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Consent to a private prosecution

Lord Robertson of Oakridge complains that we are in danger of losing the right to bring private prosecutions (letters, 19 August 1992), and refers to the Lord Chancellor's written answer listing legislation requiring the consent of the Director of Public Prosecutions to the initiation of a prosecution: 93 current public general Acts, five statutory instruments and seven local and private Acts (Lords Hansard 18 December 1991). The citizen's right at common law to initiate a prosecution, referred to by Lord Robertson, is matched by the state's right at common law to terminate any prosecution. The latter exists because the overriding criterion in a particular case is whether it accords with the public interest to prosecute. The state, in the form ultimately of the Attorney General, is the judge of that.

As a former parliamentary draftsman, I can say that the decision to include in a bill a requirement for the consent of the Attorney General or Director of Public Prosecutions is taken where it is likely that, for the offence in question, some private prosecutions would be so terminated. For such cases it is better to prevent the prosecution ever being started. Of course it can be argued that the public interest test is wrong. Where there is evidence that an offence has been committed, why not in every case prosecute to conviction? If leniency is called for, cannot it be left to the judge or magistrate in sentencing, or the exercise of the prerogative of mercy? There are answers, and I give just one example. Lord Robertson instances the offence of possessing indecent photographs of a child as requiring consent to prosecution. Would we really want to see a sick old man forced to endure the anxiety of a trial for this, perhaps on the prosecution of a personal enemy of his?[1]

[1] *The Times*, 24 August 1992.