



Legal Delegations and Authorisations

Last Updated: 10 September 2012

Contents

1.	General Overview on the Law of Delegation and Authorisation.....	1
	• The Power to Delegate.....	1
	• The Power to Authorise	2
2.	Powers under the DPP Act.....	2
	• Instituting a Prosecution on Indictment – sections 9(2) and 6(2A)-(2C)	2
	• No Bills - section 9(4).....	4
	• Discontinuing a Summary or Committal Proceeding - section 9(5A)	5
	• Taking over a Private Prosecution - section 9(5).....	5
	• Appeals - subsections 9(7), 9(8A) and 9(8B)	5
3.	Crimes Act 1914.....	6
	• Section 16BA(1)(c)	6
	• Part 1B	6
	• Section 21E.....	6
4.	Freedom of Information Act 1982	7
5.	Taxation Administration Act 1953	7
6.	Public Order (Protection of Persons and Property) Act 1971	7

1. General Overview on the Law of Delegation and Authorisation

- **The Power to Delegate**

Power exercised under a delegation may not be subject to direction or conditions, though non-binding guidelines are permissible. A delegator may limit the power that is actually delegated.

The delegate exercises the delegated power in his/her own name and the discretion exercised must be his/her own, not under the direction of another.

Section 31 of the DPP Act contains a statutory limitation on the delegation power by preventing the powers under ss6(2D), 9(2) and 9(6D), and the power of delegation itself from being delegated

Section 31 of the DPP Act deems the acts of the delegate to be those of the Director. When exercising a power delegated under section 31 of the DPP Act, the delegate signs his/her name as a delegate of the Director.

- **The Power to Authorise**

The power to authorise may be express or implied. Unlike delegations, authorisations may have conditions attached to them. The authorised person acts for and on behalf of the person who gives the authorisation and who (in contrast to the case of a delegation) remains personally responsible for an act performed under his/her authority. Accordingly, control may be exerted over the recipient of an authorisation by the person who gives the authorisation.

Whether a power to authorise can be implied is always a matter of the construction of the particular statute, having regard to the nature scope and purpose of the function or power.

Generally, a power to authorise can be implied where it is not administratively practicable to exercise an express power of delegation, or perhaps also where an express power of delegation is limited. (*O'Reilly v State Bank of Victoria Commissioners* 153 CLR 1).

'Administratively impracticable' means that the person on whom the power is conferred must perform such 'a myriad' of acts or 'functions so multifarious' that he/she could not possibly perform them all personally. Of necessity, he/she must do so through officers responsible to him/her (from *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560, therefore known as 'the *Carltona* principle').

2. Powers under the DPP Act

- **Instituting a Prosecution on Indictment – sections 9(2) and 6(2A)-(2C)**

Section 9(1) confers on the Director a general power to prosecute by indictment in his/her official name, while s6(2A), 6(2B), 6(2C) and 6(2D) provide more specific powers to institute a prosecution on indictment in the circumstances specified in those subsections.

The power to make a decision to institute a prosecution on indictment is distinct from the signing of the actual indictment. The decision to institute a prosecution on indictment may be made some considerable time before an indictment is signed or presented in court.

Section 9(2) provides:

Where the Director institutes a prosecution on indictment for an offence against a law of the Commonwealth, the indictment shall be signed:

- (a) by the Director; or*
- (b) for and on behalf of the Director, by a person authorised by the Director, by instrument in writing, to sign indictments.*

Section 9(2) can authorise the signing of the indictment where the prosecution is instituted in reliance on:

- the general power conferred by s9(1); or
- the more specific powers conferred by s6(2A), 6(2B), 6(2C) and 6(2D).

It would be administratively impracticable for the Director in every case to make the actual decision to institute a prosecution on indictment. Only the First Deputy holds relevant delegations.

However, in reliance on the *Carltona* principle, the Director has authorised those persons who have been authorised under s9(2)(b) to sign indictments to make the decision for and on behalf of the Director:

- to institute a prosecution on indictment in reliance on the general power in s9(1); and
- in the circumstances referred to in s6(2A) to 6(2C);

subject to the condition that, where there has been a committal, the matter **must be referred to the Director** if:

- (a) it is proposed to include a count or counts in the indictment in reliance on the power under s6(2B)(a) - where the prosecution relates to an offence on which the person was examined but not committed for trial; or
- (b) it is proposed:
 - to include one or more counts in the indictment in reliance on the power under s6(2B)(b) - an offence disclosed in the course of committal on which the person was not examined or committed for trial; and
 - the count or counts would be substantially different, either in number and/or kind, from the offence or offences for which a committal order was obtained.

Any proposed indictment must be referred to the Director if it:

- involves a case that is politically sensitive;
- could be contentious; or

- where the Director has previously indicated that he should be consulted in relation to the decision whether to institute a prosecution on indictment.

Note: *O'Reilly and Ors v The Commissioners of the State Bank of Victoria and Ors*, (1983) 153 CLR, 1 indicates that reliance may be placed on the *Carltona* principle notwithstanding that it is open to the Director to delegate the power under s9(1) because:

- in delegating a power under the Act the Director cannot impose conditions on the exercise of the delegated power as he/she may on an authorisation;
- delegating the power under s9(1), as well as the powers under s6(2A) to (2C), could lead decisions being routinely made by a delegate when as a matter of good practice they should be referred to the Director for decision; and,
- the fact that another may be authorised to sign an indictment for and on behalf of the Director could support the view that the Director may authorise another to make the decision to institute a prosecution on indictment on behalf of the Director.

Where the Director has made the decision to institute a prosecution on indictment in a particular case a person authorised under s9(2)(b) may sign the indictment reflecting the Director's decision (but note the exception in practice where s6(2D) applies).

This authorisation may also be relied on to make changes to a charge/s that may be characterised as a 'technical' change e.g. a change to the amount of drugs or the amount of the fraud in the charges.

- **No Bills - section 9(4)**

The power under s9(4) of the DPP Act to decline to proceed further following a commitment has been delegated to cover situations:

1. of urgency, where the power should only be exercised by a delegate when, in his or her opinion, there is insufficient time in a particular case for the matter to be referred to the Director; or
2. where the charge or charges are to be replaced by charges which are founded on facts or evidence disclosed in the course of the committal proceedings and are not substantially different in number and/or kind (for example in substance and/or elements) to the committal order. However, if the matter is politically sensitive, contentious or a matter which the Director has indicated he should be consulted on, the decision should be referred to the Director.

Whenever a delegate exercises the power the delegate should, as soon as practicable, inform the Director

The power has been delegated to the occupants of the following positions who are legal practitioners:

- SES Band 2 and Band 3 Officers;
- Deputy Director, Adelaide; and,

- Senior Assistant Directors, Hobart, Darwin and ACT Prosecutions.

From 24 June 2010, the power under s9(4) of the DPP Act to decline to proceed further following a commitment has been delegated to SES Band 1 lawyers to allow them to discontinue charges where the defendant is under commitment or has been indicted, in certain circumstances. The delegation applies to that class of cases which mirror the circumstances where an SES Band 1 lawyer is also authorised to institute a prosecution on indictment i.e. where the charges are founded on facts or evidence disclosed in the course of the committal proceedings and are not substantially different in number or kind from the offences for which the person was committed for trial.

- **Discontinuing a Summary or Committal Proceeding - section 9(5A)**

Summary or committal proceedings instituted by a police officer or other official in the exercise of a public duty sometimes need to be discontinued. Section 9(5A) was inserted to provide that mechanism.

The power under s9(5A) has been delegated to the occupants of SES positions within the office who are legal practitioners.

A decision to discontinue a prosecution under s9(5A) will ordinarily be made at the regional office level without reference to the Director. However, the Director should be consulted if the exercise of the power could be contentious in the circumstances of a particular case.

- **Taking over a Private Prosecution - section 9(5)**

Any proposal to take over a private prosecution must be referred to Head Office.

The power under s9(5) has been delegated only to First Deputy Director.

- **Appeals - subsections 9(7), 9(8A) and 9(8B)**

All proposals to institute an appeal or a proceeding in the nature of an appeal should be referred to the Director for decision.

However, a protective appeal may be filed if the institution of an appeal is subject to a time limit that may expire before the Director will be able to consider the matter.

The s9(7) power has been delegated to cover situations of urgency. It should be exercised by a delegate only when there is insufficient time in a particular case for the matter to be referred to the Director.

Whenever a delegate exercises the power he or she should, as soon as practicable, inform the Director.

s9(7) confers on the Director of such rights of appeal (defined in s9(8A)) as are exercisable by the Attorney-General. Those rights of appeal are conferred on the Attorney-General mainly under s68 of the *Judiciary Act 1903*. Therefore, in some instances the exercise of a right of appeal will not involve the exercise of the power under s9(7).

The power in s9(7) of the Act to exercise a right of appeal has been delegated to the occupations of the following positions who are legal practitioners:

- SES Band 2 and Band 3 officers;
- the Deputy Director, Adelaide; and
- the Senior Assistant Directors, Hobart, Darwin and ACT Prosecutions.

3. Crimes Act 1914

- **Section 16BA(1)(c)**

The Director has authorised the occupants of SES positions within the office who are also legal practitioners to sign the documents referred to in s16BA(1)(c) for and on behalf of the Director of Public Prosecutions.

- **Part 1B**

Certain provisions in Part 1B of the *Crimes Act 1914* authorise “the Director of Public Prosecutions” to make an application or institute an appeal following either sentence or the making of an order under Divisions 6, 7 and 9.

With the exception of s21E (see below) the decision to make an application etc under the following provisions can be made by an officer as a matter of administrative necessity in reliance on the *Carltona* principle:

- s19AH(1) - Correcting an irregularity in relation to the fixing of a non-parole period or the making of a recognisance release order;
- s19AS - Application for a warrant of detention to serve the balance of a sentence;
- ss19AV, 20BF and 20BM - Application for a warrant of arrest;
- s20AA - Application to discharge or vary the terms of a recognisance;
- ss20BC(7) and 20BJ(6) - Application to vary conditions of release; and,
- s20BU - Application for discharge of a hospital order.

Any associated documents may be signed by a member of staff “for and on behalf of” the Director.

- **Section 21E**

A proposed appeal under s21E, which is in the nature of an appeal against sentence, must be referred to the Director through Head Office.

4. Freedom of Information Act 1982

The Director has authorised the occupants of SES positions within the office under sections 23, 54B and 54C of the FOI Act to:

- make a decision in respect of a request under the *Freedom of Information Act*;
- conduct an internal review of a decision and to make a fresh decision; and
- allow a further period for review of a decision.

5. Taxation Administration Act 1953

The Director has authorised under section 355-70 of Schedule 1 of the Act the occupants of SES positions within the office who are also legal practitioners to perform the functions of an authorised law enforcement agency officer under the Act.

6. Public Order (Protection of Persons and Property) Act 1971

The Director has authorised the occupants of SES positions within the office, who are also legal practitioners, to consent to prosecutions under the Public Order (Protection of Persons and Property) Act.