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Conspiracy: The basics of what you need to know when defending or prosecuting a conspiracy charge

Companion slides to the **Think Foley's** presentation

by Raelene Sharp KC
Director of Public Prosecutions (Cth)

Material referenced

- *Khayat v The King* [2025] NSWCCA 151
- Prosecution Policy of the Commonwealth
- Extension of criminal liability provisions under the *Criminal Code* (Cth)
- *DPP (Cth) v Knopp (a pseudonym) & Anor* [2023] VSCA 315 (“Knopp”)
- Annual Report data on use of conspiracy charges by the Commonwealth DPP

★ *Khayat v The King* [2025] NSWCCA 151, [87]:

... the essential ingredients (as opposed to “elements” as identified in the *Criminal Code*) which must be proved for a person to be found guilty of an offence of conspiracy under 11.5 are:

1. The person **entered into an agreement** with at least one other party to do something that would amount to an offence of the type referred to in s 11.5(1);
2. The person **intended**, that is the person meant, **to enter into that agreement**;
3. The person and at least one other party to the agreement **intended** that **an offence** of the type referred to in s 11.5(1) would be committed pursuant to the agreement;
and
4. the person or at least one other party to the agreement must have committed **an overt act** pursuant to the agreement.

Prosecution Policy of the Commonwealth

[2.19]

In many cases the evidence will disclose an offence against several different laws. Care must therefore be taken to choose a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the Court with an appropriate basis for sentence.

[2.20]

In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence.

[2.23]

A number of judgments have highlighted the need for restraint in laying conspiracy charges. Whenever possible, substantive charges should be laid. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where it is proposed to lay or proceed with conspiracy charges against a number of defendants jointly, those responsible for making the necessary decision must guard against the risk of the joint trial being unduly complex or lengthy, or otherwise causing unfairness to defendants.



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Extension of criminal liability: the available charges



- Offences or attempted offences, committed by way of **joint commission**: s 11.2A
- Aiding and abetting the commission of an offence(s) by another person, known as **complicity and common purpose**: s 11.2
- **Incitement**: s 11.4(1)
- Commission of an offence **by proxy**: s 11.3



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Factors identified in *Knopp*, [54]

- Group 1: Does the charge reflect the offending and therefore provide adequate scope for sentence? (factors **(a)**, **(e)**, **(h)** and **(l)**);
- Group 2: Are there issues of duplicity? (factors **(b)** and **(c)**);
- Group 3: Would the trial be fair or occasion an abuse of process? (factors **(d)**, **(f)**, **(i)** and **(m)**); and
- Group 4: Would the trial be more complex? (factors **(g)** and **(k)**).



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Use of conspiracy charges

- **FY 20-21:** 55 defendants, 20 alleged conspiracies (of 2288 new referrals)
- **FY 21-22:** 53 defendants, 24 alleged conspiracies (of 2081 new referrals)
- **FY 22-23:** 65 defendants, 37 alleged conspiracies (of 2199 new referrals)
- **FY 23-24:** 49 defendants, 24 alleged conspiracies (of 2098 new referrals)
- **FY 24-25:** 30 defendants, 14 alleged conspiracies (of 2535 new referrals)