

## Charging decisions

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## Policy statement and principles

### What

A good charging decision is made when the charges chosen adequately reflect the nature and extent of the criminal conduct (disclosed by the evidence) and provide the court with an appropriate basis for sentence.

This chapter:

- provides guidance and creates a process for making good charging decisions
- ensures that nationally consistent charging decisions are made
- must be read in conjunction with the [Formal warnings](#) and [Criminal procedure](#) chapters.

### Why

Making a good charging decision from the beginning ensures that matters proceed efficiently through the court.

### How

To ensure good charging decisions Police will follow the process set out below in accordance with the [Solicitor General's Prosecution Guidelines 2013](#).

## Process for making good charging decisions

Use this table as a guide to ensure good charging decisions are made.

Answer these questions...	Then these actions follow...
<ul style="list-style-type: none"><li>- <a href="#">What evidence do you have?</a></li><li>- <a href="#">Has an offence been committed?</a></li><li>- <a href="#">Is a formal warning appropriate?</a></li><li>- <a href="#">Have you considered current strategic policy?</a></li><li>- <a href="#">Is prosecution required?</a></li><li>- <a href="#">Which charge(s) should be filed?</a></li><li>- <a href="#">How many charges should be filed?</a></li><li>- <a href="#">Is the Attorney-General's consent required?</a></li><li>- <a href="#">Should you arrest or summons the suspect?</a></li></ul>	<ul style="list-style-type: none"><li>- <a href="#">Decision is checked by a supervisor</a></li><li>- <a href="#">File is reviewed by Prosecutions</a></li></ul>

### What evidence do you have?

Once the initial investigation is complete, look objectively at all the information you have obtained. What can you prove the suspect has done? When contemplating charges you can only rely on admissible evidence. Suspicions and inadmissible evidence cannot be taken into account. If you are unsure whether something is likely to be admitted, seek guidance from your Police Prosecution Service (PPS) or Legal Services team.

If you identify evidential weaknesses, seek to rectify these before determining whether or which charges can be filed.

### Has an offence been committed?

Consider whether the evidence you have obtained discloses an offence. Before filing a charge, you must be able to prove each element of the offence. If you need assistance identifying the elements of an offence, the [legislation commentary](#) will be useful.

The [Legislative Reference Table \(LRT\)](#) also helps to clarify the elements of the offence.

In other circumstances the legislation governing the offence may be administered by another agency. For example, benefit fraud is investigated and prosecuted by the Ministry of Social Development. In these circumstances, the most appropriate action may be to contact the relevant agency so they can investigate the offence.

### Is a formal warning appropriate?

Once you've ascertained that an offence has been committed, consider what further action is required. See the [Formal warnings](#) chapter to determine whether a warning is the most appropriate outcome for the offence committed by the suspect. If the suspect has committed multiple offences it may be appropriate to 'warn' for some offences but not for others.

## Have you considered current strategic policy?

Take into account any current strategic Police policy promoting prosecution in particular areas of focus. For example, although many offences involving liquor are not serious, they may be offences for which a District has, from time to time, a low tolerance for offending. It may be that liquor-related offending is identified as a high-prevalence offence where warnings or diversion should not be available for a specified period of time.

Another example is in relation to hate crimes. See the '[Hate crimes and hate incidents investigations](#)' chapter for information about recognising, recording and dealing appropriately with [hate crime](#), [hate incidents](#) and [hate speech](#) within the context of scene attendance, investigations, applying proportionality and using discretion.

## Is prosecution required?

If an offence has been committed, and a warning is not appropriate, you must consider whether to commence prosecution (by filing charges). There are two steps required by the [Solicitor-General's Prosecution Guidelines](#) to make this determination:

Step	Test	Description
1	The evidential test	<p>Is the admissible evidence sufficient to provide a reasonable prospect of conviction?</p> <p>In other words, if a court (either judge or jury) was presented with all the admissible evidence, could they reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed the offence alleged?</p> <p>If the evidential test:</p> <ul style="list-style-type: none"> <li>- is not met, the charge cannot be filed</li> <li>- is met, then the public interest test must next be considered.</li> </ul>
2	The public interest test	<p>The prosecution is required in the public interest.</p> <p>It is not necessary or appropriate to prosecute all offences for which there is sufficient evidence. Police must exercise their discretion as to whether a prosecution is required in the public interest. Considering whether the public interest requires a prosecution is often difficult and requires considering a number of factors about the offender, the offence, and the victim.</p>

## Factors to be considered when determining public interest

The [Solicitor-General's Prosecution Guidelines](#) list a number of factors to consider when determining whether prosecution is in the public interest. This list is not exhaustive, however it gives a good indication of what types of factors should be considered. Some of the main considerations are:

Factor	Comment
Seriousness of the offence	The more serious the offence, the more likely prosecution is required.
Likely penalty upon conviction	If it is a significant penalty including any confiscation order or disqualification, then there is a strong public interest for a prosecution. Similarly, where a reparation order is required and prosecution is the only way to recover the cost, this favours prosecution.
The circumstances of the defendant	If they have no previous convictions, are a child/young person or elderly, or were suffering mental illness at the time of the offence, there is a lesser public interest in prosecution.  If the defendant: <ul style="list-style-type: none"> <li>- was in a position of authority or trust, a ringleader or an organiser of the offence, or</li> <li>- has breached a protection or non-contact order, or</li> <li>- committed the offence whilst on bail, on probation, or subject to a sentence, or on parole</li> </ul> this favours prosecution.
The likelihood of the offence being continued or repeated	Is there is a history of recurring conduct or was the offence the result of a single incident, an error of judgement or a genuine mistake (e.g. careless driving)?
The circumstances of the victim	Is a prosecution likely to have a detrimental effect on their physical or mental health? What is the extent of loss or harm they have suffered?

## Which charge(s) should be filed?

If prosecution is appropriate, the next consideration is which charge or charges to file. First identify what type of offence has been committed - for example, a property offence or a drug offence. This will help you to narrow the relevant legislation.

While the appropriate charge is sometimes obvious (e.g. driving whilst disqualified) there are often circumstances where an action could be reflected by a number of different charges. In these circumstances work is required to determine the most appropriate charge or charges. Consider the following:

- What did the suspect do?
- What was the suspect's intent?
- What was the result of the suspect's actions?

It is essential to consider all three factors before determining a charge as the same scenario with one factor altered can significantly affect the most appropriate charge. To illustrate this, consider this example:

## Example

### Scenario 1

The suspect is standing in the street flailing his fist round. He accidentally hits the victim in the head - the victim is not injured.

What did the suspect do?	He hit the victim in the head.
What was the suspect's intent?	As the suspect accidentally hit the victim, he had no intent to assault him.
What was the result of the suspect's actions?	The victim was not injured.
What is the appropriate charge?	As the suspect had no intent, no charge is warranted.

## Scenario 2

The suspect is standing in the street flailing his fist around. He sees the victim and wants to frighten him. He hits the victim in the head as he walks past, breaking his nose.

What did the suspect do?	He hit the victim in the head.
What was the suspect's intent?	He wanted to frighten the victim.
What was the result of the suspect's actions?	The victim is injured.
What is the appropriate charge?	<p>Given the suspect only intended to frighten the victim, the most appropriate charge is <a href="#">s196</a> Crimes Act, common assault.</p> <p>If the suspect had intended to hurt the victim then injuring with intent to injure - <a href="#">s189</a> Crimes Act, would be warranted.</p> <p>If the victim had not been injured (as in scenario 1), Summary Offences Act assault would be the most appropriate charge.</p>

## Scenario 3

The suspect is standing in the street flailing his fist around. He knows that the sick elderly victim is going to walk past shortly and he wants to kill him. He hits the victim in the head with his fist. The victim survives but suffers serious head injuries which require long term hospitalisation.

What did the suspect do?	He hit the victim in the head.
What was the suspect's intent?	He wanted to kill the victim.
What was the result of the suspect's actions?	The victim is seriously injured.
What is the appropriate charge?	<p>The charge which best reflects the action, intention and result is wounding with intent to cause grievous bodily harm - <a href="#">s188</a> Crimes Act. The maximum penalty of 14 years imprisonment is sufficient to allow the court to impose an adequate sentence.</p> <p>If the suspect had achieved his goal of killing the victim, the offence would be murder.</p>

As you can see from the example above, even though the action remains the same, changing the other factors results in the most appropriate offence ranging from a low level Summary Offences Act assault to murder. That is why it is important to look at the full evidence and consider all three factors before determining the most appropriate offence.

## How many charges should be filed?

In determining the totality of charges to proceed, the selection of charges should seek to reflect the seriousness and the extent of the offending. It should also provide the court with adequate sentencing powers, and enable the case to be dealt with fairly and expeditiously according to law.

Consider the following when selecting the appropriate charge(s):

- the charge(s) should accurately reflect the extent of the suspect's alleged involvement and responsibility, allowing the courts the discretion to sentence appropriately

- the choice of charges should ensure the clear and simple presentation of the case particularly when there is more than one defendant
- there must never be overloading of charges by selecting more charges than are necessary just to encourage the suspect to plead guilty to a few, and
- there should be no overcharging by selecting a charge which is not supported by the evidence in order to encourage a plea to a lesser allegation.

In the ordinary course, the charge or charges filed will be the most serious disclosed by the evidence. The decision will also be weighted towards inclusion of charges where the alleged offences are to be filed against a member of an organised crime organisation.

Where the evidence supports multiple offences (e.g. assault, wilful damage, offensive behaviour, resisting arrest, obstruction and offensive language) it is not appropriate to file all possible charges unless this truly reflects the seriousness of the offending. In these circumstances the charges chosen should show the seriousness of the incident in relation to other comparable incidents. Consider whether:

- the charge should contain alternatives (s19 CPA), or
- a representative charge is appropriate (s20 CPA).

Charges should give the court adequate powers to sentence and impose appropriate post-conviction orders. For example, if the defendant should be disqualified from driving as part of their sentence, ensure the charges filed allow the court to make that order.

Some charges should be carefully considered for inclusion. As per the [Prosecuting family violence](#) policy, a breach of protection order should be filed where the evidence supports this charge. Another example is 'possession of an offensive weapon' (s202BA Crimes Act) which provides a mandatory prison sentence for a second s202A(4) offence within 2 years.

### Is the Attorney-General's consent required?

There are certain charges which require the consent of the Attorney-General prior to the filing of a charging document. For example, bribery and corruption offences under the [Crimes Act 1961](#), inciting racial disharmony under the [Human Rights Act 1993](#), and extraterritorial firearms offences under the [Arms Act 1983](#). A full list of offences requiring consent of the Attorney-General is available [here](#).

It is the O/C case's responsibility to obtain the Attorney-General's consent prior to filing the charging document and they should liaise with Police Legal Services to do so. Likewise, if the O/C is unclear whether a charge requires the consent of Attorney-General, they should contact Legal Services.

The O/C should provide Legal Services with a draft copy of the charging document/s and sufficient material to allow the Attorney-General to properly consider the evidence and relevant circumstances of the alleged offence.

Although it is not a statutory requirement for proof of consent to be filed with the charging document, it is encouraged. The O/C should scan the document containing proof of consent and attach it under the Prosecution Case on NIA, so PPS can see that this procedural requirement has been complied with. A note to this effect should also be recorded in the POL258 report.

If proof of consent is not obtained before the charging document is filed, there is no jurisdiction for charges to be heard and the charge may be declared a nullity - this means that the charge may be dismissed by the Court.

### Should you arrest or summons the suspect?

Once you have decided to commence prosecution you must decide whether to arrest or summons the suspect. Refer to the [Arrest and detention](#) chapter for assistance.

### Decision checked by supervisor

If at any stage of the procedure you need guidance, seek the assistance of your supervisor. It is their responsibility to assist you and to check whether the number and types of charges you have selected are the most appropriate. The PPS is also able to assist you in making these decisions.

### File review by Prosecutions

The decision to prosecute and the charges you have filed will be independently reviewed by PPS who have discretion to amend,

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withdraw and file additional charges. Review is a continuing process and prosecutors must consider any change in circumstances that occurs as the case develops.

Where practicable, prosecutors will talk to the officer in charge first if they are considering amending or withdrawing the charges. Prosecutors and investigators work closely together, but the final responsibility for the decision whether or not a case should go ahead rests with PPS. If you do not understand any decision made by PPS you should discuss this with the prosecutor (or their District Prosecution Manager).

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