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Guideline Number 16 Adjudications

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Introduction

Where an arrest is made and the investigating officer proposes to charge the offender with an offence immediately, the decision to charge is *adjudicated* by either the ODPP, in the case of major indictable offences, or, otherwise, the appropriate person in SAPOL.

The adjudication task involves advising upon whether the proposed offence(s) should be laid in an Information and a prosecution consequently commenced.

The importance of the adjudication cannot be overstated. It is advice about who should be brought into the criminal justice system and for what, with all the attendant consequences.

This guideline deals with adjudications undertaken by the ODPP (*i.e.* adjudications undertaken in relation to matters where the investigating officer proposes to charge an offender with one or more major indictable offences upon arrest).

It should be noted that the ODPP does not adjudicate matters where it is proposed to lay charges of major indictable offences against youths, save the offences of murder and manslaughter or any attempt or conspiracy to commit murder or manslaughter.

This guideline also includes guidance on advising investigating officers on the content of preliminary and committal briefs and whether a matter is of a kind such that the ODPP should assume its conduct immediately.

The Adjudication Function

Five questions must be answered in the discharge of the adjudication function:

1. should a prosecution be commenced (including what charge or charges should be laid)?
2. what evidential material should be provided in the preliminary brief in order that a charge determination may be made?
3. what evidential material should be provided in the committal brief?
4. is the matter complex such that the ODPP should assume conduct immediately?

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5. if the accused has been refused police bail, but is subsequently granted bail, does the ODPF authorise the review of the grant of bail?

In addition, those undertaking the adjudication function are directed to turn their mind to advising on whether, having regard to all the circumstances, SAPOL's Major Indictable Brief Unit (MIBU) should commence negotiating a possible resolution immediately.

Of the five questions posed above, the first applies equally to the position where the investigating officer proposes to charge an accused who has been arrested with summary and/or minor indictable offences.

Should a prosecution be commenced?

1. This question has two parts. First, the choice of charge. Second, whether a charge should be laid and a prosecution commenced.
2. **As to the choice of charge**, DPP Statement of Prosecution Policy & Guidelines, Guideline Number 1 must be applied. It may be summarised as follows:

2.1. The charge or charges to be laid against an accused should be selected on the basis that they:

2.1.1. reflect the nature and extent of the criminal conduct disclosed in the evidential material provided, and

2.1.2. provide a sentencing court with an appropriate basis for imposing an appropriate sentence.

Ordinarily this will mean that the most serious charge disclosed by the evidential material will be proceeded with (but see paragraph 5 below).

2.2. Substantive charges are to be preferred to a charge of conspiracy, but sometimes a conspiracy will be both adequate and appropriate.

2.3. Generally it is undesirable to overload an Information, however multiple charges may be unavoidable where it is necessary to achieve the purposes set out at paragraph 2.1. On other occasions, a representative sample of charges may be all that is necessary to satisfy paragraph 2.1.

2.4. As between co-accused, consistency in charges laid is ideal, but there will be cases where the respective roles of co-accused demand different charges.

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- 2.5. It is never appropriate to overcharge in order to gain a benefit in negotiation or for some other perceived benefit to the prosecution.
3. Whether the charge or charges selected should be laid and a prosecution commenced turns on the ODPP adjudicator's assessment of the sufficiency of the evidential material to prove the charge or charges and whether it is in the public interest to proceed.
4. As regards the sufficiency of the evidential material, the adjudication is undertaken by the ODPP adjudicator considering the evidential material supplied electronically by SAPOL. That material generally consists of draft charges, a summary of evidence (the Facts of Charge), an offender history report, and, in some cases, key witness statements, CCTV or body worn footage, and other advice from the investigating officer. Because an investigation will not be complete at the time when a matter is submitted for adjudication the test to be applied in determining whether to advise SAPOL to proceed, and on what charges, is of a different order to that applied upon the receipt of the committal brief when determining whether a prosecution commenced should continue.
5. Whether advice should be given to commence a prosecution, and on what charges, requires an affirmative answer to each of the following five questions -

- 5.1. Are there reasonable grounds to suspect that the accused has committed the offence(s) subject of the charge(s) in contemplation?

Prosecutors must be satisfied, upon an objective assessment of the evidential material provided (whether in an admissible form or otherwise), that there are reasonable grounds to suspect that the person arrested has committed the offence that the police propose to charge or some other charge. This assessment includes consideration of any defence or exculpatory information provided.

- 5.2. Are there reasonable grounds to believe that the investigation will elicit evidence that can be presented in an admissible form, that is credible and reliable, and which will support a conclusion that there is a reasonable prospect of conviction on the trial of the offence(s) subject of the charge(s) in contemplation?

Prosecutors should be able to identify the evidence to be obtained, the nature, extent and likely admissibility of such evidence, and its capacity to prove the charge(s).

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- 5.3. Are there reasonable grounds to conclude that the investigating officer will be able to obtain the said evidence in an admissible form within a reasonable time?

What is a reasonable time? It cannot be defined save by reference to the interests of justice which necessitates an evaluation including consideration of the gravity of the offence, the victim's circumstances, the accused's circumstances, the presumption of innocence, and what can reasonably be expected of SAPOL, Forensic Science SA etc.

- 5.4. Does the seriousness of the alleged offending justify the making of an immediate charging decision (as opposed to the accused being reported)?

Generally this is an operational decision for SAPOL and will be made before the adjudication is undertaken. However, from time to time it does happen that prosecutors can have input into the decision whether to charge immediately or report.

- 5.5. If each of the above questions are answered in the affirmative the next question is whether it is in the public interest to prosecute. Generally an affirmative answer to questions 1 - 4 means that it is in the public interest to prosecute, but not invariably.

Only the Director, Deputy Director, Chief Crown Prosecutor, Executive Managing Prosecutor and Executive Managing Solicitor can decide that a prosecution should not be commenced in the public interest.

In determining whether it is in the public interest to prosecute, the ODPP adjudicator will consider:

- the seriousness/relative triviality of the offence;
- the accused's culpability;
- the harm or loss caused the victim;
- the victim's attitude toward proceeding;
- the accused's age, maturity, health, antecedents and circumstances;
- the impact of the conduct upon the community;
- the obsolescence or obscurity of the offence;
- whether prosecuting is a proportionate response to the conduct;
- whether prosecuting would be counter-productive in terms of bringing the law into disrepute;
- the availability and appropriateness of alternatives;

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- the prevalence of the alleged offence and the need to protect and deter;
 - any entitlement of the State or victim to compensation, reparation or forfeiture;
 - the likely outcome upon conviction;
 - the necessity to maintain public confidence in such institutions as the Parliament, the Courts and the Police;
 - whether evidential sources require protection that would be compromised if a prosecution proceeds (to the extent this is known at the time of the adjudication).
6. All five considerations set out above (paragraphs 5.1-5.5) must be considered and answered in the affirmative before a decision to commence a prosecution on a charge or charges selected in accordance with Guideline No 1 is made (but all need not necessarily be considered if a decision not to prosecute is made).
7. Where the evidence gives rise to the possibility of laying either major indictable or minor indictable/summary charges based upon the same essential facts (for example the spectrum of trespass offences; offences of violence; threat and endangerment offences; discretionary summary prosecution for certain firearm offences) the ODPP adjudicator must give close consideration to the question of whether the matter warrants finalisation in the District Court or whether it may be dealt with adequately in the Magistrates Court.

What evidential material must be provided in the preliminary brief in order that a charge determination may be made?

8. The purpose of the preliminary brief is twofold; first, to allow the ODPP to determine whether a prosecution should be maintained and, if so, to settle the charges on which the prosecution will proceed. Second, to provide to the defence early disclosure of the essential basis of the prosecution case. These two purposes have been identified as crucial to the negotiation and resolution of prosecutions early in the process. The prospect that the charge or charges will change has been identified as an obstacle to negotiation. Accepting this, the objective is to settle the charges that the prosecution will proceed to trial on. This is not always possible, but it remains the objective nonetheless.
9. Importantly, neither purpose requires that the preliminary brief be comprised of evidential material presented in an admissible form, nor that the brief be trial ready. That is not to say that the question of admissibility is irrelevant to a charge determination (see paragraph 5.2 above). It

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is most important that the prosecutor be satisfied that the evidence necessary to establish a reasonable prospect of conviction can be obtained in an admissible form *as part of the committal brief*. What is not necessary is that the evidence be in that form *as part of the preliminary brief* at the time of charge determination.

10. At the time of making an adjudication the ODPP prosecutor will list for the investigating officer the evidential material to be provided *in the preliminary brief* for the purposes of the ODPP making a charge determination -
 - 10.1. having regard to the two purposes identified at paragraph 8 above,
 - 10.2. bearing in mind that the ODPP will, in effect, repeat the adjudication function when making a charge determination, albeit with more substantial evidential material.
11. The proposed content of the preliminary brief as listed in the adjudication will inform the date nominated for charge determination by SAPOL. ODPP adjudicators may wish to assist in this regard by nominating such date. Of course, that will be difficult where there is significant further investigation to be undertaken in order that the evidential material required for charge determination be assembled (in which case SAPOL MIBU will consult the investigating officers), but in many cases (*e.g.* sex cases where identity and the fact of the sexual conduct is not in issue) the ODPP will be in a position to nominate the minimum period of any adjournment to charge determination because, usually, the police will already have what is required (*i.e.* the victim's affidavit).

What evidential material must be provided in the committal brief?

12. At the time of making an adjudication the ODPP prosecutor will also list for the investigating officer the evidential material to be provided in the committal brief.
13. The committal brief must contain evidence *in an admissible form* that is not only sufficient to establish a case to answer, but meets **the primary test** of there being a reasonable prospect of conviction on the charges laid.
14. Here regard should be had once more to the ODPP Statement of Prosecution Policy & Guidelines and the observations made under the heading, "The Decision to Prosecute".
15. It must be emphasised that a case to answer is not the same thing as there being a reasonable prospect of conviction. The Magistrates Court will find a case to answer if, issues of credibility,

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admissibility (save the obvious), and any defence to one side, the evidence contained in the committal brief, if accepted, would prove every element of the offence(s) charged (*Criminal Procedure Act 1921, s 115*), whereas in determining whether there is a reasonable prospect of conviction, the ODPP prosecutor will consider objective indicators as to a lack of credibility and reliability, possible defences arising on the evidential material provided, and the admissibility of the evidential material provided.

16. Despite committal depending on there being a case to answer, the ODPP requires that the committal brief be at a near trial ready state of readiness, if not trial ready. The reason for this is that within six weeks of committal the Prosecution Case Statement must be filed, and, generally, for the purposes of drafting such statement a trial ready brief is required.
17. Prosecutors must be prepared to be flexible here. The ODPP can proceed to answer the charge on less than a trial ready brief if the committal brief is sufficient such that there is admissible evidence capable of satisfying a Magistrate that there is a case to answer, *and*, the outstanding material will likely arrive in time for the Prosecution Case Statement to be drafted and filed in accordance with the rules of court, *and*, irrespective of what remains outstanding, the committal brief discloses a reasonable prospect of conviction (*i.e.* satisfies the primary test). Even then the interests of justice may demand further flexibility (*i.e.* the ODPP can proceed to case to answer if the committal brief is sufficient such that there is a case to answer, *and*, irrespective of what remains outstanding, the committal brief satisfies the primary test, *and*, the prosecutor can identify in the Prosecution Case Statement what is outstanding and be satisfied that it will arrive in good time for the trial).
18. It must be borne in mind that whilst it is preferable that the ODPP have a trial ready brief by the time a matter leaves the Magistrates Court, that objective cannot be pursued to the detriment of the interests of justice more generally. Delay works to the detriment of many, many victims.

Is this a complex matter?

19. If a matter is considered complex such that early ODPP involvement is recommended the prosecutor may recommend that the ODPP assume conduct immediately. ODPP managers should be consulted before a final decision in this regard is made.

If bail is granted will the DPP review that decision?

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20. The primary question here is whether the ODPP will review any grant of bail made by the Magistrates Court over the objection of SAPOL prosecutors. Putting to one side prescribed applicants (*Bail Act 1985 (SA)*, s 10A), the ODPP attitude toward bail will reflect a consideration of the factors listed in s 10 of the *Bail Act*, in particular:

- protection of the community from the risk of further offending;
- protection of the victim and the victim's perceived need for protection;
- risk of flight/likelihood that the accused will answer bail and comply with bail conditions;
- risk of interference with the investigation or otherwise with the prosecution case.

Negotiations

21. From a consideration of the evidential material provided it will often be apparent that the case against the accused is strong. For example, the accused may be clearly identifiable on CCTV footage committing the offence or may be found with a quantity of drugs and indicia of sale on their person. In circumstances like this, the ODPP adjudicator should encourage the investigating officer to disclose the critical evidence (such as the CCTV footage) to the defence as soon as possible so that SAPOL MIBU, with ODPP oversight, may begin negotiating an acceptable plea.



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