



PROSECUTING CRIMINAL OFFENCES

in the summary jurisdiction

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10 September 2014

Overview

Target Audience

- Junior criminal practitioners or those looking for a refresher in basic principles and practice relating to the criminal law jurisdiction

Content

- What should be in a Brief of Evidence?
- Assessing a Brief of Evidence
- Reading and analysing an offence provision
- Drafting Charges
- Breaking down offence elements
- General principles of criminal responsibility
 - Part II and Part IIA of the Criminal Code (NT)
 - Chapter 2 of the Criminal Code (Cth)



Preparing for a Summary Hearing

- NT DPP & Commonwealth DPP Prosecutorial tests
- Prosecutorial duties and ethics

What should be in a Brief of Evidence



- **Contact details of Key Investigator / Officer in Charge**
- **Referred/recommended charge**
 - Prosecutor to prefer charges on the evidence available and DPP Guidelines for choice of charges
- **Disclosure Certificate**
 - Should include indication of any outstanding materials; including exculpatory materials in investigator's possession that do not appear in the brief but may be disclosable to the defence
- **Notes to the Prosecutor**
 - Observations made by investigator of matters of interest (eg any investigations into potential co-accused; attitude of D during investigation etc)
 - Background & antecedents of D
 - Outstanding evidence yet to be gathered (notes on matters affecting admissibility)
- **Evidence**
 - Ordered in a meaningful/structured/chronological way
 - Evidence should be admissible – witness statements with exhibits annexed
 - Statements should have the correct jurat (where witness is interstate) – important for committal proceedings where statements used in lieu of oral testimony

Assessing a Brief of Evidence

- **Make sure you have the correct version of law**
 - Must assess on laws in force at time of conduct alleged!
 - *Eg Drugs Misuse Act – methamphetamines used to be schedule 2 drug; amended to become schedule 1- affects jurisdiction and penalties*
- **Structuring the brief**
 - Types of evidence (eg for fraud: identity of defendant, financial records, business records)
 - Chronology / Alphabetical – individual preference
 - For large briefs – use of tabs, coloured highlighters
- **Check timeframes for commencement of a prosecution**
 - s 52, *Justices Act* – within 6 months where statute does not otherwise set time limitation
- **Assess Admissibility of Evidence**
 - In a summary hearing, documents must be produced by a witness unless the document falls within an exception to the hearsay rule – eg. business records s69 Evidence Act exception

Prosecution Test



- **Reasonable prospects** of securing a conviction + in the **public interest**
 - Clause 2, NT DPP Prosecution Guidelines – described as “prima facie” test
 - CDPP approach of “reasonable prospects” is more than a prima facie case – requires consideration of admissibility of evidence and any available defences on available evidence
 - Prosecution burden of proof: beyond reasonable doubt
- **Public interest factors**
 - See NT DPP Prosecution Guidelines – clause 2.5 – for non-exhaustive list
- **Prosecution burden of proof**
 - Beyond Reasonable Doubt

Prosecutorial Duties

- See ***NT DPP Prosecution Guidelines, CDPP Guidelines*** and ***Barristers' Conduct Rules*** of the NT Bar Association
- Duty of **fairness** to the court and community
 - Duty to act fairly and impartially etc
- Continuing duty to make full and timely **disclosure** of Prosecution case to Defence, including of materials:
 - Relevant or possibly relevant to an issue, whether inculpatory or exculpatory
 - Raises or possibly raises new issue whose existence is not apparent from evidence prosecution proposes to use; and/or
 - Holds out a real as opposed to fanciful prospect of providing a lead to evidence which is relevant or raises a [relevant] new issue



Characterisation of Offences

See: Stephen Gray & Jenny Blokland, “Criminal Laws: Northern Territory” for detailed explanation

- **Characterisation**

- Crime
- Minor Indictable Offence – see s4 *Justices Act* (NT)
- Simple Offence
- Regulatory Offence

- **Significance:**

- Determining jurisdiction
- Determining governing principles of criminal responsibility (Part II or Part IIAA of *Criminal Code* (NT))
- NB: rules for criminal responsibility do not derive from the characterisation of an offence, but rather are found in the offence-creating provision – must check provision!

Characterisation of Offences

- **Crime (not defined)**

- Max penalty is imprisonment for more than 2 years – s 38E, *Interpretation Act*
- “Crime” appears to be able to be used interchangeably with “indictable offence”
- Must be charged on Indictment – s 3(2), *Criminal Code*
- ie – goes through committal to be committed to Supreme court (unless ex-officio indictment presented)

- **Minor Indictable Offence**

- a “crime” which is capable of being dealt with, summarily – s 4, *Justices Act*
- To deal w/summarily, requires consent of prosecutor AND defence AND leave of court –s 121A, *Justices Act*
- BUT – if matter is serious or difficult, they are not to be dealt with summarily – s122A, *Justices Act*

- **Simple Offence (not defined)**

- Not defined, but is “an offence not otherwise designated” – s3(4), *Criminal Code*
- ie: an offence which is not characterized as a “crime”, or a “regulatory offence”
- Punishable by 2 years imprisonment – D may be found guilty summarily – s 3(4) Code; see also *Justices Act* (NT)

- **Regulatory Offence**

- Certain offence provisions specify that the offence is a “regulatory offence”
- D may be liable if they have committed the act constituting the offence, even if they did not intend to commit the offence
- Only some provisions specified in **Part II** of the Criminal Code are applicable (sections 23, 24, 26, 30(3) and 38)
- Accident (s31); mistake of fact (s32); emergency (s33); duress (s40) etc – DO NOT apply
- Part IIAA principles do not apply because offence creating provisions do not declare them to be offences to which Part IIAA applies



Commencement of Charges

- **Indictable Offences**

- Charged on Information – s 101, *Justices Act*
- Goes through committal (an administrative function; rule against double jeopardy does not apply because there is no “final determination”)
- Magistrate must find there is a *prima facie* case before committing to Supreme Court
- Person can plead guilty in Magistrates Court and be committed for sentence – s 106A, *Justices Act*
- See Division I or Part V, *Justices Act* for rules about committal procedure

- **Simple or Regulatory Offences**

- Charged on Complaint

Drafting Charges

Choice of charges

- Focus on **conduct** of defendant
- Refer to NT DPP Guidelines
- Where several offences are available for the same conduct, go with the most serious offence disclosed by the evidence

Jurisdiction

- Type of Offence and jurisdiction
- Charge on Complaint or Information?
- Maximum penalty available for offence
- Does the legislation specify jurisdiction?

Elements of an Offence

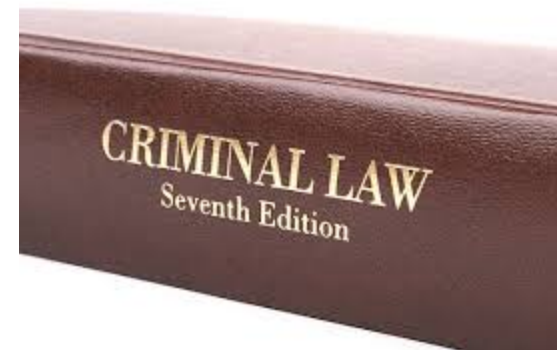
- Consider how the offence provision is drafted

Particulars

- Enables defendant to know nature & substance of allegations against him/her (a matter of fairness)
- All elements of offence per the offence provision should be particularised (unless default element)
- Place and Date (consider period of the conduct; “between dates”; rolled up charges; “on or around”)

Statement of Facts

- All facts alleged must be supported by the evidence (preferably, admissible evidence!)



NT Offence: Part II or Part IIA

Part IIA Criminal Code applies to:

- Schedule I offences
- Declared offences
 - Offences which declare that Part IIA apply (dictionary)
 - For offences in legislation other than Criminal Code (NT), *must* check offence provision
- Committed on or after commencement of part (20 Dec 2006)
 - NB: s43AA(2): some provisions in Part I do not apply
 - s43AA(3): Parts of Code do not apply to Schedule I offences (eg attempts; conspiracy)

NT Offence: Part II or Part IIA

- **Part II** applies to:
 - offences NOT listed in Schedule I of the Criminal Code (NT)
 -
 - Offences that are not otherwise “declared”
 - ie. for offences in legislation other than the Criminal Code (NT), where there is no declaration that “Part IIAA applies” Eg offences in *Misuse of Drugs Act*

Part IIAA – General Principles of Criminal Responsibility

- **Part IIAA based on Model Criminal Code**
- **Part IIAA of NT Code is adopts provisions identical to Chapter 2 of Criminal Code (Cth)**
 - **Elements of offence – Division 2**
 - **Physical elements** = conduct; result of conduct or circumstance in which conduct or its result, occurs
 - **Fault elements** = intention, knowledge, recklessness, negligence
 - **Default Fault elements:**
 - Where physical element is conduct, intention is the fault element – s43AM(1)
 - Where physical element is result or circumstance, recklessness is fault – s 43AM(2)
 - **Strict liability** – no fault elements; mistake of fact defence – s43AN
 - **Absolute liability** – no fault elements; mistake defence NOT available – s 43AO)
 - Circumstances in which there is **no criminal responsibility** (lack of capacity; intoxication etc) – Division 3
 - **Defences** – mistake or ignorance of law; mistake of fact; claim of right; intervening conduct; duress; sudden or extraordinary emergency; self defence; lawful authority etc

Part IIAA – Extensions of Criminal Responsibility

- **Attempt – s43BF**
 - Punishable as if substantive offence committed
 - Conduct must be more than merely preparatory
 - Intention and knowledge are fault elements for each physical element (harder to prove than reckless)
- **Complicity and common purpose – s 43BG**
 - Aid, abet, counsel or procure
 - Conduct *in fact* aided, abetted, counseled or procured and person must have intended it to
 - Offence must have been committed by other person
- **Conspiracy – s 43Bj**
 - D entered into **agreement** with another (or more)
 - D and at least one other party to the agreement must have intended that an offence be committed pursuant to agreement
 - D or another party to agreement commit an overt act pursuant to agreement
- Innocent agent – s 43BH
- Incitement – s 43Bi

Burden of Proof

- **Legal burden of proof**

- Legal burden of proof = **burden of proving the existence of a matter** – s43BQ
- Prosecution bears legal burden of
 - Proving every element of an offence (s43BR(1))
 - Disproving any matter, for which defence has discharged an evidential burden (s43BR(2))
- Legal burden must be discharged **beyond a reasonable doubt** – s43BS(1) – *unless a law specifies a different standard* – s43BS(2)

- **Evidential burden of proof**

- Evidential burden = **burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist** – s43BT
- Subject to s43BV, burden of proof that law imposes on D is evidential burden only – s43BU(1)
- D only has a legal burden of proof if law expressly specifies so, or creates a presumption that something exists unless the contrary is proved – s43BV
- Legal burden on D must be discharged on the **balance of probabilities** – s43BW

Example: Prosecuting offence under s20A Education Act (NT)

Offence Provision

20A Compulsory enrolment

(1) A parent who has the actual custody of a child of compulsory school age must enrol the child in:

- (a) a Government school; or
- (b) a non-Government school registered under Part 7

Maximum penalty: For a first offence – 15 penalty units.
For a second or subsequent offence – 20 penalty units.

(2) If a child of compulsory school age is living independently, the child must enrol himself or herself in a school mentioned in subsection (1)(a) or (b).

Maximum penalty: For a first offence – 1.5 penalty units.
For a second or subsequent offence – 2 penalty units.

(3) An offence against subsection (1) or (2) is an offence of **strict liability**.

(4) Subsections (1) and (2) do not apply in relation to a child:

- (a) who is complying with special arrangements made under Part 5 for the child; or
- (b) who is enrolled in a school in a State or another Territory and receiving education or training that, if provided in the Territory, would comply with the requirements of this Part; or
- (c) for whom the parent is providing home education in accordance with an approval under section 20E.

(5) It is a **defence** to a prosecution for an offence against subsection (1) or (2) if the defendant establishes a **reasonable excuse**.

Does Part IIAA of the Criminal Code apply?

Education Act (NT)

19D Application of Criminal Code

Part IIAA of the Criminal Code applies to an offence against this Part.

Note for section 19D

*Part IIAA of the Criminal Code states the **general principles of criminal responsibility**, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences.*



Definitions & Context

- **DEFINITIONS**

- Parent

- Includes person who has actual custody of a child and the person with whom a child resides

- Compulsory school age

- 6 years old or over (s20(1)), but under 17, or age when child completes year 10 education (s20(2)).
- If child who completes year 10 is below 17 years old, the child is of compulsory school age UNLESS they participate full-time in approved education or training – (s20(3)) – etc

- School

- A school or institution at which any person or body of persons provides, or offers to provide, courses of instruction substantially in pre-school, primary or secondary education
- Government school – school declared to be a Government school
- Non-Government school – a school other than a Government school

- **CONTEXT**

- Read other parts of the Act – provides for different modalities of schooling etc

- The act may provide for other penalty provisions; jurisdictional issues; defences and exceptions etc

Offence Element Breakdown

20A(1) Compulsory enrolment

- (1) **Physical:** D is a parent with actual custody of a child (circumstance – s43AE)

Fault: strict liability – s20A(3)

- (2) **Physical:** The child is of compulsory school age

Fault: strict liability – s20A(3)

- (1) **Physical:** D fails to enrol the child in a Government school or a non-Government school registered under Part 7 (conduct – s43AD)

Fault: strict liability – s20A(3)



Facts Required to be Established

- (1) D is a parent of a child
- (2) D has actual custody of the child
- (3) The child is of compulsory school age – apply definition from s20(1)
- (4) D fails to enrol the child in a Government school; or a non-Government school registered under Part 7
- (5) D does not have a reasonable excuse for failing to enrol the child in a school
- (6) None of the exceptions under s20A(4) apply

Draft Charge for Offence under s20A

- [The Defendant, (Name; DOB)] on [date], at [place] in the Northern Territory of Australia, being a parent with actual custody of a child, namely [child's name], the child being of compulsory school age, namely [age], failed to enrol the child in a school

Contrary to subsection 20A of the *Education Act* (NT)

- Consider how many charges?
 - “a child” → one charge per child
- Jurisdiction
 - If they lived for some time interstate, the conduct carrying criminal liability in the NT may not apply; or may be subject to the other State's laws
- When did conduct occur?
 - Is it appropriate to charge for everyday?
 - Use between dates (eg “Between about 20 January 2012 to 31 April 2014”)
- Remember: principle of fairness to the defence – let them know specifics about the charge against them

Preparing a Summary Hearing

- Check whether **offence provision used was the drafting** at the time of the alleged conduct – *laws do change!*
- **Double check charges**
 - Particulars – dates, times, specifics of offence
 - Avoid double jeopardy/duplicity in charges
 - For contested matters, any rolled up charges should be un-rolled as prosecution needs to prove every element of all charges
 - For plea of guilt, by agreement, charges can be rolled up
- Review **evidence, admissibility** of evidence, any available defences etc
- **Proof witnesses**
- Prepare **witness list** and consider **order of presenting** prosecution case
- **Anticipate issues** (factual issues and potential defences)
 - Prosecution cannot split its case – so need to lead evidence in anticipation of defences
 - Eg if defence of mistake of fact anticipated, Prosecution to lead evidence that there was no actual mistaken belief; or if there was, it was not honest or reasonable etc.
- Consider **advocacy** – preparation for performance in court

Conducting a Summary Hearing

Witnesses

- Summoning witnesses
- Proofing witnesses
- Preparing witness order
 - Consider what evidence/document you want to tender through which witness
- **Short Opening (roadmap for the court)**
 - May not be required in summary jurisdiction – but good practice to prepare one
 - If novel or complex offence, explain elements of the offence that prosecution is to prove
 - Witnesses to be called and summary of evidence to be adduced
- **Taking evidence**
 - Organise materials to easily find (tabs; different coloured folders or paper for different witnesses or issues)
- **Closing**
- Prepare materials for **plea and sentence**



Instructing Counsel

- Chase up all outstanding evidence/materials for brief
- Ensure witness summonses have issued and follow up service of witnesses
 - interstate witnesses must be served at least 14 days prior to hearing to ensure validity of service and compellable of witness – see SEPA
 - Investigator or Instructor: Coordinate witnesses at the hearing
- Arrange and/or attend proofing sessions with counsel
 - depending on arrangement between counsel and instructor
- Provide instructions to counsel
 - Briefing Note or Memo

Questions?



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