

# **Chapter 6**

## **Commonwealth offences**

# Chapter 6—Commonwealth offences

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## A. Introduction

### 6-1 Overview

As a duty lawyer, you should be aware of the following matters in relation to Commonwealth offences.

State courts exercise Commonwealth jurisdiction. State courts have the power to deal with people charged with Commonwealth offences ([Judiciary Act 1903](#) (Cth), s 58). The state laws regarding procedure and evidence, remand time and bail generally apply (Judiciary Act, ss 68 and 79).

The [Bail Act 1980](#) (Qld) applies if a person is charged with a Commonwealth offence (Judiciary Act, s 68(1)).

Section 15 of the [Crimes Act 1914](#) (Cth) gives a court of summary jurisdiction power to remand the defendant in custody or release them on bail on a recognisance if it becomes necessary or advisable to defer a case's hearing.

The Crimes Act (Cth) and the [Criminal Code Act 1995](#) (Cth) are the main pieces of legislation introducing procedural and offence provisions of general application. These provisions have been added to over the years.

The Commonwealth Director of Public Prosecutions conducts most Commonwealth prosecutions.

Many matters of evidence and procedure are dealt with directly by Commonwealth law to the exclusion of state law. One example is the [Evidence Act 1995](#) (Cth).

Sentencing under the Commonwealth jurisdiction normally occurs under ss 16–22A of the Crimes Act. Generally, a sentence under Commonwealth legislation leads to a conviction being recorded. The exception is where it can be argued that s 19B of the Crimes Act applies. You should be familiar with s 19B provisions and the leading case, *Commissioner of Taxation v Baffsky* (2001) 122 A Crim R 568 [2001] NSWCCA 332, also discussed in *CEO Customs v Odesnik* [2010] QMC 3.

If a court of summary jurisdiction (Crimes Act, s 4J) deals with an offence, the court may:

- deal with the matter if the offence relates to property, where the value does not exceed \$5000
- impose a prison sentence for a maximum of 12 months or a maximum fine of 60 penalty units, or both – this applies where the offence is punishable by imprisonment for 5 years or less
- impose a prison sentence for a maximum of 2 years or a maximum fine of 120 penalty units, or both – this applies where the offence is punishable by imprisonment for more than 5 years but no more than 10 years.

If a person is convicted of two or more Commonwealth offences against the same provision of a Commonwealth law, the court can impose one penalty for both or all the offences.

Usually, Commonwealth offences can be dealt with summarily only if they attract a maximum of 10 years, and both prosecutor and defendant agree to have the matters dealt with summarily.

In one exceptional case of possessing a controlled drug under s 308(1) of the Criminal Code (Cth), ‘the person may be tried, punished or otherwise dealt with as if the offence were an offence against the law of the State’ so that state sentencing options, such as drug diversion, are available.

A separate Commonwealth callover is held for Commonwealth criminal matters. ‘[Practice Direction No 22 of 2011](#)’ deals with the procedure for Commonwealth criminal matters in the magistrates court.

Defences under the [Criminal Code Act 1899](#) (Qld) are not available in Commonwealth matters.

The [Mental Health Act 2000](#) (Qld) does not apply to Commonwealth offences. Sections 20BS–BY of the Crimes Act (Part 1B, Division 9) provide special sentencing alternatives for persons suffering from mental illness or intellectual disability. Such matters are likely to require more representation than you, as the duty lawyer, can provide.

There is no concept of parole release dates in Commonwealth matters. There are only imprisonment sentences that can be suspended immediately (Crimes Act, s 20(1)(b)) or after an imprisonment period has been served (Crimes Act, ss 19AC–AF).

## B. Jurisdiction

### 6-2 Dealing with offences—summarily or on indictment

Generally, Commonwealth offences can be dealt with summarily only:

- if they attract a maximum of 10 years (and no contrary intention is expressed or implied), and
- both prosecutor and defendant agree to dispose of the matters summarily.

Indictable offences are offences that are punishable by imprisonment for more than 12 months. Such matters can still be dealt with summarily if prosecutor and defendant agree.

Summary offences are offences that are either punishable by imprisonment for 12 months or less, or not punishable by imprisonment (Crimes Act, ss 4G, 4H and 4J).

### 6-3 Time for commencing prosecutions

Prosecutions for offences against Commonwealth laws may be commenced within the following timeframes:

- no time limitation for offences where the maximum imprisonment for a first offence exceeds six months
- one year after the offence was committed for offences where the maximum imprisonment is six months or less
- one year also for offences where punishment is a pecuniary penalty and no imprisonment (Crimes Act, s 15B).

### 6-4 Party offences

‘Any person who receives or assists another person, who is, to his knowledge, guilty of any offence against a law of the Commonwealth, in order to enable him or her to escape punishment or to dispose of the proceeds of the offence shall be guilty of an offence’ (Crimes Act, s 6).

### 6-5 Defences

‘Where a provision of a law of the Commonwealth provides a defence to a particular offence, the provision does not, unless the contrary intention appears, prevent the use of any defence that is otherwise available’ (Crimes Act, s 4L).

# C. Common offences index

## 6-6 Common offences a duty lawyer may encounter

If a matter is proceeding by way of a guilty plea, you will need to know the sentencing provisions under the Crimes Act. In many cases, the Commonwealth Director of Public Prosecutions may provide a schedule of comparative cases that indicates the range of sentences that you could seek.

### Centrelink fraud

You would normally deal with these matters in a duty lawyer session unless:

- there is a dispute with the statement of facts
- the amount of fraud involves the prospect of imprisonment
- the client requires or seeks an order for no conviction to be recorded under s 19B of the Crimes Act.

In these situations, you should seek an adjournment to obtain evidence to support the case.

Prosecutions for Centrelink fraud fall under s 135.2 of the Criminal Code (Cth).

### People smuggling matters under ss 232–233 of the *Migration Act 1958* (Cth)

You are unlikely to deal with these matters except in bail matters, or while obtaining separate representation or acting as agent on a mention for the lawyer briefed in the matter.

There may be cases of utilising or presenting false documents under ss 234, 235 or 236 of the [Migration Act 1958](#) (Cth). Here, you must assess whether the complexity of these matters requires an adjournment for separate representation.

### Aviation offences or ‘Carrying weapons or prohibited goods on an aircraft or through a screening point before boarding the aircraft’

Prohibited goods can include fireworks, gas canisters or rechargeable batteries. Items are deemed prohibited goods under the [Aviation Transport Security Act 2004](#) (Cth) and [Aviation Transport Security Regulations 2005](#) (Cth).

Note: The Aviation Transport Regulations also cover situations such as jokes about bombs in luggage. Such matters are deemed complex, as they amount to threats to aviation and may involve prosecution submissions of actual imprisonment. You should have such charges adjourned for separate representation.

### Telecommunication offences relating to carriage services

These offences are dealt with under Part 10.6 Subdivision C of the Criminal Code (Cth) (ss 474.14–474.18). They involve matters such as ‘Improper use of carriage services’ (s 474.17):

‘A person is guilty of an offence if:

- (a) the person uses a carriage service; and
- (b) the person does so in a way (whether by the method of use or the content of the communication or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive’.

The penalty for an offence against s 474.17 is three years imprisonment.

Telecommunication offences involving pornography or child pornography are likely to require separate representation, and may involve only bail and remand issues for the duty lawyer.

### Australia Post offences

Major offences involving Australia Post are now dealt with under either ss 471.1–471.15 of the Criminal Code (Cth) or ss 85E–85ZA of the Crimes Act. The Australian Federal Police usually investigate these offences in conjunction with Australia Post officers.

As a duty lawyer, you can assess whether to deal with or remand the matter, depending on the facts and amounts involved. You should obtain the schedule of comparative sentences that the Commonwealth prosecutor is seeking to rely on if you intend to deal with the matter by way of a guilty plea. Sentencing falls under the Crimes Act.

### **Commonwealth drug offences**

Generally, you would deal with matters under s 308.1 of the Criminal Code (Cth) (i.e. possession of a controlled drug) only where ‘a person may be tried punished or otherwise dealt with as if the offence were an offence against the law of the State’ so that state sentencing options such as drug diversion are available. The meaning of ‘possession’ is similar to that under the [Drugs Misuse Act 1986](#) (Qld).

Most Commonwealth drug offences under the Criminal Code (Cth) are listed as ‘serious’ drug offences and beyond the duty lawyer’s scope. The schedules of controlled, border controlled, marketable, commercial and trafficable amounts of the relevant drugs are listed in Chapter 9, Part 9.1 of the Criminal Code (Cth). These include importing or exporting narcotic drugs and related offences, such as possessing narcotic drugs that have been imported.

You are unlikely to deal with any of these charges except to consider issues of bail, secure longer term representation for the client or act as agent for a lawyer briefed in the matter.

### **Crimes Act offences**

These include destroying or damaging Commonwealth property, forgery, uttering false pretences and false representations (imposition).

The types of offences that you may commonly encounter include offences of trespass under s 89 of the Crimes Act. This states that any ‘person who, without lawful excuse..., trespasses or goes upon any prohibited Commonwealth land shall be guilty of an offence’. The penalty is 10 penalty units.

Another offence could be wilful damage under s 29 of the Crimes Act, which states that ‘[a]ny person who intentionally destroys or damages any property...belonging to the Commonwealth or to any public authority under the Commonwealth, shall be guilty of an offence’. The penalty is 10 years’ imprisonment.

Note s 17B of the Crimes Act, which restricts prison sentences on certain minor offences, for which s 29 of the Crimes Act is specifically mentioned.

### **Failing to lodge return form offences under the Bankruptcy Act, insolvency and trustee legislation or corporations law**

As a duty lawyer, you can usually deal with these matters, depending on their complexity. The sentences normally sought are hefty fines with the recording of a conviction.

Note: Failure to lodge tax returns is dealt with separately under specific callovers for the Australian Tax Office.

### **Breach proceedings under ss 20A and 20AC of the Crimes Act**

These breach proceedings are for failure to comply with:

- probation conditions under ss 19B(1)(d)(iii) or 20(1)(a)(iv) of the Crimes Act
- community service conditions under s 20AB(1) of the Crimes Act, or
- recognisance proceedings conditions under any part of ss 19B(1)(d), 20(1)(a) or 20(1)(b) of the Crimes Act.

You should be aware that because breaches, particularly of s 20(1)(b) orders, involve the breaching of a prison term that was suspended, actual imprisonment is a possible outcome. You should adjourn such matters for separate representation.

## Customs Act offences

The Australian Customs Service has an investigative arm that investigates breaches of criminal law in the regulation of the import of items into Australia and duty payment. Customs may now prosecute these matters separately from the Commonwealth Callover. Sentences sought would be hefty fines and the recording of a conviction.

## 6-7 Defences

You should be aware that a defence under the common law may be open to a defendant charged with an offence under any Commonwealth Act. This will be in addition to any statutory defence.

Section 4L of the Crimes Act states that '[w]here a provision of a law of the Commonwealth provides a defence to a particular offence, the provision does not, unless the contrary intention appears, prevent the use of any defence that is otherwise available'.

# D. Sentencing

## 6-8 Introduction

Part 1B of the Crimes Act (ss 16–22A) now deals with sentencing. The general sentencing principles are contained in ss 16 and 17A.

Following are matters that a court will consider when passing sentence.

Section 16A of the Crimes Act states:

- '(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.
- (2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
- (a) the nature and circumstances of the offence;
  - (b) other offences (if any) that are required or permitted to be taken into account;
  - (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
  - (d) the personal circumstances of any victim of the offence;
  - (e) any injury, loss or damage resulting from the offence;
  - (f) the degree to which the person has shown contrition for the offence;
    - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
    - (ii) in any other manner;...
  - (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;
  - (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
  - (j) the deterrent effect that any sentence or order under consideration may have on the person;
  - (k) the need to ensure that the person is adequately punished for the offence;
  - (m) the character, antecedents, age, means and physical or mental condition of the person;
  - (n) the prospect of rehabilitation of the person;
  - (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'.
- '(3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a

federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order’.

Section 17A states that a ‘court shall not pass a sentence of imprisonment on any person...unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case’.

Apart from various sentencing options, Part 1B also deals with matters such as parole, unfitness for trial, acquittal because of mental illness, and other provisions for people suffering from mental illness or intellectual disability.

## 6-9 Taking other offences into account

Section 16BA provides for a procedure under which a court, when passing sentence for a federal offence or federal offences, can, with the prosecutor’s and defendant’s consent, take into account other offences that the defendant is believed to have committed and admits guilt of.

For example, the prosecution may have evidence of a large number of similar offences by a defendant (e.g. a series of fraudulent Centrelink claims resulting in several debts of overpayment prior to the court matters). In this case, the prosecution might elect to proceed on one charge only but give the defendant a list of others under s 16BA. The defendant might plead guilty to that one offence but, under that section, ask the court to take the others into account in passing sentence.

Where necessary, you should consult s 16BA for the precise requirements of the section.

An offence taken into account under this section must not be regarded as an offence of which the person has been convicted. However, the fact that the court has taken it into account can be referred to and proved, subject to the precise terms of s 16BA, in the same manner as the related conviction.

## 6-10 Sentencing options

The sentencing options that may be available under the Crimes Act are:

- dismissal of charge without any conviction and with no conditions attached (s 19B(1)(c))
- discharge without conviction on certain conditions (s 19B(1)(d))
- conviction and release on certain conditions (s 20(1)(a))
- imprisonment with order for release on certain conditions, either immediately or after serving a specified part of imprisonment term (known as a recognisance release order) (s 20(1)(b))
- probation, as one of the conditions of an order under either ss 19B(1)(d), or 20(1)(a) or (b)
- community service (s 20AB)
- fines
- imprisonment, including, in some cases, the setting of a non-parole period
- fine option orders (s 15A)
- reparation (i.e. restitution) (s 21B)
- hospital orders for people suffering from mental illness (s 20BS)
- psychiatric probation orders for people suffering from mental illness (s 20BV)
- program probation order for people suffering from intellectual disability (s 20BY)
- summary disposition of people suffering from mental illness or intellectual disability (ss 20BU and 20BV).

Below are sentence options that may be relevant to a duty lawyer session. You should conduct more research for a more detailed analysis of sentencing options.

## **Dismissal of charge without conviction and with no conditions attached; discharge without conviction on certain conditions; probation as one of the conditions**

It is convenient to deal with the alternative orders that can be made under s 19B of the Crimes Act together. The criteria for each are the same and, whatever alternative is chosen, there is no conviction.

Section 19B(1)(b) sets out the following criteria:

- (b) ‘the court is satisfied...that the charge is proved, but is of the opinion, having regard to:
- (i) the character, antecedents, [cultural background,] age, health or mental condition of the person;
  - (ii) the extent (if any) to which the offence is of a trivial nature; or
  - (iii) the extent (if any) to which the offence was committed under extenuating circumstances;

that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation’.

If the court is so satisfied, it may:

- dismiss the charge. Note that this is a dismissal of the charge where the charge has been proved in contrast to where a charge is dismissed because it has not been proved. Also note that this is similar to an unconditional discharge under s 19 of the Penalties and Sentences Act, though the criteria are not identical
- discharge the person on certain conditions under s 19B(1)(d), which is similar to a conditional discharge under s 19 of the Penalties and Sentences Act. A conditional discharge will be for a fixed period of up to three years and one condition will be that the person demonstrate good behaviour for that period
- make a probation order. This is done by discharging the person on conditions, as described above, including a condition that the person will, during a specified period, be subject to the supervision of an appointed probation officer and obey all their reasonable directions. The period specified must not exceed two years.

You should be familiar with the cases that examine s 19B, i.e. *Commissioner of Taxation v Baffsky* (2001) 122 A Crim R 568 [\[2001\] NSWCCA 332](#), also discussed in *CEO Customs v Odesnik* [\[2010\] QMC 3](#).

### **Contrast with s 19 of the Penalties and Sentences Act**

There is one important difference between s 19B of the Crimes Act and s 19 of the [Penalties and Sentences Act 1992](#) (Qld). The use of the word ‘or’ at the end of paragraph (ii) of s 19B(1)(b) means that the criteria in (i), (ii) and (iii) (above) are alternatives only. It is not necessary for all three to be satisfied before the court can apply the section. This is reinforced by the use of the words ‘(if any)’ in (ii) and (iii).

Section 19 of the Penalties and Sentences Act lists similar criteria but they are not alternatives and each criterion must be satisfied.

The most important effect of this is that offences do not necessarily have to be trivial for s 19B of the Crimes Act to apply (whereas they do for s 19 of the Penalties and Sentences Act).

### **Conditional release after conviction; recognisance release order; probation as a condition**

Section 20 of the Crimes Act empowers a court to convict an offender and then:

- release the person on certain conditions without passing sentence (s 20(1)(a)), or
- sentence the person to an imprisonment term but order that the person be released on certain conditions either immediately or after serving a specified part of the term (s 20(1)(b)). This is known elsewhere in the Act as a recognisance release order, or
- make a probation order. This is done by discharging the person on conditions, including that the person will, during a specified period, be supervised by a probation officer appointed under the order and obey all their reasonable directions. The specified period must not exceed two years.

Section 19AC of the Crimes Act sets out circumstances in which a court must make a recognisance release order—when it imposes a sentence or sentences not exceeding three years’ imprisonment in total and where the offender is not undergoing a federal imprisonment term. This is subject to s 19AE, which states that a court is not required ‘to do

so if, having regard to the nature and circumstances...and to the antecedents of the person, the court is satisfied that such an order is not appropriate’.

Note also that a court is not required to make a recognisance release order if the sentence or sentences imposed do not exceed six months imprisonment (s 19AE(3)).

The effect of s 19AC is that (subject to s 19AE), whenever the court imposes a sentence that does not exceed three years, it must order that the person be released under s 20(1)(b) on conditions either immediately or after serving a specified imprisonment period.

### **Community service**

Under s 20AB, a court may, after conviction, make a community service order for a federal offence (s 20AB(3)). State laws regarding community service orders will apply.

### **Imprisonment**

As with fines, the actual legislation under which a person is charged will generally set out a maximum term of imprisonment that a court can impose for the particular offence. Unless a term of imprisonment is set out, either in the offence section itself or elsewhere in the legislation, a court cannot directly impose imprisonment (though s 15A of the Crimes Act allows imprisonment in default of payment of fines according to state law).

Where an indictable offence is dealt with summarily, the maximum term of imprisonment (and maximum fine) that may be imposed is as set out in s 4J of the Crimes Act.

Section 17A of the Crimes Act states that ‘[a] court shall not pass a sentence of imprisonment on any person for a federal offence...unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case’.

Section 17B(1) states that, if a person (who has not previously been sentenced to imprisonment for any federal, State or Territory offence) ‘is convicted of one or more [federal offences]...relating to property, money or both, whose total value is not more than \$2000’, the court must not impose imprisonment ‘unless, in the opinion of the court, there are exceptional circumstances that warrant it’.

Section 17A applies subject to any contrary intention in the law creating the offence (s 17A(4)). In determining whether the \$2000 limit referred to above has been reached, other offences taken into account in sentencing under s 16BA should also be considered.

Note that ss 16E–19AA of the Crimes Act cover other aspects of imprisonment sentences, including when sentences are to commence; cumulative, partly cumulative, or concurrent sentences; and remissions.

### **Fines**

The maximum fines for particular offences are set out under the individual offences. Maximum fines are generally set out in the particular legislation under which a person is charged.

If an indictable offence is dealt with summarily, the maximum fine (and maximum imprisonment term) is as set out in s 4J of the Crimes Act.

## **6-11 Fine option orders**

Under s 15A of the Crimes Act, a court, in dealing with Commonwealth offences, can make a fine option order in lieu of fine payment if the defendant applies under Queensland law (see the discussion of [fine option orders](#) in Chapter 13 of this handbook; in particular, the criteria for making a fine option order).

## 6-12 Reparation (restitution)

Under s 21B of the Crimes Act, a court can make an order for a defendant to make reparation to the Commonwealth, by way of money payment or otherwise, for any loss suffered or any expense incurred by the Commonwealth (or Commonwealth authority) due the offence.

Alternatively, the court can order the offender to make reparation to any person, by way of money payment or otherwise, 'in respect of any loss suffered by the person as a direct result of the offence'.

A person must not be imprisoned for failing to pay an amount so ordered (s 21B(2)).

The court may make reparation a condition of a discharge under s 19B, a condition of a release under s 20, and in addition to a community service order under s 20AB.

### **Sentencing alternatives for persons suffering from mental illness or intellectual disability**

If you see that there are mental health or disability issues, have the case adjourned and matters considered under s 20BS–20BY of the Crimes Act if the matter is to proceed as a guilty plea.

## E. Appeals

### 6-13 State law applying to appeals

Under s 68(1) of the Judiciary Act, state laws regarding the procedure for hearing and determining appeals apply where Commonwealth offences are dealt with by a state court.

You should consider an appeal on sentence if the court of summary jurisdiction has imposed:

- a prison sentence for a period exceeding the maximum period that could have been imposed if the offence had been tried on indictment
- a fine exceeding the maximum fine that could have been imposed if the offence had been tried
- both a prison sentence and a fine, but the offence is punishable on trial for indictment by a prison sentence or a fine (all matters contained in s 4J(6) of the Crimes Act).