



Consents to Prosecute

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1. Overview of Consents to Prosecute

A consent to prosecute provision operates as a restriction on what would otherwise be the unfettered right of any person to institute a prosecution for the subject offence.

The purpose of a consent requirement is to ensure that a proposed prosecution is scrutinised and a judgement made about its appropriateness before it proceeds.

A number of Commonwealth Acts provide that a prosecution for a particular offence cannot commence or proceed without the consent of a specified person, usually:

- the Attorney-General;
- a Minister; or
- the Director of Public Prosecutions.

A consent to prosecute provision may require the specified person's consent to:

- an extension of time within which to institute a prosecution; or
- the institution of a prosecution (usually providing that the alleged offender may be arrested and charged but no further step in the prosecution may be taken until the requisite consent has been obtained); or
- may require the proceedings to be brought in the name of a nominated person, often the Attorney-General or Director of Public Prosecutions.

The trend is to reduce the number of consent to prosecute provisions. The *Crimes and Other Legislation Amendment Act 1997* repealed such provisions from nine Commonwealth Acts.

However, officers should always check the relevant legislation in case there is a consent provision.

The most commonly encountered consent requirement is in section 11.5(8) of the *Criminal Code* which came into effect on 24 May 2001 in relation to conspiracy.

A few things to remember:

- a consent to prosecute must always be obtained in writing to avoid any opportunity for legal challenge on the issue of consent;
- section 11.1(6) of the *Criminal Code* requires that if an offence requires a consent to prosecute, then a charge of attempting to commit that offence will also require a consent;
- section 11.5(7) of the *Criminal Code* requires that if an offence requires a consent to prosecute, then a consent is also required for an offence of conspiracy to commit that offence;
- section 11.4(4) of the *Criminal Code* requires that if an offence requires a consent to prosecute, then a consent is also required for an offence of inciting that offence.

Prior to the commencement of the *Criminal Code*, section 86(9) of the *Crimes Act 1914* contained the conspiracy consent provision. Sections 7(5) and 86(8) of the *Crimes Act* contained equivalent provisions to sections 11.1(6) and 11.5(7) of the *Criminal Code*. One point of distinction is that section 7A of the *Crimes Act* did not require consent to be obtained where consent is required for the offence incited.

2. Authorisation of Director by Attorney-General to Consent to Prosecutions

Section 6(4) of the *Director of Public Prosecutions Act 1983* provides that a person empowered to consent to a prosecution may authorise the Director to give that consent.

Section 31(1A) of the DPP Act allows the Director to delegate the authority to give consent to SES officers who are also legal practitioners.

In an instrument dated 13 July 1999 published in the Gazette, GN33 of 18 August 1999, the Attorney-General authorised the Director to consent to the following provisions on his behalf (the Director has delegated that power to SES officers who are also legal practitioners):

- section 121(8) *Family Law Act 1975*
- section 129 *Insurance Act 1973* (consent for a prosecution out of time).

3. Prosecutions requiring the Consent of the Attorney-General

Where the Attorney-General's consent is required (for example in the *Crimes (Foreign Incursions and Recruitment) Act 1978*), the regional office must inform the Director and Head Office as soon as

possible. The regional office must provide all relevant information so that the Attorney-General can be properly advised.

Under section 1315(1)(c) of the *Corporations Act 2001* the Attorney-General can authorise a person (other than ASIC or an ASIC delegate) in writing to institute proceedings for an offence against the Act. The Attorney-General is the responsible minister for this purpose pursuant to the Administrative Arrangements Order.

In the ordinary course the request to the Attorney-General for authorisation will be made by an investigative agency (e.g. AFP). However, the CDPP will provide advice to the investigative agency on whether the contemplated proceedings satisfy the *Prosecution Policy of the Commonwealth* and this advice will form the foundation of the investigative agency's request.

Where a regional office is requested to provide such an advice to an investigative agency the regional office must provide a copy of the draft advice to Head Office for approval prior to releasing it to the investigative agency. Head Office will then liaise with the Attorney-General's Department.

Head Office will advise the Attorney-General's Department with a view to obtaining the necessary consent, including details of:

- the operational aspects of the decision to prosecute, such as the sufficiency of evidence or choice of charge; and
- whether the public interest requires a prosecution.

4. Consent to Prosecution of a Minister (not the Attorney-General) or other Official

Head Office will assume the responsibility of requesting the necessary consent.

The regional office should provide all relevant information so that the minister may be properly advised.

The kind of material required to support the application may vary with the purpose of the offence provision in a given Act, but would include:

- operational aspects of the decision to prosecute, such as the sufficiency of evidence or choice of charge; and
- whether the public interest requires a prosecution.

5. Other Acts where Power to Consent has been delegated to DPP

- **Public Order (Protection of Persons and Property) Act 1971**

Under section 23 of the *Public Order (Protection of Persons and Property) Act 1971* a prosecution for an offence against the Act may only be instituted with the consent in writing of the Director of Public Prosecutions or a person authorised in writing by the Director of Public Prosecutions.

The Director has authorised SES officers who are also legal practitioners to give consent under the *Public Order (Protection of Persons and Property) Act 1971*.

- **Telecommunications (Interception and Access) Act 1979**

Under section 105(3) *Telecommunications (Interception and Access) Act 1979* summary proceedings for offences against sections 7(1) and 63 of the Act must be brought in the name of, *inter alia*, the Director of Public Prosecutions. The effect of this provision is that the Information or Complaint charging the offence must be in the personal name of the Director. The form of the Information or Complaint is:

The Complaint of [*personal name of current Director*], the Director of Public Prosecutions, made this ___ day of _____.

The Director has authorised SES officers who are also legal practitioners to give consent under the *Telecommunications (Interception and Access) Act*.