

# **PROSECUTING CRIMINAL OFFENCES**

**in the summary jurisdiction**

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# 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

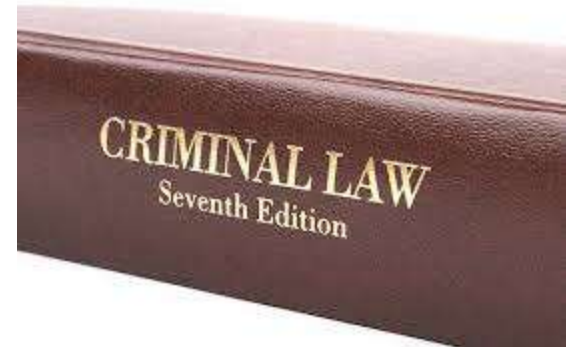
- Consider how the offence provision is drafted

## 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”
    - I.e. 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
- (1) 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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