

Alphabet Soup: Commonwealth Crime in Everyday Practice

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I. Introduction

1. Commonwealth offences have a varied habitat. They can be found in almost any court in the land. They can be prosecuted by police, New South Wales DPP, the Commonwealth DPP, or any other person.¹
2. Criminal lawyers may commonly encounter commonwealth offences in camouflage on a NSW Police facts sheet. In early practice I viewed them essentially as stowaways; often appearing as Sequence 2 under a more familiar NSW Crimes Act charge like common assault; perhaps the texted threat before a physical confrontation.²
3. Each Commonwealth statute relevant to criminal law is lengthy, and it can be difficult to remember, for example, whether you should be making a submission on 16AAA of the Cth Crimes Act (mandatory minimum imprisonment) or 16AAAA (victim impact statements). The provisions have been referred to in some quarters as an 'alphabet soup.'
4. It might be tempting to cower in the face of the sheer size of the Commonwealth Code, and cling to the knowledge that NSW penalties are available for Commonwealth offences,³ getting by on existing legal knowledge when appearing in Commonwealth criminal law matters. But engaging with the significant differences in the Commonwealth criminal law is essential, and can have a significant impact on the result of a matter.
5. This paper aims to help busy practitioners to get across the fundamentals with a 'quickstart guide' of sorts. I also refer to some other resources to turn to when you need more detail.

¹ *Crimes Act 1914* (Cth), s13.

² *Commonwealth Criminal Code*, 474.14: use carriage service with intent to menace/harass/offend.

³ To the extent there is no inconsistency with the federal law, because of the application of section 68 of the *Judiciary Act 1903* (Cth); see for example *Director of Public Prosecutions (Cth) v Beattie* [2017] NSWCCA 301; (2017) 270 A Crim R 556.

I. Where to start

6. The essential legislation is:
 - i. The *Crimes Act 1914* (Cth) ('the Cth Crimes Act'); and
 - ii. The Commonwealth Criminal Code, found as a schedule to the *Criminal Code Act 1995* (Cth) ('the Code').

7. Each statute is lengthy. If you ever find yourself scrolling through one of them and forgetting which one you are in, an easy way to tell is that the Cth Crimes Act is organised alphabetically (resulting in provisions such as 3ZQZB and 3ZZBG), whereas the Criminal Code is largely organised numerically (with provisions including 474.24 and 474.25).

8. Each statute provides complementary parts of the criminal justice system. In the *Crimes Act*, you'll find some offences, but also a range of other essential criminal law and procedure:
 - i. **Police powers**, including search, seizure and arrest powers in Part 1AA and 1AAA; investigation in Part 1C;
 - ii. How to work out what is an **indictable offence**, what is a **summary offence**, and what **indictable offences can be dealt with summarily**, in ss4G-4JA;
 - iii. The **age of criminal responsibility** and determining the guilt of young children, in ss4M-4N;
 - iv. **Bail**, in sections 15-15AB;
 - v. Statute of **limitations** in section 15B;
 - vi. **Sentencing**, in ss16-19AK
 - vii. **Parole**, in ss 19AKA-AZB;
 - viii. **Fitness and accused persons living with mental illness**, in ss20B-20BS;
 - ix. **Forensic procedures** in Part 1D; and
 - x. Some **offences** in ss30k-85W.

9. **Annexure 1** at the end of this paper is a comparative table that points to

which part of the Crimes Act you should turn to when you are looking for the Commonwealth equivalent of a NSW law. **Annexure 2** contains a table that serves as an approximate comparative guide, matching each Commonwealth penalty to the most similar NSW penalty.

10. In the Commonwealth Criminal Code you will find the majority of Commonwealth offence provisions, as well as:

- i. The elements of an offence, including the definitions of **intention, knowledge, recklessness and negligence** in ss 5.1 – 5.5;
- ii. The relevance of **intoxication** to proof of offences in ss 8.1 – 8.5;
- iii. **Defences**, including mistakes of fact and law (9.1 – 9.4), Claim of right (s 9.5); Duress, Emergency and Self-defence (ss 10.2-10.4)
- iv. **Attempts** to commit offences, **joint criminal enterprise, incitement and conspiracy** in ss 11.1 – 11.

11. Of course, there are references to various other acts within the two key acts, but these two acts are foundational.

II. **Indictable v Summary offences**

12. The Cth Crimes Act sets out how to distinguish indictable offences from summary ones:

- i. Indictable offences are offences punishable by imprisonment for more than 12 months: s 4G;
- ii. Summary offences are offences carrying imprisonment for 12 months or less, or no imprisonment: s 4H; and
- iii. The circumstances in which indictable offences may be tried summarily are found in s 4J and 4JA.

III. **Mental health provisions**

13. Similar to section 14 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, section 20BQ of the Cth Crimes Act allows

for a dismissal of charges in proceedings for a federal offence before a court of summary jurisdiction, if:

- i. it appears that the accused is suffering from either a mental illness or intellectual disability, and
- ii. on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under section 20BQ than otherwise in accordance with law.

14. The Cth Crimes Act also provides for a pathway for unfit persons which is distinct from the NSW legislation. That pathway is outside the scope of this paper, but is contained in Division 6 of Part 1B of the Cth Crimes Act.

IV. Children

15. Section 20C of the Cth Crimes Act expressly applies state law to children charged with or convicted of federal offences, and so the processes applicable to the prosecution of children are consistent with the law as provided by the *Children (Criminal Proceedings) Act 1986* (NSW) ('CCPA') so far as possible.

16. As with law applying to adults, Commonwealth sentencing provisions apply to children and override the CCPA to the extent of any inconsistency.⁴ In practice, this means there are a greater number of types of penalties available to a court sentencing a child for a Commonwealth offence as compared to a NSW offence.

V. Early Appropriate Guilty Plea Process

17. The Early Appropriate Guilty Plea process for NSW committals, like all other NSW law, applies only to the extent that it does not conflict with any Commonwealth laws.⁵ As a result, the process of charge

⁴ *Judiciary Act 1903* (Cth) s 68.

⁵ *Judiciary Act 1903* (Cth) s 68; see for example *Director of Public Prosecutions (Cth) v Beattie* [2017] NSWCCA 301; (2017) 270 A Crim R 556 for discussion.

certification and case conference apply to Commonwealth offences.

18. However, because the Cth Crimes Act sets out how a plea of guilty ought to be taken into account on sentence, the mandatory discounts for the utilitarian value of pleas of guilty in 25D of the NSW Sentencing Procedure Act do not apply. The court may apply discounts for the utilitarian value of the plea that are generally consistent with the discounts available under state law; but there is more judicial discretion as these are not mandatory.

19. The court may also take into account the subjective value of a plea of guilty, for example as willingness to facilitate the course of justice (16A(2)(h)), and an expression of remorse or contrition s 16A(2)(g). This is not generally given additional numerical discounts, but taken into account as a relevant matter on sentence under section 16A of the Cth Crimes Act.

20. A willingness to facilitate the course of justice is matter given broad consideration on sentence. Section 16A provides that it is a matter the court is required to take into account to the extent relevant and known to the court. It may be established by admissions to investigators, providing police with passwords or log in details, providing information about the offence or other offences, narrowing issues during court proceedings, or a myriad of other ways.

VI. What must the court take into account on sentence?

21. The overriding principle is that the court must impose a sentence appropriate to the circumstances of the offence: 16A Cth Crimes Act.

22. The Court must take into account the factors in 16A of the Cth Crimes Act to the extent they are relevant and known to the court. Many of these factors are co-extensive with the matters in the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('NSW Sentencing Procedure

Act)'. However, they are not identical. Submissions should always be made on the factors in 16A of the Cth Crimes Act and not on 21A of the NSW Act.

23. Some observations about 16A(2)(h) appear above.

24. The court must take into account the '*probable effect of a sentence or order on an offender's family or dependants*'.⁶ For Commonwealth offences there is no requirement for exceptional hardship to be demonstrated before this effect can be taken into court on sentence, as is the test in NSW matters.⁷ It will often be relevant to present evidence of this probable effect in a Commonwealth sentence.

25. A court can also take a Victim Impact Statement into account on sentence. The requirements for a Victim Impact Statement are in 16AAAA and 16AB of the Cth Crimes Act. As a general observation, there is more scope for a Victim Impact Statement to be taken into account on sentence for a Commonwealth offence than under the equivalent NSW provisions.

VII. Sentences of imprisonment

26. A court must follow the Cth Crimes Act provisions when setting a term of imprisonment. Wherever Commonwealth law applies, NSW law that is inconsistent with the Commonwealth law cannot. Two significant NSW provisions relevant to setting terms of imprisonment are imposing an Intensive Correction Order (ICO), and setting an aggregate term of imprisonment.

27. A court must not impose a sentence of imprisonment for a Commonwealth offence unless no other sentencing option is appropriate: Cth Crimes Act, s 17A(1).

⁶ S16A(2)(p)

⁷ *Totaan v The Queen* [2022] NSWCCA 75; 108 NSWLR 17 at [77], [92]-[93], [148]-[151].

Intensive Correction Orders

28. An ICO may be imposed for an offence, provided the offence type and sentence length comply with the NSW Sentencing Procedure Act. When deciding whether to make an ICO, section 66 of the NSW Sentencing Procedure Act does not apply, and neither does the process for approaching the section 66 task set out in *Stanley v Director of Public Prosecutions (NSW)* (2023) 296 ALJR 107; [2023] HCA 3. This is because section 66 requires the court to give primacy to a particular consideration of sentencing identified under NSW law.⁸ In Commonwealth sentencing law there is no hierarchy of sentencing considerations.⁹

Release forthwith

29. An offender may be sentenced to imprisonment, but released on a recognisance release order 'forthwith' Cth Crimes Act, s 20(1)(b).

Full-time imprisonment to serve

30. The significant differences to be aware of in the setting of terms of imprisonment are as follows:

- i. There is no 'statutory ratio' between the non-parole period and the head sentence (except in relation to some offences including terrorism offences: s 19AG Cth Crimes Act). There is therefore no need for a court to find 'special circumstances' in order to give a non-parole period of less than 75% of the head sentence.
- ii. For sentences of 3 years or less, a non-parole period is not ordered. Instead, an offender is released on a recognisance release order (RRO) to commence at a certain time, unless there is reason not to order an RRO: s 19AC Cth Crimes Act.

⁸ It was held to be inconsistent with 16A of the Cth Crimes Act in *Vamadevan v The King* [2024] NSWCCA 223 at [9]-[46].

⁹ *Totaan v The Queen* [2022] NSWCCA 75; 108 NSWLR 17 at [83] per Bell CJ.

- iii. Where a court determines to impose separate sentences of imprisonment for multiple Commonwealth offences totalling more than 3 years, only one non-parole period is set for all Commonwealth offences: s 19AB Cth Crimes Act.
- iv. When imposing sentences for Cth child sex offences, the sentences are to be accumulated unless there is reason not to accumulate: s19(5)-(7) Cth Crimes Act. Totality is a reason to depart from accumulation.

Aggregate Sentences

31. Aggregate sentences may be imposed in accordance with section 53A of the NSW Sentencing Procedure Act,¹⁰ but a single aggregate sentence cannot be imposed for both a Commonwealth offence and NSW offence. If you have, for example, two Commonwealth and two NSW offences, the court could impose two aggregate sentences; one for the Commonwealth offences and one for the NSW offences.

Sentencing for both Commonwealth and State offences

If an offender is sentenced to imprisonment for both Commonwealth and NSW offences, the legislative requirements under the respective statutes means that careful attention is required as there is significant scope for error. There is more than one way to approach the task.¹¹ I suggest it is preferable to:

- i. impose the NSW sentence first, aggregating if there is more than one NSW offence, with a non-parole period in accordance with the NSW Sentencing Procedure Act;
- ii. impose the Cth sentence next, aggregating if there is more than

¹⁰ *McGregor v The King* [2024] NSWCCA 200.

¹¹ *DPP v Swingler* (2017) VSCA 305; 269 A Crim R 526 at [78]. Compliance with each provision of Part 1B of the *Crimes Act 1914* (Cth), as well as Part 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), is required. The Court of Criminal Appeal reserved their decision in a judgment discussing these provisions on 5 March 2025.

one Cth offence, and setting the commencement date of this sentence to reflect a degree of concurrence or accumulation as appropriate;

- iii. impose either one non-parole period in respect of the Cth offences, or a recognisance release order, depending on the length of the term of Cth aggregate sentence.

32. Put more simply, as Arjun Chhabra of Maurice Byers Chambers says:

'start with state.'

Mandatory Minimum Sentences

33. Some child sex offences carry mandatory minimum sentences, as set out in 16AAA - 16AAC of the Cth Crimes Act. These sections also set a 'floor,' below the 'mandatory' minimum, below which a sentence of imprisonment could not be set.

34. Perhaps counter-intuitively, the applicability of a mandatory minimum sentence does not mean an offender is certain to serve time in custody. Further detail on this topic is outside the scope of this paper, but the seminal case is *Hurt v The King* [2024] HCA 8; 98 ALJR 485.

35. To summarise:

- i. the mandatory minimum applicable to an offence is not strictly mandatory; and
- ii. the discounted minimum, below the mandatory minimum, is also not mandatory; because
- iii. if that discounted minimum is three years or less, an offender could be sentenced to a term of imprisonment but be immediately released on recognisance (although there are significant hurdles in the way of such a result).

VIII. Further Resources

36. The website of the Office of the Commonwealth Director of Public Prosecutions is a useful place to find more information on the Commonwealth criminal Law, including **key legislation, guidelines and directions**, and a large publication called **Sentencing Federal Offenders in Australia – a Guide for Practitioners** ('CDPP Sentencing Guide'). Despite its title, its contents are somewhat broader than sentencing, and includes fitness to plead.
37. Consistent with the facts sheets and submissions born of the same source, the CDPP Sentencing Guide is peppered with footnotes to primary sources. These should be consulted to ensure any submissions you make to the court are well-founded.¹²

I wish you all the best in your navigatory endeavours through the Commonwealth's alphanumeric soup. The fog does start to lift with practice.

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¹² Avoiding the issue observed by Bell CJ in *Totaan v The Queen* [2022] NSWCCA 75; 108 NSWLR 17 at [101]: 'A number of other propositions or principles for which various cases were cited by the Crown did not in fact appear to be supported by the authorities referred to in the Crown's submissions at first instance, which continued to be relied upon on appeal.'

APPENDIX 1: NSW ACTS → COMMONWEALTH CRIMES ACT COMPARISON

	TOPIC	NSW ACT	CTH CRIMES ACT
1.	Police powers	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>	Part 1AA Part 1AAA Part 1C (Investigation)
2	Indictable v Summary disposition; charge limitation periods	<i>Criminal Procedure Act 1986</i>	Sections 4G – 4JA
3	Age of criminal responsibility including children 10-14 years old	<i>Children (Criminal Proceedings) Act 1987</i>	Sections 4M-4N See also sections 7.1 and 7.2 of the <i>Criminal Code</i>
4	Bail	<i>Bail Act 2013</i>	Sections 15-15AB
5	Sentencing	<i>Crimes (Sentencing Procedure) Act 1999</i>	Sections 16 – 19AK
6	Parole	<i>Crimes (Administration of Sentences) Act 1999</i>	Sections 19AKA – 19AZB
7	Fitness and mental health	<i>Mental Health and Cognitive Impairment Forensic Provisions Act 2020</i>	Sections 20B – 20BS See also section 7.3 of the <i>Criminal Code</i>
8	Forensic Procedures	<i>Crimes (Forensic Procedures) Act 2000</i>	Part 1D

APPENDIX 2: NSW PENALTIES → COMMONWEALTH PENALTIES COMPARISON

	NSW PENALTY	CTH PENALTY
1.	Section 10(1)(a) dismissal without conviction	Dismissal without conviction – s19B(c) Crimes Act 1914 (Cth)
2	Conditional release order without conviction	Discharge without conviction– s19B(d) Crimes Act 1914 (Cth)
3	Conditional release order with conviction	Bond/Recognisance Release Order (RRO)with conviction– s20(1)(a) <i>Crimes Act 1914 (Cth)</i>
4	Community Correction Order	Bond/Recognisance Release Order (RRO) with conviction– s20(1)(a) Crimes Act 1914 (Cth)
7	Intensive Correction Order (ICO)	ICO - but note s66 of the <i>Crimes (Sentencing Procedure) Act</i> and <i>Stanley v DPP (NSW) [2023] HCA 3; 278 CLR 1</i> do not apply
8	Full-time imprisonment	Imprisonment to be served immediately– s19(1), Crimes Act 1914 (Cth)
8	Fine	Fine- s16C, Crimes Act 1914 (Cth)