FUNDAMENTALS OF COMMONWEALTH CRIMINAL LAW

A paper prepared and delivered for the Continuing Professional Education Seminars for the College of Law-14 September 2011 by Caroline Dobraszczyk, Barrister

1.MAIN LEGISLATION

- Criminal Code Act 1995-this Act in effect comprises of a Schedule which contains the Criminal Code and has effect as a law of the Commonwealth. The Code sets out the general principles of criminal responsibility, which includes how elements of an offence are analysed-physical and fault elements; circumstances in which there is no criminal responsibility-e.g. lack of capacity, intoxication; extensions of criminal responsibility-e.g. attempt and conspiracy; corporate criminal responsibility and proof of criminal responsibility. It also contains the bulk of Commonwealth offences including terrorism offences, fraud, bribery, war crimes, slavery/sexual servitude, trafficking and importing narcotics, money laundering and computer offences.
- Crimes Act 1914-this Act contains police powers of search and arrest including specific sections dealing with terrorism offences, controlled operations, principles in relation to sentencing, forensic procedures, and some offences-e.g. offences relating to the administration of justice and child sex tourism.
- Other Commonwealth legislation-there are various other Commonwealth Acts which contain offences which are prosecuted-e.g. Part 2 Div 12 of the Migration Act 1958 which sets out offences in relation to entry into, and remaining in, Australia, including "people smuggling" offences; Bankruptcy Act 1966; Corporations Act 2001; Copyright Act 1968; Australian Passports Act 2005; Division 1 Part IV of the Competition and Consumer Act 2010.
- Proceeds of Crime Act 2002-this Act provides a comprehensive scheme to trace, restrain and confiscate proceeds of crime against Commonwealth law. In some circumstances it can be used to confiscate the proceeds of crime against foreign law or the proceeds of crime against a State law (if those proceeds have been used in a way that contravenes Commonwealth law). The Act provides for two streams of recovery action: a conviction based stream, which is based on securing a conviction against the person and a civil based stream under which recovery action can be taken independently of the prosecution process.

2. THE CONSTITUTION-sections 51, 80 and 109

Section 51

An important aspect of Commonwealth criminal law is to understand the Constitutional basis for the source of power to enact Federal criminal laws. Essentially, the source of power is found in the express and implied incidental powers in s51 of the Constitution (as well as some other express provisions in the Constitution). Section 51 states that:

> "*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.....*"

The section then sets out various subject matters as well as incidental powers which must be linked to any Federal legislation in order for the legislation to be valid. Some examples of heads of power which are relevant to Federal criminal laws are:

- (ii)-taxation.....
- (v)-postal, telegraphic, telephonic, and other like services
- (x)-fisheries in Australian waters beyond territorial limits
- (xvii)-bankruptcy and insolvency
- (xviii)-copyrights, patents of inventions and designs, and trade marks
- (xx)-foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- (xxiii)-invalid and old-age pensions;
- (xxiiia)-the provision of maternity allowances, widow' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits...benefits to students and family allowances;
- (xxiv)-the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxvii)-immigration and emigration;
- (xxviii)-the influx of criminals;
- (xxix)-external affairs;
- (xxxix)-matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

For example-in *R* v *Tang* 249 ALR 200 the High Court held that various "slavery" offences in the Criminal Code, were enacted pursuant to, and sustained by, the external affairs power of the Constitution-see [19]-[35]. At [34]:

"*In the result, the definition of "slavery" in s270.1 falls within the definition of Art 1 of the 1926 Slavery Convention, and the relevant provisions of Div 270 are reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under that convention. They are sustained by the external affairs power...*"

Section 80

Another section of the Constitution highly relevant to Commonwealth prosecutions is section 80 which is headed "Trial by jury" and 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.*"

Some of the main cases dealing with section 80 are:

- *Kingswell v the Queen* (1985) 159 CLR 264-where it was held that section 235 of the Customs Act 1901, which gave a trial judge the power to determine whether certain facts exist in order to determine the sentence, did not offend section 80 as the jury still had the function of deciding whether or not the accused had committed the offence. Further, that the section applies to trials on indictment but it is for Parliament to determine whether any particular offence shall be tried on indictment or summarily.

- *Cheatle v the Queen* (1993) 177 CLR 541-trial by jury require a unanimous verdict-laws in relation to majority verdicts, which are permitted in some States, cannot be applied to trials of Federal offences. This case also refers to *Huddart, Parker &Co Pty Ltd v Moorehead* (1909) 8 CLR 330, where the "essential features" of a trial by jury were discussed-the representative character of a jury, the fact finding function under the guidance of a judge and, as confirmed in *Cheatle,* the agreement or consensus of all jurors as to the verdict.

- *Ng v the Queen (2003)* 217 CLR 521-the essential features of a jury trial are to be ascertained by considering the purpose to which s80 was intended to serve and to the constant evolution of the characteristics of a jury trial. Therefore, Victorian law that a jury of 15 be empanelled with a ballot at the end of the trial to reduce the number to 12, was within section 80.

- *Brownlee v the Queen (2001)* 207 CLR 278-a jury constituted by 10 members, having been reduced to that number validly by a law of NSW, does not infringe s 80. The jury number was not "an essential feature". Gaudron, Gummow and Hayne JJ, obiter, indicated that a jury of less than 10 may be contrary to s80.

- *Cheikho v the Queen* (2008) 261 ALR 57-a certificate under the Telecommunications (Interception and Access) Act 1979, being prima facie evidence of an illegal act, does

not impinge upon the separation of powers or upon any essential characteristic of a trial by jury.

- *The Queen v LK and the Queen v RK* [2010] HCA 17-the Court of Criminal Appeal could validly exercise a statutory jurisdiction (section 107 of the Crimes (Appeal and Review) Act 2001 (NSW)) to hear and determine an appeal against a directed verdict of acquittal on an indictment for an offence against the Commonwealth. It was held that such an appeal, which turned solely of questions of law, did not infringe upon any of the essential functions of trial by jury.

Section 109

Another important section in the Constitution for Federal criminal law practioners is section 109. This section is headed "Inconsistency of laws" and states that:

> "*When a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

See for example *Dickson v the Queen [2010] HCA 30* where it was held that section 321 (1) of the Crimes Act 1958 (Vic) –a State offence of conspiracy to steal, was invalid on the grounds of direct inconsistency, in circumstances where cigarettes seized by Australian Customs and stored in a storage facility leased by Customs from a company in Victoria, were stolen. This was due to the fact that the cigarettes were property belonging to the Commonwealth to which the theft and conspiracy Commonwealth laws in the Criminal Code, applied. In particular, it was found that the state law attached criminal liability to conduct which fell outside the relevant Commonwealth law, and in that sense, the state law altered, impaired or detracted from the operation of the federal legislation.

3.THE JUDICIARY ACT 1903-sections 68,70 and 70A

Section 68 of the Judiciary Act is an important section for practioners as it explains how Commonwealth criminal law cases are dealt with in State courts and how certain State legislation applies to Commonwealth matters. Section 68 (1) states that:

> *(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and their procedure for:*
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> *(a) their summary conviction; and*
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> *(b) their examination and commitment for trial on indictment; and*
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> *(c) 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.

> *(2) The several Courts of a State or Territory exercising jurisdiction with respect to:*
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> *(a) the summary conviction; or*
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> *(b) the examination and commitment for trial on indictment; or*
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> *(c) the trial on conviction on indictment;*

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

In *Williams v the King (No 2) (1934) 50 CLR 551,*Dixon J said:

"...the general policy disclosed by the enactment [is] to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice. It is, in my opinion, no objection to the validity of such a provision that the State law adopted varies in the different States."

Section 70(1) states that:

> *Where an offence against the laws of the Commonwealth is begun in one State or part of the Commonwealth and completed in another, the offender may be dealt with tried and punished in either State or part in the same manner as if the offence had been actually and wholly committed therein.*

Section 70A (1) states that:

> *The trial on indictment of an offence against the laws of the Commonwealth not committed within any State and not being an offence to which section 70 applies may be held in any State or Territory.*

A recent example of the application of section 68(1) is in relation to the amendments to the Crimes (Appeal and Review) Act 2001 NSW in relation to the removal of the "double jeopardy" effect in Crown appeals. That is, by section 68A of the Act, the discretion of the CCA in a Crown appeal against sentence to impose a lesser sentence than it otherwise would or to dismiss the appeal because of the "double jeopardy" effect, was removed. This has been held to apply to Commonwealth offences-see *Director of Public Prosecutions (Cth) v De La Rosa [2010] NSWCCA 194; R v Van Loi Nguyen [2010] NSWCCA 226.*

Accordingly, NSW legislation such as the Bail Act 1978, the Criminal Procedure Act 1986 (to the extent it is not inconsistent with any Commonwealth laws of procedure) and the Evidence Act 1995 apply to prosecutions of Commonwealth offences.

4. HOW TO ANALYSE COMMONWEALTH OFFENCES

Physical and fault elements

- Chapter 2 of the Criminal Code is headed "General principles of criminal responsibility" and sets out the basic principles of how Commonwealth offences are proven-i.e. in place of "mens rea" and "actus reas", Commonwealth offences have physical and fault elements. Physical elements are defined as conduct, a result of conduct or a circumstance in which conduct or result of conduct occurs. Fault elements are defined as either intention, knowledge, recklessness or negligence. Also, a law that creates a particular offence may specify another fault element e.g. dishonesty, belief, deception.

In terms of analysing a Commonwealth offence, some of the more important sections of Chapter 2 are:

Section 2.1

The purpose of this Chapter is to codify the general principles of criminal responsibility under the laws of the Commonwealth. *It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.*

Section 2.2

(1) This Chapter applies to all offences against this Code.

(2) Subject to section 2.3, this Chapter applies on and after 15 December 2001 to all other offences.

Section 3.2

In order for a person to be found guilty of committing an offence, the following must be proved:

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Section 4.1

(1) A physical element of an offence may be:

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

Section 5.1

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

Section 5.4(4)

If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness sill satisfy that fault element.

Section 5.6

(1) If the law creating the offence does not specify a fault element or a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Section 6.1

(1) If a law that creates an offence provides that the 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 9.2 is available.

Section 6.2

(1) If a law that creates an offence provides that the offence is an offence of absolute 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 9.2 is unavailable.

Examples

1.Section 137.2-false or misleading documents

(1) A person is guilty of an offence if:

(a) the person produces a document to another person; and

(b) the person does so knowing that the document is false or misleading; and

(c) the document is produced in compliance or purported compliance with the law of the Commonwealth.

Analysis-

the person produces a document to another person-physical element is conduct and fault element is intention-section 5.6

the document is false or misleading-physical element is circumstance and fault element is knowledge-sections 4.1 and 5.1

the document is produced in compliance or purported compliance with the law of the Commonwealth-physical element is circumstance and fault element is recklessness-sections 4.1 and 5.6(2).

2.Trafficking commercial quantities of controlled drugs-section 302.2

(1) A person commits an offence if:

(a) the person traffics in a substance; and

(b) the substance is a controlled drug; and

(c) the quantity trafficked is a commercial quantity.

(2) The fault element for paragraph (1) (b) is recklessness.

(3) Absolute liability applies to paragraph (1) (c).

Analysis-

trafficking in a substance-physical element is conduct and fault element is intention

the substance is a controlled drug-physical element is circumstance and fault element is recklessness

the quality is a commercial quality-physical element is circumstance and fault element is absolute liability

3. Membership of a terrorist organisation-section 102.3

(1) A person commits an offence if:

(a) the person intentionally is a member of an organisation; and

(b) the organisation is a terrorist organisation; and

(c) the person knows the organisation is a terrorist organisation.

(2) Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

Analysis-

Being a member of a terrorist organisation-physical element is conduct and fault element is intention

The organisation is a terrorist organisation-physical element is circumstance and fault element is knowledge.

NB-the accused has the onus of proof when relying upon the defence in s102.3 (2)-the burdon of proof is on the balance of probabilities-see s13.4.

Defences and other issues-Parts 2.3-2.5

Part 2.3 is headed "Circumstances in which there is no criminal responsibility". It sets out "defences" that are generally available, for example;

- 7.1-7.2-incapacity due to age
- 7.3-mental impairment
- 8.1-8.5-intoxication
- 9.1-9.4-mistake or ignorance
- 9.5-claim of right
- 10.1-10.5-external factors-e.g. duress, self defence

Part 2.4 is headed “Extensions of criminal responsibility” and includes the applicability of attempt, complicity and common purpose, incitement and conspiracy. Part 2.5 deals with corporate criminal responsibility.

Burdon of proof-Part 2.6

This Part is headed “Proof of criminal responsibility” and sets out the burdens of proof relevant to Commonwealth criminal law, for example;

- 13.1-sets out the legal burdon of proof on the prosecution-of proving every element of a charge and disproving any matter in relation to which the defendant has discharged an evidential burdon
- 13.2-the standard of proof on the prosecution is beyond reasonable doubt. The law may provide for a different standard of proof.
- 13.3-any burdon of proof on a defendant is an evidential burdon only
- 13.5-the legal burdon of proof on the defendant must be discharged on the balance of probabilities.

Interpretation of a Code

Some cases dealing with the interpretation of a Code are The Queen v Barlow [1996-1997] 188 CLR 1 at 31and Charlie v The Queen [1999] 199 CLR 387 at 394:

> “...it is erroneous to approach the meaning of a code with the presumption that Parliament’s purpose was to do no more than re-state the pre-existing law. The first loyalty, as it has often been put, is to the Code.”

Some of the main cases to date dealing with the application of chapter 2 principles are:

- R v Saengsai-Or (2004) 61 NSWLR 135-how to prove “intention”-at page 147, paragraph 67,”...actual knowledge is not required to establish mens rea and that knowledge or belief is relevant to proof of intention...” At page 148, paragraph 74,”...Intention to import narcotic goods into Australia may be the inference to be drawn from circumstances that include the person’s awareness of the likelihood that the thing imported contained narcotic goods.”

- Oblach v the Queen (2005) 195 FLR 212-duress-meaning of "reasonably believed"-at page 217, paragraph 23, "The issue before this Court is what Parliament intended by the words it chose in s10.2 (2) of the Criminal Code. The use of similar terminology in the development of a common law principle can be of no direct assistance in determining that issue.

- Lodhi v The Queen (2006) 199 FLR 303-use of definitions-elements to be pleaded-duplicity in terrorism cases-The applicant submitted that the offences charged failed to particularise "the terrorist act" with the required level of specificity. Further that some of the offences were duplicitous arising from the fact that each contains multiple acts. It was held that Parliament had specifically created offences where an offender has not decided ultimately, what she or he intends to do. At page 318,paragraph 66, "A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case.."At paragraph 70 "In an offence which is intended to apply before the offender has decided precisely what he or she intends to do, there is no duplicity in identifying a range of matters that may constitute a relevant 'circumstance'".

  At page 323, paragraph 90, "The references to 'intention' in each of para (b) and (c) of the definition of 'terrorist act' are not fault elements of the offence. Rather they identify the character of the action that falls within (2) of the definition. This is a physical element, being a 'circumstance'".

- Lee v the Queen (2007) 170 A Crim R 287-whether you have a physical or fault element-burden of proof-at page 288 paragraph 6, "The words 'sole or dominant purpose' are capable of constituting either a fault element or a physical element." At page 289, paragraph 10, "The words 'sole or dominant purpose' in s31(1)9b) of the FTRA refer, in my opinion, to the actuating purpose of the conduct, rather than to the 'result' of the conduct. An actuating purpose would, in ordinary discourse, be regarded as indicating 'fault' of itself."

- R v JS (2007) 175 A Crim R 108-definition of a "federal" proceeding-At page 133, paragraph 126,"...the appellant sought to draw a distinction between different kinds of elements of an offence. It invoked a distinction between 'substantive' and 'definitional' characteristics of the physical element of an offence..." It was held that this was not the correct interpretation of what was the requisite fault element for the physical element of "judicial proceeding" which was defined as a proceeding in a Federal court. Accordingly, the correct application of chapter 2 meant that the requisite fault element of 'knowledge' was applicable to 'federal judicial proceeding'

so that the Crown had to prove that the accused knew that the data could be used in a federal judicial proceeding.

- Campbell v R [2008] NSWCCA 214-physical and fault elements must coincide in time

- Onuorah v R [2009] NSWCCA 238-charge of "attempt"

- R v Tang (2008) 249 ALR 200-elements of slavery offence-intention-at page 215 paragraph 47, "The physical element was conduct (which includes a state of affairs); the fault element was intention. It was, therefore, s 5.2(1) that was relevant. A person has intention with respect to conduct if he or she means to engage in that conduct. Knowledge or belief is often relevant to intention. If, for example, it is proof of knowledge of that state of affairs that gives an act it's criminal character, then proof of knowledge of that state of affairs ordinarily would be the best method of proving that an accused meant to engage in that prescribed conduct."

- The Queen v LK; The Queen v RK [2010] HCA 17-conspiracy and money laundering-at paragraph 57, "There was debate at the haring of these appeals on the question whether s11.5(2) sets out all or some of the elements of the offence of conspiracy. Although the MCCOC report referred to "elements" in this context, s11.5(2) cannot be read as defining the physical and fault elements of the offence of conspiracy for the purpose of Divs 3,4 and 5 of the Code...The common law defines the elements of the offence by reference, albeit not without some difficulty, to the agreement as the actus reas and the intention to do an unlawful act pursuant to the agreement as the mens rea. The text of s11.5(2) (b) supports that conclusion..."

  At paragraph 72, "The Chief Justice proceeded correctly on the basis that the Code imported the common law concept of conspiracy. So a person cannot enter into a conspiracy under the Code without knowing the facts that make the agreed conduct unlawful. It was not the Crown case that either of the respondents knew that the money was proceeds of crime."

- Ansari v the Queen; Ansari v the Queen [2010] HCA 18-conspiracy and money laundering-at paragraph 26, "The requisite intention on the part of the conspirators that the offence against s 400.3(2) be committed, extends to an intention that a person

committing it will be reckless as to the fact that there is a risk that the money dealt with will become an instrument of crime. Such an intention may exist where the contemplated repository of the reckless state of mind is a third party. But if it be the alleged conspirator who is said to intend to carry out the offence, that person may intend to deal with the money with knowledge of the risk that it will become an instrument of crime. These states of mind are logically consistent and reflect the application of the extended meaning of recklessness under s 5.4(4) of the Code..."

- Poniatowska v DPP (Cth) [2010] SASCFC 19-fraud by omission-Special leave application heard in the High Court in March 2011. The decision will be important as authority as to how conduct by "omission" is to be proven. NB the definition of "engage in conduct" which is defined to include "omit to perform an act" and section 4.3-"an omission to perform an act can only be a physical element if (a) the law creating the offence makes it so..".

5.SENTENCING

Commonwealth laws provide for a separate Federal regime of sentencing federal offenders. Part IB of the Crimes Act 1914 is headed "Sentencing, imprisonment and release of federal offenders". Section 16A(2) lists a range of matters that a Court must take into account (as well as any other matters), when determining a sentence-this includes the nature and circumstances of the offence, whether there is a course of conduct, personal circumstances of any victim, any injury, loss or damage resulting from the offence, the degree of contrition, a plea of guilty, cooperation with law enforcement agencies, the deterrent effect, adequate punishment, the character, antecedents, age, means and physical or mental condition of the person, prospect of rehabilitation and effect on family or dependants.

The main principle is set out in section 16A(1) which is:

> "In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence."

Section 19 sets out how sentences may be cumulative, partly cumulative or concurrent.

Sections 19AB-19AK deal with the fixing of non parole periods and making of recognizance release orders. Note the recent cases of R v Asplund [2010] NSWCCA 316 and Hili v The Queen and Jones v The Queen [2010] HCA 45 where the High Court rejected the suggestion that there was a "norm" for non parole periods for federal offenders. (Numerous cases prior to these decisions held that the usual proportion between the non parole period and the period on parole should be in the order of 60% to 662/3%-see e.g. R v Berner (1998) 102 A Crim R 44). The High Court has emphasised that although consistency in sentencing is important, what is required is to treat like cases alike and different cases differently. Consistency of that

kind, "is not capable of mathematical expression" [49]. More recently, the cases "...have emphasised the importance of imposing a sentence appropriate to the individual offender and his or her offence"-Asplund at [26].

However, section 23AG states that the court must fix a single non parole period of at least ¾ of the sentence in offences of treachery, terrorism or treason/ sedition/espionage. Note also section 233C of the Migration Act 1958 which provides for mandatory minimum sentences and non parole periods for certain "people smuggling" offences under the Act.

Section 19B sets out in what circumstances offenders may be discharged without proceeding to conviction.

Section 20 sets out the power to order suspended sentences-section 20A deals with the powers of a court upon breach of any conditions of release under s19B or s20-and section 20AB sets out how various State sentencing alternatives may be imposed upon Federal offenders e.g. periodic detention, intensive correction orders.

Mental illness

Division 6 of part 1B deals with the situation where an offender has been found unfit to be tried in indictable matters. Division 7 deals with acquittals due to mental illness, on indictment and Division 8 deals with the summary disposition of matters when an offender is suffering from a mental illness or intellectual disability. Division 9 deals with sentencing alternatives for persons suffering from mental illness or an intellectual disability in relation to both indictable and summary matters.

State legislation dealing with the issues as to whether a person is fit to plead, is applicable-see Kesavarajah v R (1994) 181 CLR 230, as a result of sections 68 and 79 of the Judiciary Act. In R v Khaled Sharrouf (No 2) [2008] NSWSC 1450 Whealy J held at [5-7] that:

> "The question of the accused's fitness having been raised, the parties agree that there is a three –stage process to be followed. First, there is an initial determination as to fitness or unfitness. As there is no Commonwealth legislation governing the procedure to be followed on this issue, the provisions of the Mental Health (Criminal Procedure) Act (NSW) apply to this first stage. I have earlier determined that this issue may be determined on a Judge- alone basis. (R v Balajam 7 March 2008). I have also determined that the provisions of s11 of the New South Wales legislation (which require trial by Judge alone) do not infringe s80 of the Constitution (R v Balajam (No 13) 1 May 2008).
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> Secondly, in the event of a finding of unfitness, there is Commonwealth legislation dealing with the second stage process to be followed...
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> The third stage process arises if a prima facie case has been established and the Court does not otherwise determine that the charge should be dismissed. In that situation, the Act imposes on the Court the need to make a

determination as to whether the accused is likely to be fit within a 12 month period..."

Guideline Judgments

Guideline judgments issued under NSW State legislation do not apply to Commonwealth matters. In Wong v the Queen; Leung v the Queen 207 CLR 584 at [31] Gleeson CJ said:

> "... making due allowance for all the qualifications with which the guidelines were accompanied, there is a substantial risk that they may result in an approach to sentencing which is inconsistent with the requirements s16A of the Crimes Act 1914(Cth). In so far as they are a mere compilation or classification of sentencing information, then they are either accurate or inaccurate, helpful or unhelpful. But they are clearly intended to be more than that. The effect they will have, is to constrain the exercise of sentencing discretion. This is a risky undertaking when there is a federal statute which spells out in detail the matters to be taken into account by a sentencing judge.....In particular, the guidelines, in their specificity, and in the significance they attach to the objective fact of the quality of heroin imported, which is broken down into subcategories which have no statutory foundation, are likely to lead to error."

Costs

The Costs in Criminal Cases Act 1967(NSW) does not apply to Commonwealth trials- Solomons v District Court Act (NSW) (2002) 192 ALR 217.

CONCLUSION

It can be seen therefore that federal criminal law has aspects to it which require some very different considerations than State criminal law and careful analysis of federal charges and jurisdictional issues should occur by practioners when acting in these matters.

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