's.20BXXX(a)(iii)[1] – how to navigate ordinary commonwealth criminal law'

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Introduction

1. Commonwealth criminal law is not necessarily hard to understand – but it is hard to navigate. The purpose of this paper is to provide some guidance to practitioners who deal with the more common and everyday sorts of commonwealth criminal matters. Carriage service offences, government fraud offences etc. This paper is divided into three parts:

    a. The Basics;
    b. Elements of offences; and,
    c. Sentencing.

PART 1 - BASICS

2. Commonwealth criminal law is a series of federal laws that regulate behavior, breach of which amounts to a crime. The legal principle that governs the application and interpretation of these federal laws is contained in a Code. A single piece of legislation. To know and understand commonwealth crime, means one must at least attempt to know and understand the Code.

3. The commonwealth criminal jurisdiction is what is known as a "Code" jurisdiction. The other 'code' jurisdictions are Western Australia, ACT, Northern Territory, Queensland and Tasmania. The 'Common law' jurisdictions are New South Wales, Victoria and South Australia.

4. Commonwealth offences are strewn throughout different pieces of federal legislation but for today's purposes, I'm concentrating on the everyday and the most common:
    a. *Crimes Act 1914* (Cth) ('the Act'); and,
    b. *Criminal Code Act 1995* (Cth) ('the Code').

5. Broadly, **the Act** concerns procedure and process across the spectrum of the criminal justice system from arrest to parole. Simply, it can be divided into two parts:
    a. Investigation, procedure, and evidence gathering (Parts 1, 1AA, 1A, 1AB, 1ABA, 1AC, 1ACA, 1AD, 1AE); and,
    b. Sentencing (Part 1B).

6. In contrast, **the Code** sets out a number of offences, but it also deals with the principles of criminal responsibility (Chapter 2).

7. The common law applies in Commonwealth criminal law but ONLY "*so far as the laws of the Commonwealth are not applicable or so far as their provision are insufficient to carry them into effect*": section 80 of the *Judiciary Act 1904* (Cth).

[1] Not a real provision.

8. High Court has held that this means in practice one must read the Code without any preconceptions that a particular provision has, or has not altered the law. (*Vallance v The Queen* (1961) 108 CLR 56), however, it may be appropriate to refer to the common law in certain circumstances, for example, if a word employed has a technical legal meaning, where there is ambiguity as to the meaning or there where the interpretation of a word is well-established (*The Queen v LK* 2010 CLR 177; *R v JS* (2007) 175 A Crim R 108)

9. The Constitution underpins and sets out the structure for our entire legal and political system. It sets up a system of representative government. It provides for responsible government. It also sets out the Constitutional basis for the source of power to enact federal criminal laws. This is contained in Section 51 which states:

> *"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to….*
>
> *(ii) taxation…*
> *…*
> *(v) postal, telegraphic, telephonic, and other like services*
> *…*
> *(xxiiia) the provision of maternity allowances, widow pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits … benefits to students and family allowances. "*

10. If a piece of commonwealth legislation cannot be sourced to a provision under section 51 (express or implied), then the legislation is invalid and can be the subject of constitutional challenge.

R v Tang **(2008) HCA 39 (28 August 2008)**

- The Accused was charged under s.270.3 (1)(a) of the Code which is titled "Slavery Offences". It was alleged that she (on multiple occasions) intentionally possessed a slave or exercised over a powers attaching to the right of ownership over that slave.
- Accused ran a legal brothel in Fitzroy. With a syndicate, she bought 5 women from Thailand to work in her brothel.
- Customers were charged $110, of which $90 went to accused. The rest went to the complainants who worked 6 days a week. They had no money, very little English and their passports were held by the accused. Otherwise, they were well looked after.
- At trial – the accused was convicted in Victorian County Court by a jury.
- On appeal, the Court of Appeal quashed conviction. They found that the Crown had to prove that the accused had knowledge or belief that her power was being exercised through ownership and an intention to therefore exercise those powers.
- The CDPP appealed to the High Court. The accused cross-appealed on the basis that the Commonwealth had no power to make laws with respect to 'slavery'.
- High Court overturned the Court of Appeal decision. It made two important findings:
    a. The Crown did not need to prove that that the accused knew or believed that they were slaves. They only had prove that she intentionally exercised her powers over them; and,
    b. The Federal government was lawfully able to make such a law pursuant to their power under s.51(xxix) - external affairs.

11. By virtue of section 68(1) of the *Judiciary Act 1903* (Cth), the relevant NSW legislation pertaining to arrest, custody, bail, summary conviction, committal, trial on indictment and appeals applies to Commonwealth matters. This means that the *Evidence Act 1995* (NSW), *Bail Act 2013* (NSW), *Criminal Procedure Act 1989* (NSW) all apply to commonwealth matters heard in NSW courts. Section 68(1) states:

> *(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:*
>
> *a. their summary conviction; and*
> *b. their examination and commitment for trial on indictment; and*
> *c. their trial and conviction on indictment; and*
> *d. the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;*
>
> *and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.*

12. Accordingly, LEPRA does not apply to Commonwealth offences unless its provisions relate to the matters as set out in section 68(1) of the *Judiciary Act* (e.g. arrest). Instead, Part 1C of the Act applies.

13. Under Part 1C:
    i. That standard investigation period is 4 hours but this is reduced to 2 hours for child and ATSI offenders (s.23C(4)(a) of the Act);
    ii. For child and ATSI offenders the period can be extended by a judicial officer once for a period of 8 hours
    iii. Section 23F of the Act provides that a person who has been arrested by an investigating official must be cautioned before they are questioned. The caution is "You do not have to say anything but anything you do say may be used in evidence".
    iv. Section 23F (caution) also applies to 'protected suspects' which is defined under s23B as persons in the company of investigating official who are being questioned about a Commonwealth offence, who have not been arrested, and who are not free to leave or perceive that they are not; and
    v. An 'investigating official' is defined in section 23B is

14. Under Part 1C, all persons under arrest must be 'treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment' (section 23Q).

15. The *Evidence Act 1995* (NSW) applies to Commonwealth prosecutions in state courts, the *Evidence Act 1995* (Cth) is not completely redundant. See section 5 of that

latter Act. It sets out a series of evidentiary matters that apply to both state and commonwealth prosecutions. These are mostly technical provisions.

16. Sentencing is not provided for in s.68(1) of the Judiciary Act, so for the law as it relates to sentencing, you must turn to the relevant commonwealth legislation – Part 1B of the Act.

17. There is no right to a trial by judge alone for Commonwealth offences. Section 80 of the Constitution states:

> *"The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."*

PART 2 – ELEMENTS OF OFFENCES

18. The Criminal Code became operational in 2001, and Chapter 2 was basically derived from the Model Criminal Code Officer's Committee (MCCOC) draft proposed model code of criminal laws. The MCCOC was formed by the Commonwealth government and consisted of representatives from each jurisdiction (state, territory and commonwealth). It is for this reason that it reads as if it has been drafted by committee. It was ambitious. The Explanatory Memorandum of the original Bill for the Code stated:

> *"It is hoped that the 1994 Bill will not only be the beginning of a new era for Commonwealth criminal law, by ensuring that those who are accused of Federal offences are subject of he same principles in all parts of Australia, but for the criminal law of Australia generally. It is the beginning of one of the most ambitious legal simplification program ever attempted in Australia."* (my underlining)

19. On reflection, it appears that that ambition was misplaced. Heydon J said in *CDPP v Poniatowska* [2011] HCA 43:

> *"...the proposition advanced by the responsible Minister, when the Code was introduced in to the House of Representatives in 1995, [was] that it would reflect Benthamite ideals of certainty in the criminal law. One does not often encounter a more striking illustration of the vanity of human wishes. That is because very many parts of the Court, including the parts debated in this appeal, are inconsistent with those ideals. They represent a significant regression from the condition of Commonwealth, State and Territory criminal law as it was before 1995. That criminal litigation under the Coe is conducted with any semblance of ordered justice is a tribute to the Australian legal profession."* (my underlining)

20. Chapter 2 of the Code codifies all the general principles of criminal responsibility. It is important and needs careful reading. If the Code applies to an offence, it (the

offence) must be approached on the basis that the Code comprehensively states each of the elements of a criminal offence: *R v JS* (2007) 175 A Crim R 108 at [129].

21. Chapter 2 provides that an offence consists of both 'physical elements' and 'fault elements', rather than actus reus or mens reea. Proof of the commission of a Commonwealth offence now requires proof of the 'physical element/s' of an offence together with the applicable 'fault element/s' for each physical element.

22. Physical elements under the Code may be either conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs[2]. Fault elements under the Code may be either intention, knowledge, recklessness or negligence[3].

Elements of a Criminal Offence under the Commonwealth Code			
Physical elements	**Section**	**Fault Elements**	**Section**
Conduct (a) act (b) omission (c) state of affairs	4.1	**Fault** 1. intention 2. knowledge 3. recklessness 4. negligence	 5.2 5.3 5.4 5.5
Circumstances (in which conduct or a result of conduct occurs)	4.1(1)	5. dishonest or other specific forms of fault	5.1
Result of conduct	4.1(2)	**Liability without fault** (a) strict liability (b) absolute liability	 6.1 6.2

23. It gets complicated:
    a. Each physical element must have a corresponding fault element;
    b. Where the law creating an offence does not specify the fault element relevant to each of the physical elements, then section 5.6 of the Code will supply a 'default fault element'. Which 'default fault elements' applies will depend on the particular physical element relied upon:
        i. Conduct = Intention
        ii. Circumstance or result = recklessness, but where recklessness is the fault element, proof of intention, knowledge or reckless will suffice. (section 5.4(4))

24. Once the elements have been identified, they must then be interpreted. Some are defined in the Code itself, some are not.

[2] Section 4.1 of the Code
[3] 5.2 of the Code

***CDPP v Poniatowksa* [2011] HCA 43**

- The CDPP alleged that the accused failed to report employment income to Centrelink – a total of $71,502 she had received from her employer. This meant she was overpaid the Parenting Payment Single by Centrelink in the amount of $20,162.58.
- She pleaded guilty to section 135.2(1) of the Code. She was convicted and sentenced to a 21-month suspended sentence. She appealed against sentence, and then against sentence and conviction to the Supreme Court of South Australia. That Court allowed the appeal and set aside the convictions.
- The CDPP appealed to the High Court, who upheld th Supreme Court's decision. They found that:
    - The physical element of the offence was an omission – the failure to notify Centrelink of the monies she had received from her employer;
    - Section 4.3 of the Code states that an omission to perform an act can only constitute the physical element of an offence if *"there is a duty to perform [the act] by a law of the Commonwealth, a State or a Territory, or at common law"*
    - There was no such law which provided that anyone must do such a positive act – that is disclose earnings, and none could be implied from the provision itself.

25. A common commonwealth offence in our Local Court s is pursuant to section 474.17 of the Code: - 'Using a carriage service in a way that a reasonable person would find offensive, menacing or harassing'.

26. What constitutes 'offensive' is the area of contention. The Code tries to assist – and sets out a process to assist what determining that issue in section 474.3:

> *"473.4 Determining whether material is offensive*
>
> *The matters to be taken into account in deciding for the purposes of this Part whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:*
>
> *(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and*
> *(b) the literary, artistic or educational merit (if any) of the material; and*
> *(c) the general character of the material (including whether it is of a medical, legal or scientific character)."*

***Monis v the Queen*; *Droudis v The Queen* [2013] HCA 4**

- Mr Monis etc sent a series of letters to the families of members of the ADF who had died in service. These letters were critical of the political aspects to their deployment. They offered a form of condolence but also used "intemperate and extravagant language", some of which was directly insulting.
- They were charged under s. 474.17 of the Code and convicted. On appeal the issue became oe of freedom of speech, freedom of political communication and, in particular, the question of what is 'offensive';
- The Court of Appeal found that for a communication to be offensive, it must be "calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person *in all the circumstances";*
- The High Court, adopted the Court of Appeal's reasoning and found that the kind of reaction brought about by the relevant alleged offensive communication must be 'strong' or 'significant'. The reasonable person's response must be "clearly experienced" and "deeply felt"
- Specifically, Crennan, Kiefel and Bell JJ found that, when considering the context of the word 'offensive' alongside the words 'harassing' and 'menacing' in a similar provision of the Code:

  > "… *to be offensive, a communication must be likely to have a serious effect upon the emotional well-being of an addressee*.[4]"

- It was noted that the offence carries a maximum penalty of 3 years imprisonment and that the word 'offensive' is adjacent to the words 'menacing' and 'harassing'. As Hayne J stated, "No single definition of "offensive" was or is apt for every different form of crime. Much turns on the context in which the word 'offensive' is used[5]". To that end, the level of offence to be felt by the reasonable person and to which the accused intends or turns his or her mind, must be significant.

PART 3 – SENTENCING

27. Sentencing is not one of the 'procedures' provided for in section 68(1) of the *Judiciary Act* which means that when looking at sentencing options for offenders of Commonwealth offences, you must turn to Part 1B of the Act.

28. But – it is a labyrinth. Literally. In R *v Carroll* (1991) 2 VR 509, the Court found that federal sentencing laws were 'labyrinthine'.

29. Sentencing under the Act and for Commonwealth offences generally requires practitioners to be familiar with the relevant provisions of the Act. This is because you need to make sure the Court is aware of the relevant provisions, that you understand there are differences between the NSW *Crimes (Sentencing Procedure)*

[4] Note 4 at 310 per Crennan, Kiefel and Bell JJ
[5] Note 4per Hayne J at 151

Act and the Act and, importantly, that among those areas of distinction are certain features of the Commonwealth provisions that may allow you to make submissions not usually considered.

30. This paper is not intended to be exhaustive of the points of distinction that exist between state and Commonwealth offending. See attached Table.

31. It is now established that it is quite appropriate for state courts to give significant weight to decisions made by other jurisdictions, given the importance of ensuring 'interstate consistency': *CDPP v De La Rosa* [2010] NSWCCA; *Hili v The Queen; Jones v The Queen* [2010] HCA 45.

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