**Commonwealth – differences vs Qld laws**

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| **Evidence** |

Relevant act is the **Evidence Act 1995 (Cth)** – operates under the Unfirm Evidence Act Reforms introduced in 1990s, along with NSW, ACT, NT, Tas and Vic.

Common law principles apply unless otherwise excluded.

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| **Sentencing – jurisdiction**  |

**Indictable offences** are any offences under commonwealth laws exceeding a MP of 12 months imprisonment (4G Crimes Act)

**S4J** of the Crimes Act – any indictable offence with MP of 10 years or less can be dealt with summarily with the consent of the prosecutor (in other words, defence always retain an election to proceed on indictment)

**Maximum penalties if dealt with summarily (4J(3) Crimes Act)**

* If MP is 5 years or less, MP is 12 months imp or 60 PU
* If MP is more than 5 years but less than 10, MP is 2 years imprisonment or 120 PU
* Anything above 10 years MP would have to proceed on indictment as 4J wouldn’t apply

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| **Sentencing – key differences (Crimes Act)** |

* 17B – for any offence relating to property where the value is under $2,000, a sentence of imprisonment cannot be imposed unless there are exceptional circumstances
* 17A(1) and common law – imprisonment as a last resort + shortest possible sentence generally applies
* 16BA is equivalent of our 189 PSA allowing for a form of other offences to be taken into account (can be for state or Cth offences
* Parole only imposed for when aggregate sentence over 3 years (19AB), otherwise will be by RRO scheme
* Deportation is specifically said not be a reason to not impose parole (19AK) – contrasted to *R v Abdi* in Qld
* No specific ration for non parole period, but at common law typically between 60% - 66.6% (*R v Selim* [1998] NSWC 165) and 75% typically reserved for the worst category of a case
* Parole release is automatic under the scheme (19AL to 19 AZD)
* Parole supervised by state authorities with any breaches to be referred to the AG for consideration – may be revoked under 19AU

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| **Liability – elements**  |

Part 2.2 of the Criminal Code Act 1995 (Cth) defines offences in terms of **physical element and fault element**

**Physical element** referring to the conduct or the result of the conduct

**Fault element** going towards state of mind (intention, knowledge, recklessness or negligence)

Unless the offence dictates an element, s 5.6 provides that:

* for a physical element that consists only of conduct, intention is the fault element
* for a physical element that consists of a *circumstance or a result*, recklessness is the fault element

*example from recent Stockman sentence:*

Elements of the offences

1. The minimum basis of liability in relation to charges 1-3 is as follows:
2. Physical element: defendant gives information to another person (conduct)
Fault: Intention (subsection 5.4 Criminal Code)
3. Physical element: The information is false or misleading (circumstance)
Fault: Recklessness (subsection 5.4 Criminal Code)
4. Physical element: The information was given in connection with an Australian travel document (circumstance)
Fault: Recklessness (subsection 5.4 Criminal Code).

**Regarding attempts to commit offences**

Importantly, **s 11.3** provides that for an attempt offence, 'intention and knowledge are the fault elements in relation to each physical element of the offence attempted'. If a client is charged with possessing a border controlled drug then the fault element is recklessness but where the offence is an attempt (usually because the drugs have been removed by authorities in a controlled delivery) the prosecution must prove actual knowledge of the drugs. This can be a difficult for the Crown in the absence of admissions.

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| **Party liability**  |

**Qld s 7 liability** mirrored by section 11.2 of the Commonwealth Criminal Code Act 1995 – captures offenders who have engaged in conduct which aided, abetted, counselled or procured the commission of the offence by another person. Further requires:

* The offence actually committed
* Intended that their conduct would aid etc the offence to be committed *or* can be on recklessness

However not liable under 11.2 if the party terminates their involvement before the commission of the offence and took all reasonable steps to prevent the commission of the offence.

**Qld s 8 liability** (probable consequence) loosely mirrored by s 11.2A (discusses recklessness as to principal offender committing the other offence). Common law doctrine shifted in the Cth Code in that they must realise the commission of the additional offence was a ‘substantial risk’ from the common purpose rather than a mere possibility. (*really similar to Qld position in terms of probable consequences)*

**Accessory after the fact** mirrored by section 6 of the Crimes Act.

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| **Bail**  |

**Procedurally**, s 68 of the Judiciary Act 1903 (Cth) applies state procedures to Commonwealth matters (which also confers procedural application of state laws regarding summary conviction, committal and trials and appeals).

**Bail criteria** set out in s 15AAA of the Crimes Act (equivalent of our s 16). Key considerations under that section are whether the person would be likely to fail to appear, commit a further offence, put at risk the safety of the community or case any person to suffer any harm, **conceal fabricate or destroy evidence or intimidate a witness**

Must also consider whether they were 18 or older.

A **show cause** situation is prescribed for certain offences as set out in s 15AAA (including importing marketable quantities of border controlled drugs over certain thresholds (less than 250 grams of amphetamines, cocaine or heroin), terrorism offences, offences resulting in death

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| **Time limit for prosecution (15B Crimes Act)** |

**No limit** if offence is punishable by more than 6 months imprisonment (much broader than Qld)

Otherwise, 12 months (same as Qld)

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| **Doli Incapax** |

Position is identical to Qld:

* Under 10 cannot be liable for a Cth offence (s 4M Crimes Act)
* Between 10 and 13 can only be liable if child knows htat conduct is wrong – question of fact to be proved by the prosecution (s 4N)

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| **Mental health**  |

**Application of defences**

Arises under s **7.3** of the Commonwealth Criminal Code:

(1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

 (a) the person did not know the nature and quality of the conduct; or

 (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

 (c) the person was unable to control the conduct.

Subsection 9 clarifies that it may be permanent or temporary unsoundness and does not include a condition that results from “the reaction of a health mind to extraordinary stimuli”

Must be proved on the balance of probabilities (3)

**Procedure in summary jurisdiction**

Permitted by 20BQ under the *Crimes Act* – where court satisfied person charged is suffering from mental illness or disability within state meanings, may dismiss charge or take other actions such as discharging them into appropriate care for up to 3 years

Division 9 also sets out alternative sentencing options such as hospital orders and psychiatric probation orders (whether summary or on indictment)

Where fitness is an issue at committal, the Magistrate must refer proceedings to the appropriate higher court that the trial would be heard (20B) and 20BA outlines other options for dismissal at committal

**Procedure on indictment**

**20BJ** – where acquitted because of a mental illness at the time of the offence, court must order person be detained in safe custody in a prison or hospital unless satisfied it is more appropriate to release them absolutely or with conditions.

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| **Questioning**  |

**S 23F** of the Crimes Act requires cautioning prior to questioning. Statutory caution is “you do not have to say anything but anything you do say may be used in evidence”

23B clarifies the obligation extends not only to AFP and Cth bodies but state or territory police service who are empowered to investigate and arrest for commonwealth offences

**Investigation / questioning times**

Standard investigation period is 4 hours(23C(4)(b) – (shorter than Qld 8 hours)

* For a child, Aborigine, Torres Strait Islander this is reduced to 2 hours: section 23C(4)(a)
* For these two groups off offenders the period can be extended by a judicial officer once for a period of 8 hours.
* For a terrorism suspect the above investigation periods apply but the period can be extended by a judicial officer any number of times up to 20 hours: section 23DA.
* Time outs are covered by subsection 23C(7).

**Other Rights**

Many of the rights of people arrested for Commonwealth offences are similar to those of state suspects.

* Statutory right to remain silent – s 23P
* Right to communicate with third persons: section 23G.
* Aboriginal suspects: section 23H.
* Child suspects: section 23K.
* Right to an interpreter: section 23N.
* Confessions and admissions should be tape recorded where practicable or written down: section 23V.
* Suspects who are not Australian citizens have a right to communicate with the consular office of the country – suspects must be advised of this right and cannot be questioned before they are so advised 23P

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| **Defences**  |

**S 4L** of the Crimes Act clarifies that any statutory defence does not, unless the contrary intention appears, exclude the operation of other defences (i.e. common law defences).

**Criminal Code** also specifically provides for:

* self defence (10.4)
* intervening conduct or event (10.1)
* Sudden or extraordinary emergency (10.3)
* Lawful authority (10.5)
* Duress (10.2)