nature and extent of the criminal behaviour under investigation and which is supported by the admissible evidence. Where the circumstances of a particular case indicate two or more alternative charges may be made out, the offence carrying the greater penalty should be preferred, subject to the DPPG. Charges should not be laid with the intention of providing scope, for subsequent bargaining.

3.4.3 Factors to consider when deciding to prosecute

Sufficiency of Evidence

The primary test for the decision to prosecute is the 'sufficiency of evidence' test. This test will be satisfied if there is sufficient admissible evidence to prove the charge against the defendant. A prima facie case is essential but is not enough. There must be a reasonable prospect of the defendant being found guilty of the offence. A detailed evaluation of how strong the case will be when presented in court should be undertaken as part of this test.

In evaluating the sufficiency of evidence, it is necessary to consider all aspects of the evidence to be presented, including:

- (i) admissibility of evidence;
- (ii) reliability of evidence, including identification;
- (iii) possible defences;
- (iv) the extent of any contradictory evidence;
- (v) competency of witnesses;
- (vi) compellability of witnesses;
- (vii) credibility of witnesses;
- (viii) availability of witnesses;
- (ix) whether witnesses will be hostile, adverse, or cooperative; and
- (x) where the Court Brief (QP9) or Brief of Evidence is not provided to the relevant prosecution corps in the required time frame,

(see Guideline 4: 'The decision to prosecute' subsection (i): 'Sufficient evidence' of the Director public prosecution guidelines (DPPG)).

Before charging a person with an offence, the investigating officer is to ensure there is sufficient admissible evidence to prove the charge to the requisite standard. The admissible evidence must be clearly articulated in the Court Brief (QP9) to enable a prosecutor to deal effectively with the matter, including case conferencing, at the first appearance (see s. 3.7.2 'Documentation at first appearance' of this chapter).

Public Interest

Once the sufficiency of evidence test has been satisfied, the next test to be applied is the 'public interest'. This test involves determining whether, in light of the facts and the surrounding circumstances of the case, the public interest will be served in pursuing a prosecution.

The factors relevant to whether the public interest requires a prosecution will vary from case to case. In most cases there will be public interest factors supporting a prosecution and competing public interest factors supporting a decision not to prosecute. Generally, the more serious the offence the more likely the public interest will require a prosecution. Indeed, the proper decision in most cases will be to proceed with the prosecution if there is sufficient evidence. Mitigating factors can be put to the court at sentence.

Factors which arise for consideration in determining whether the public interest requires a prosecution include:

- (i) the seriousness or, conversely, the triviality of the alleged offence or it is of a 'technical' nature only;
- (ii) any mitigating or aggravating circumstances;
- (iii) the youth, advanced age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or a victim;
- (iv) the alleged offender's antecedents and background, including culture and ability to understand the English language;
- (v) the degree of culpability of the alleged offender in connection with the offence;
- (vi) whether the prosecution would be perceived as counter-productive to the interests of justice;
- (vii) the availability and efficacy of any alternatives to prosecution (including justice mediation);
- (viii) the prevalence of the alleged offence and the need for deterrence either personal or general;
- (ix) whether or not the alleged offence is of minimal public concern;

- (x) any entitlement or liability of the victim or other person or body to criminal compensation, reparation or forfeiture, if prosecution action is taken;
- (xi) the attitude of the victim of the alleged offence to a prosecution with regard to the seriousness of the alleged offence and whether the complainant's change of attitude has been activated by fear or intimidation;
- (xii) the cost of the prosecution relative to the seriousness of the alleged offence;
- (xiii) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which the alleged offender has done so, subject to the DPPG, particularly Guideline 35: 'Immunities';
- (xiv) the necessity to maintain public confidence in such institutions as the Parliament and the courts;
- (xv) the effect on public order and morale;
- (xvi) pending the outcome of any other prosecution from the same circumstances (including in a civil jurisdiction);
- (xvii) whether the prosecution for the class or type of offence has been discouraged by the courts in the course of judicial comment;
- (xviii) whether the prosecution will result in hardship to any witness, particularly children; and
- (xix) vexatious, oppressive or malicious complaints.

(See Guideline 4: 'The decision to prosecute' subsection (ii): 'Public Interest Criteria' of the DPPG)

Impartiality

ORDER

When officers are making a decision to prosecute they are not to be influenced by matters such as:

- (i) race, religion, sex, national origin or political views;
- (ii) personal feelings concerning the offender or the victim;
- (iii) possible political advantage or disadvantage to the government or any political group or party; or
- (iv) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution,

(See Guideline 4(iii): 'Impartiality' of the DPPG).

3.4.4 Withdrawal of charges

Unless indicated otherwise, this section does not apply when action is taken under s 3.16 'Case conferencing' of this chapter.

ORDER

When an officer determines the sufficiency of evidence test or the public interest test is no longer satisfied, the officer is to immediately complete:

- (i) a QP 0626: 'Request for authority to withdraw charges' in the relevant QPRIME case file and submit to the member's OIC; and
- (ii) a QPRIME 'For your information' task from the relevant case file via the member's OIC to the relevant prosecution corps.

Prior to withdrawing a charge, the victim is to be consulted whenever it is reasonably practicable (see s. 6B: 'Charter of victims' rights' of the *Victims of Crime Assistance Act*)

Officers are to consider s 3.4.3 'Factors to consider when deciding to prosecute' of this chapter (sufficiency of evidence test and the public interest test) when determining whether a prosecution should proceed.

The following officers have authority to approve the withdrawal of a charge:

- (i) a commissioned officer or senior sergeant:
 - (a) supervising the station or establishment to which the arresting officer is attached;
 - (b) supervising the police prosecution corps responsible for the prosecution of the particular charge (includes commissioned officers and senior sergeants attached to the Prosecution Services, Legal Division); and
 - (c) performing the role of district or command brief manager;
- (ii) a Detective Inspector or Detective Senior Sergeant, Operations Leader State Crime Command exercising supervision over the work group responsible for the particular charge;