

DIRECTOR OF PUBLIC PROSECUTIONS REGULATIONS 2019

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

INTRODUCTION

The *Director of Public Prosecutions Act 1983* (the Act) establishes the Office of the Director of Public Prosecutions and confers certain powers, functions and duties on the Commonwealth Director of Public Prosecutions (the Director).

Section 34 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Director of Public Prosecutions Regulations 1984* (the current Regulations) are made under section 34 of the Act. The current Regulations prescribe certain functions for the purposes of paragraph 6(2)(b) of the Act, which provides that the functions of the Director include such functions as prescribed in regulations. The current Regulations also prescribe certain State crime bodies for the purposes of paragraph 9(6C)(c) of the Act – this effectively enables the Director to give certain indemnities in respect of evidence in proceedings before such bodies.

Under section 50 of the *Legislative Instruments Act 2003*, the current Regulations are due to sunset on 1 April 2019. They were originally due to sunset on 1 April 2018 but this date was deferred under paragraph 51(1)(c) of the *Legislative Instruments Act 2003*.¹

PURPOSE AND OPERATION OF THE INSTRUMENT

The purpose of the *Director of Public Prosecutions Regulations 2019* (the new Regulations) is to continue the arrangements presently set out in the current Regulations after the current Regulations sunset. The new Regulations, accordingly, are substantively the same as the current Regulations – only minor changes have been made to ensure consistency with modern drafting conventions and to update outdated references. Once they take effect, the new Regulations will repeal and replace the current Regulations.

¹ *Legislation (Deferral of Sunsetting—Director of Public Prosecutions Regulations) Certificate 2018*.

CONSULTATION

These Regulations were developed in consultation with the Office of the Director of Public Prosecutions.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation advised that a Regulatory Impact Statement was not required in relation to the proposed Regulations: OBPR ID 24647.

OTHER DETAILS

The new Regulations would be a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the new Regulations are at **Attachment A**. A Statement of Compatibility under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at **Attachment B**.

NOTES ON SECTIONS

Section 1 – Name

This section provides that the title of the new Regulations is the *Director of Public Prosecutions Regulations 2019*.

Section 2 – Commencement

This section provides that the new Regulations will commence on the day after they are registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the new Regulations are made under the *Director of Public Prosecutions Act 1983*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the new Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the new Regulations has effect according to its terms.

Section 5 – Definitions

This section defines certain terms used in the new Regulations.

Section 6 – Other functions of the Director of Public Prosecutions

Subsection 6(1)

This subsection prescribes certain functions for the purposes of paragraph 6(2)(b) of the Act, which provides that the functions of the Director include such functions as prescribed in regulations.

Paragraph 6(1)(a): this paragraph enables the Director to carry on committal and summary proceedings in respect of State or Territory offences where the proceedings were instituted, broadly, by:

- employees/officers of the Commonwealth or of a Territory;
- a person (eg, a State police officer) who performs services for the Australian Crime Commission under an arrangement under subsection 58(1) of the *Australian Crime Commission Act 2002*; or

- the Australian Securities and Investments Commission.

The occasion for the exercise of this additional function could arise where, for example, following an investigation by a joint Commonwealth/State taskforce, persons were charged with both Commonwealth and State offences.

Paragraph 6(1)(b): this paragraph enables the Director to perform, in respect of matters arising under ACT legislation, the functions of the ACT Director of Public Prosecutions under the *Director of Public Prosecutions Act 1990* (ACT) when no one holds or is acting in this office.

Paragraph 6(1)(c): this paragraph enables the Director to institute or carry on proceedings under section 112AH of the *Family Law Act 1975*. Section 112AH, broadly speaking, allows courts to impose certain sanctions (eg, fines) on a person who fails to comply with a community service or other similar order made under section 112AD of the *Family Law Act 1975*.

Paragraph 6(1)(d): this paragraph enables the Director to institute or carry on proceedings under the *Confiscation of Proceeds of Crime Act 1989* (NSW). From time to time, the CDPP prosecutes offences against NSW criminal law. Paragraph 6(1)(d), supplemented by the Director's other relevant functions, enables the Director to take action under Commonwealth and/or NSW proceeds of crime legislation in addition to prosecuting predicate offences.

Paragraph 6(1)(e): this paragraph enables the Director to give, to an authority of the Commonwealth, legal advice on law enforcement or a matter relating to law enforcement. The legal advice may relate to a particular investigation (for example, whether evidence of a certain fact or transaction is needed, the drafting of charges, and the drafting of warrants). It may, where the occasion requires, also include legal advice in respect of law enforcement functions generally; that is, not related to a specific investigation.

Paragraph 6(1)(f): this paragraph enables the Director to give, to a State or Territory authority, legal advice on the investigation or prosecution of an offence against a law of the Commonwealth or a matter relating to the investigation or prosecution of such an offence, whether or not the advice is for the purposes of a particular investigation. It is not unusual for State or Territory authorities to seek advice on some aspect of prosecutions for Commonwealth offences, such as the choice of charge, or the dispositions available when a federal offender is being sentenced. Those requests for advice can arise when State or Territory authorities are conducting an investigation into conduct that involves both Commonwealth offences alone, or Commonwealth and State or Territory offences.

Paragraph 6(1)(g): this paragraph enables the Director to conduct proceedings for the recovery of an amount payable to the Commonwealth under a superannuation order made under the *Crimes (Superannuation Benefits) Act 1989* or Part VA of the *Australian Federal Police Act 1979*. Such

orders, broadly speaking, enable recovery of employer-funded superannuation benefits paid to Commonwealth and Australian Federal Police employees convicted of corruption offences and sentenced to more than twelve months imprisonment.

Subsection 6(2)

This subsection provides that nothing in paragraph 6(1)(e) of the new Regulations affects the power of the Director (or person entitled to represent the Director) under subsection 9(11) of the Act. Paragraph 6(1)(e) of the new Regulations enables the Director to give, to an authority of the Commonwealth, legal advice on law enforcement or a matter relating to law enforcement. Subsection 9(11) of the Act provides that the Director, or a person who is entitled to represent the Director, may act as counsel or solicitor for an authority of the Commonwealth which is a party to a proceeding in respect of a matter that has arisen out of, or is connected, with the performance of any of the functions of the Director, or that may result in the performance by the Director of such a function.

Section 7 – Additional powers of the Director of Public Prosecutions

This section enables the Director to exercise, in respect of matters arising under ACT legislation, the powers of the ACT Director of Public Prosecutions under the *Director of Public Prosecutions Act 1990* when no one holds or is acting in this office. Section 7 complements paragraph 6(1)(c) of the new Regulations, which refers to functions rather than powers (see above).

Section 8 – Prescribed bodies

This section prescribes certain State crime bodies for the purposes of paragraph 9(6C)(c) of the Act, which broadly states that proceedings before such bodies are “State and Territory proceedings” for the purposes of subsection 9(6B). Section 9(6B) of the Act, in turn, enables the Director to give certain undertakings in respect of oral or documentary evidence in such proceedings. The three bodies which have been prescribed are:

- the New South Wales Crime Commission established under the *Crime Commission Act 2012* (NSW);
- the Independent Commission Against Corruption established under the *Independent Commission Against Corruption Act 1988* (NSW);
- the Crime and Corruption Commission established under the *Crime and Corruption Act 2001* (Qld).

Schedule 1 – Amendments

Section 1 repeals the current Regulations (the *Director of Public Prosecutions Regulations 1984*), which the new Regulations will replace.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Director of Public Prosecutions Regulations 2019

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Director of Public Prosecutions Regulations 2018* (the new Regulations) remakes the *Director of Public Prosecutions Regulations 1984* (the current Regulations).

The current Regulations are made under the *Director of Public Prosecutions Act 1983* (**the Act**), which establishes the office of the Commonwealth Director of Public Prosecutions (**the Director**). Section 34 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The current Regulations prescribe certain functions for the purposes of paragraph 6(2)(b) of the Act, which provides that the functions of the Director include such functions as prescribed in regulations. The functions prescribed in the current Regulations enable the Director to:

- conduct committal and summary proceedings for State offences instituted by Commonwealth/Territory officials;
- exercise the functions and powers of the ACT Director of Public Prosecutions when this office is vacant;
- institute proceedings under section 112AH of the *Family Law Act 1975*. Section 112AH allows courts to impose certain sanctions (eg, fines) on a person who fails to comply with a community service or other similar order made under section 112AD of the *Family Law Act 1975*;
- institute proceedings under the *Confiscation of Proceeds of Crime Act 1989* (NSW);
- give legal advice to Commonwealth, State and Territory authorities in relation to Commonwealth offences and law enforcement matters;
- conduct proceedings for the recovery of an amount payable to the Commonwealth under a superannuation order made under the *Crimes (Superannuation Benefits) Act 1989* or the Part VA of the *Australian Federal Police Act 1979*. Such orders enable recovery of employer-funded superannuation benefits paid to Commonwealth and Australian Federal Police employees convicted of corruption offences and sentenced to more than twelve months imprisonment.

The current Regulations also prescribe certain State crime bodies for the purposes of section 9(6C)(c) of the Act. The bodies which have been prescribed are:

- the New South Wales Crime Commission established under the *Crime Commission Act 2012* (NSW);
- the Independent Commission Against Corruption established under the *Independent Commission Against Corruption Act 1988* (NSW);
- the Crime and Corruption Commission established under the *Crime and Corruption Act 2001* (Qld).

This effectively allows the Director to give certain undertakings to persons in respect of evidence they give in proceedings before these bodies. The Director can undertake that such evidence, or information/documents obtained as a consequence of this evidence, will not be used against that person in proceedings under Commonwealth law. Where the Director gives such an undertaking, the material in respect of which the undertaking was given is not admissible in Commonwealth law proceedings against the person concerned.

Human rights implications

The new Regulations do not adversely impact any of the applicable rights or freedoms. In essence, the new Regulations enable the Director to exercise certain additional functions. They do not expand the scope of criminal liability or adversely impact the process by which such liability can be imposed.

Conclusion

The new Regulations are compatible with human rights as they do not raise any human rights issues.