

PROSECUTING A REGULATORY OFFENCE:

ASSESSING A BRIEF AND PREPARING A SUMMARY HEARING

Lyma Nguyen, Barrister

LLM | LLB | Grad Dip LP | BA



CLE for staff of Attorney-General's Department (NT)

29 July 2014

Overview



- **Target Audience and objectives**
 - What should be in a Brief of Evidence?
 - Assessing a Brief of Evidence
 - Drafting Charges
 - General principles of criminal responsibility
- **Example – prosecuting an offence under s20A *Education Act***
 - Does Part IIAA Criminal Code apply?
 - Strict liability offence – Offence Breakdown
 - Definitions and context
 - Prosecution test and standard of proof
 - Drafting charges – choice of charges, particulars, duplicity etc
 - Drafting facts
- **Preparing a Summary Hearing**
 - Prosecutorial duties
 - Preparing conduct of a summary hearing
 - Briefing Counsel

Target Audience

- **About Presenter**

- Worked at CDPD six years, Head Office and NT Prosecutions
- Practising at William Forster Chambers, Darwin

- **Target Audience**

- Investigators (various NT agencies)
- Legal Officers (AGD) / Summary Prosecutors

- **For investigators:**

- What should be in a Brief of Evidence?
- Role in the prosecution process

- **For Legal Officers**

- How to Assess a Brief of Evidence
- Preparing a Summary Hearing

What should be in a Brief of Evidence



- **Contact details of investigator**
- **Referred/recommended charge**
 - Helpful as investigator may be more familiar with their agency's legislation than legal officers
 - Legal officers to determine charge(s) against evidence available
- **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 interest to the prosecutor
 - Outstanding evidence yet to be gathered (notes on matters affecting admissibility)
 - Antecedents etc of the person of interest
- **Evidence**
 - Ordered in a meaningful/structured/chronological way
 - Evidence should be admissible – witness statements with exhibits annexed
 - Statements should have the correct jurat – important for committal proceedings where statements used in lieu of oral testimony

How to Assess a Brief of Evidence

- **Re-order the brief**

- Types of evidence (eg. identity of defendant; financial records/bank statements; departmental documents)
- If it is a large brief, use tabs, coloured highlighters etc

- **Is the evidence admissible?**

- 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
 - cf CDDP approach where threshold for meeting “reasonable prospects” is more than a prima facie case – requires consideration of admissibility of evidence and any av
 - Prosecution burden of proof: beyond reasonable doubt

- **Public interest factors**

- See NT DPP Prosecution Guidelines – clause 2.5 – for non-exhaust



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.*

General Principles of Criminal Responsibility

- **Part IIAA** (Criminal responsibility for Schedule 1 offences and declared offences) Criminal Code Act (NT)
 - Applies to Schedule 1 offences and declared offences, committed on or after commencement of this Part (20 Dec 2006)
 - “Declared offences” = offences which declare that Part IIAA apply (dictionary)
 - Part IIAA covers:
 - **Elements** of offence (physical and fault elements)
 - **Physical elements** = conduct; result of conduct or circumstance in which conduct or its result, occurs
 - **Fault elements** = intention, knowledge, recklessness, negligence
 - **Strict liability and absolute liability**
 - Circumstances in which there is **no criminal responsibility** (lack of capacity; intoxication etc)
 - **Defences** (mistake or ignorance of law; mistake of fact; claim of right; intervening conduct; duress; sudden or extraordinary emergency; self defence; lawful authority;
 - **Extensions of criminal responsibility**: attempt; complicity and common purpose; innocent agency; incitement; conspiracy etc

Strict Liability – s43AN *Criminal Code* (NT)

43AN Strict liability

(1) If a law that creates an offence provides that an offence is an offence of strict liability:

- (a) there are **no fault elements for any of the physical elements** of the offence; and
- (b) the **defence of mistake of fact under section 43AX is available.**

(2) If a law that creates an offence provides that strict liability applies to a particular physical element of an offence:

- (a) there are no fault elements for that physical element; and
- (b) the defence of mistake of fact under section 43AX is available in relation to that physical element.

(3) The **existence of strict liability does not make any other defence unavailable.**

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)

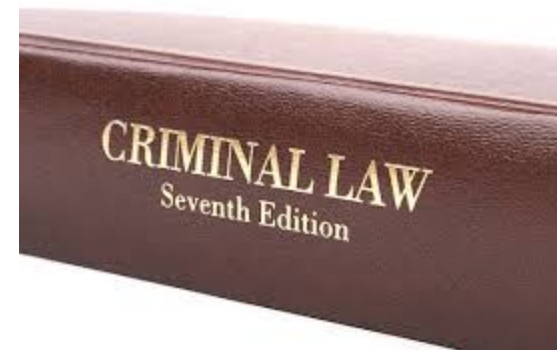
Fault: strict liability – s20A(3)

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
- (6) None of the exceptions under s20A(4) apply

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!)



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

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

Prosecutorial Duties

- See *NT DPP Prosecution 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

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**

Briefing 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?



Contact:

LNguyen@williamforster.com

(08) 8982 4700

www.williamforster.com