

SENTENCING FEDERAL OFFENDERS

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What the presentation will cover...

1. Common federal offences dealt with in the Northern Territory
2. Legislative framework and key principles
3. Sentencing options for Federal offenders/Key differences between sentencing for an offence against NT law and Cmth law
4. Federal offender sentencing scenarios
5. Useful resources

1. Federal offenders in the NT

- Wide variety of Cth offences are dealt with by NT Courts
- Most common offences dealt with in summary jurisdiction are:
 - Social security fraud
 - Offences in relation to Aboriginal Corporations
 - Fisheries offences
 - Offences against the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
 - Illegal imports e.g steroids, child pornography

Federal Offenders in the NT

- Most common offences dealt with on indictment
 - Illegal imports
 - Online child exploitation offences e.g grooming using a carriage service

2. Legislative framework and principles

- A Federal Offender is defined in the Crimes Act 1914 Cth as a person convicted of an offence against Cth law
- With limited exception the Cth parliament has refrained from investing federal courts with criminal jurisdiction over breaches of Cth law
- State and Territory Courts are invested with jurisdiction to sentence Federal Offenders under the Judiciary Act 1903 (Cth)

2. Legislative framework and principles

“Why is federal sentencing so complex?!”

Federal sentencing is a combination of:

1. Cmth legislation principally Part IB of the *Crimes Act 1914 (Cth)*
2. State and Territory statutory provisions adopted by the *Crimes Act 1914 (Cth)*
3. Common law principles which fill in the gaps when federal provisions are not complete
4. State and Territory procedural laws applied by section 68 and 79 of the Judiciary Act 1903 (Cth)

2. Legislative framework and principles

Maximum penalty on summary disposition

- Section 4J of the *Crimes Act 1914* (unless Cmth legislation creating the offence specifically provides for)
- Where the offence is punishable by imprisonment not exceeding 5 years – max 12mths imprisonment/ fine not exceeding 60PU
- Where the offence is punishable by impt exceeding 5 yrs but not exceeding 10yrs – max 2 yrs impt and/or 120 penalty units

2. Legislative framework and principles

Part IB Crimes Act 1914

- The principles applicable to sentencing federal offenders are to be found in Part IB of the Crimes Act 1914 (contrast with section 5 of the Sentencing Act NT)
 - Overarching sentencing principle, s16A(1) of the *Crimes Act 1914*
- “...a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence”
- Check list of factors the Court **must** take into account is found in ss.16A(2). Includes nature and circumstance of the offence, plea of guilty, prospect of rehabilitation, specific deterrence and need for adequate punishment
- General deterrence is not included in ss.16A(2) but is to be taken into account (*DPP v El Karhani* (1990) 97 ALR 373)

3. Sentencing options for Federal Offenders

1. Bond without conviction – Section 19B of the Crimes Act 1914
- Key decision is *Federal Commissioner of Taxation v Baffsky* [2001] 192 ALR 92

Differences between section 8 of the Sentencing Act NT and section 19B

- Section 19B is more limited than the NT provision. It is a two stage test. The court must be satisfied:
 1. that having regard to the Defendant's character, antecedents, age, health or mental condition, the extent to which the offence is trivial in nature or the extent to which the offence was committed under extenuating circumstances
 2. it is **inexpedient to inflict any punishment or to inflict any punishment other than a nominal punishment**

3. Sentencing options for Federal Offenders

Difference between section 8 of the Sentencing Act NT and section 19B

- s.19B of the *Crimes Act* 1914 does not leave the court free to make any order it is otherwise authorised to make in respect of the offender.
- Under s.19B, a court may only dismiss the charge/s or discharge the person upon entering into a bond
- Breach action in respect of bond taken pursuant to s20A of the *Crimes Act* 1914

Sentencing options for federal offenders

2. Fine

- S.4AA currently defines a penalty unit as \$170 (prior to 28 December 2012 was \$110)
- Before imposing a fine, the court must take into account the financial circumstances of the person: s.16C *Crimes Act*

Difference with NT Offenders

- Cannot impose a fine without recording a conviction

Sentencing options for Federal offenders

3. Bond with conviction - s.20(1)(a) of the *Crimes Act 1914*

- The court orders the release of the offender upon giving security, with or without sureties, by recognisance will comply with conditions
- Maximum of 5 years to be of good behaviour
- Maximum of 2 years for other conditions e.g probation
- Community Service cannot be made a condition of a s.20 bond (*R -v- Shambayati*)
- Breach action is taken pursuant to s.20A

3. Sentencing options for Federal Offenders

4. Community based orders
 - S.20AB of the *Crimes Act 1914* makes specified Territory sentencing options available to Federal Offenders
 - Community based orders are “picked up” by s.20AB of the *Crimes Act 1914*
 - The order is made pursuant to s.20AB(1) of the *Crimes Act 1914*, applying s.39B of the *Sentencing Act (NT)*
 - Section 39E & s39F *Sentencing Act (NT)* contains the mandatory and discretionary conditions of such an order
 - Breach action is taken under s.20AC

3. Sentencing options for Federal Offenders

5. Community work order
 - S.20AB of the *Crimes Act 1914* makes specified Territory sentencing options available to Federal Offenders
 - Community based orders are “picked up” by s.20AB of the *Crimes Act 1914* (is prescribed in regulation 6 of the *Crimes Regulations 1900*)
 - The order is made pursuant to s.20AB(1) of the *Crimes Act 1914*, applying s.34 of the *Sentencing Act (NT)*
 - Breach action is taken under s.20AC

3. Sentencing options for Federal offenders

6. Home Detention order
 - S.20AB of the *Crimes Act 1914* “picks up” section 44 of the Sentencing Act NT (is prescribed in regulation 6 of the Crimes Regulations 1900)
 - The order is made pursuant to s.20AB(1) of the *Crimes Act*, applying s.44 of the *Sentencing Act (NT)* and related provisions.
 - The combined effect of s.20AB of the *Crimes Act* and s.46 of the *Sentencing Act (NT)* is that one home detention order can be made in substitution of multiple sentences of imprisonment
 - Breach action is taken under s.20AC

3. Sentencing options for Federal Offenders

7. Community Custody Order
 - This sentencing option is available to federal offenders pursuant to s.20AB of the *Crimes Act 1914* which “picks up” section 48A of the *Sentencing Act (NT)* (is prescribed in regulation 6 of the Crimes Regulations 1900)
 - Breach action is taken under s.20AC of the *Crimes Act 1914 (Cth)*

3. Sentencing options for Federal Offenders

8. Imprisonment

- Can only be imposed where a court is satisfied that no other penalty is appropriate in the circumstances of the case s.17A *Crimes Act*
- The court may impose a suspended sentence released forthwith or after serving a period of impt by imposing a recognisance release order pursuant to s.20(1)(b) of the *Crimes Act 1914*
- Where the sentence of imprisonment is **greater than 6 months but does not exceed 3 years**, the court must make a recognisance release order under s.20(1)(b) and must not fix a non-parole period: s.19AC (can decline to order recog if satisfied is inappropriate but must state reasons)
- If the sentence is greater than 3 years a non-parole period or a recognisance release order must be ordered unless the court is satisfied that such an order is inappropriate and must state reasons (s.19AB)
- A court may decline to make a recognisance release order for sentences that do not exceed 6 months (s.19AC(3))

3. Sentencing options for Federal Offenders

Differences with NT Sentencing Act

- In contrast with section 40 of the NT Sentencing Act for Cmth offenders the Court cannot simply “suspend” a period of impt but rather must make either a non-parole period or a recognisance release order
- In contrast with section 54 of the NT Sentencing Act for Cmth offenders there is no minimum non-parole period. The Court must set the minimum time that justice requires the person serve, having regard to all the circumstances of the offence *Hili v The Queen; Jones v The Queen* [2010] HCA 45

3. Other differences

Children

- Section 20C of the *Crimes Act 1914* incorporates all Territory sentencing options for young persons where the federal offender is a child. Therefore the full range of Territory and Federal sentencing options are available for federal offenders who are children. Few Cmth offenders are children.

Mental illness/Intellectual disability

- The *Crimes Act 1914* includes a regime of sentencing options in relation to persons suffering from mental illness and intellectual disability – see section 20BQ-section 20BY.

4. Sentencing Scenarios

Scenario 1

- My client is charged with the following offences:
 - ▣ Possess child pornography (s125B Criminal Code NT) (10 years)
 - ▣ Use carriage service to procure a person under age 16 to engage in sexual activity (s474.26 Criminal Code Cth) (15 years), and
 - ▣ Use carriage service to transmit child pornography (s474.19 Criminal Code Cth) (15 years)

4. Sentencing Scenarios

What sentencing issues arise?

- CDDP and NT DPP have joint trial arrangement, enabling both agencies to prosecute against laws of both the NT and the Cth
- The NT offence must be sentenced under the *Sentencing Act* (NT)
- The Cth offences must be sentenced under the *Crimes Act 1914* (Cth)

4. Sentencing Scenarios

Jurisdiction

- NT offence capable of being dealt with summarily; Both Cth offences can only be dealt with on Indictment (s4J *Crimes Act*)

4. Sentencing Scenarios

Can the sentences be aggregated?

- For offences dealt with summarily: Cannot aggregate if not under same offence provisions (s4K(3) and (4))
- For offences dealt with on Indictment: s52 *Sentencing Act* (NT) enables aggregate sentence for federal offences to be imposed upon federal offenders sentenced in the NTSC via operation of s68(1) *Judiciary Act* 1903 (Cth)
- There is no provision which allows for a "combined" State and Cmth sentence. Separate sentences must be imposed though they can be served concurrently.

4. Sentencing Scenarios

Victims of Crime

- Victims levy applies to the NT offence
- No victims levy applies to the Cth offences
- Victim of crime can make an impact statement (s16AB) and impact statement to be made to the court (s16A(2)(e))
- Court can order that offender make reparation to any person in respect of any loss suffered or expense incurred by reason of the offence: s21B *Crimes Act* 1914

4. Sentencing Scenarios

Scenario 2

My client is charged with importing a border controlled drug into Australia contrary to section 307.3 of the Criminal Code. He is residing in Hobart. He wants to plead guilty and provide assistance to law enforcement authorities.

4. Sentencing Scenarios

Where can he be sentenced?

- Different issues depending on whether will be dealt with on indictment or summarily

On indictment

If a Commonwealth offence is to be dealt with on indictment as a **trial**, then the trial must take place in the state where the offence was committed (section 80 of the Constitution).

5. Sentencing Scenarios

- If the Defendant intends to plead guilty there is more flexibility.
- State and Territory courts can hear a **plea** on indictment where the accused was committed by a Magistrate in that State/Territory on that charge and at which committal the accused pleaded guilty regardless of where the offence was committed (Subsections 68(2), (5) and (7) of the *Judiciary Act 1903*, *Pinkstone* (2000) 117 A Crim R 111)
- CDPP will consider the circumstances of each case when determining where the prosecution should proceed

5. Sentencing Scenarios

Summarily

- The CDPP can choose where to commence proceedings regardless of where the offence was committed.
- The CDPP will consider the circumstances of each case when determining where the prosecution should proceed.

4. Sentencing Scenarios

Co-operation

- Under Commonwealth law past and future co-operation is dealt with differently
- Past co-operation is to be taken into account under s. 16A(2)(h) of the *Crimes Act 1914*
- The Court is not required to specify the discount given
- Future co-operation is taken into account generally and s.21E of *Crimes Act 1914* applies

4. Sentencing Scenarios

- Section 21E of the *Crimes Act 1914* provides that where a federal sentence or non-parole period is reduced because the offender has undertaken to co-operate with authorities in future proceedings the court must specify the sentence that would have been imposed but for that undertaking

4. Sentencing Scenarios

- Sub-sections 21E(2) and (3) of the Crimes Act 1914 provide a mechanism which enables the DPP to appeal against the inadequacy of a “reduced sentence” if the Offender, without reasonable excuse, does not co-operate in accordance with the undertaking.
- Client will be asked to sign a s.21E undertaking promising to provide the future co-operation and provide a statement

Conclusion

On 12 July 2004 the AG requested the Australian Law Reform Commission to conduct a review of Part IB. The Commission published its report “Same Crime, Same Time” in April 2006.

At paragraph 2.13 of the report the ALRC noted some of the criticisms of Part IB to be that it is too complex, is ambiguous, lacks clarity, is internally inconsistent, is convoluted and confusing, opaque and unnecessarily time consuming, complicated and unnecessarily detailed, a legislative jungle and labyrinthine

Cmth sentencing is not easy – each matter needs to be carefully worked through

Useful Resources

- Crimes Act 1914
- Federal Sentencing in Victoria (CDPP website www.cdpp.gov.au)
- Commonwealth sentencing database (www.njca.com.au/sentencing)
- Odgers, Stephen, "Sentence: the law of sentencing in NSW courts for State and Federal Offenders", 2012.