



Commonwealth Crimes

What all practitioners need to know

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Resources

- Criminal Code – hyperlinked version through JIRS, or download from [Federal Register of Legislation](#)
- Sentencing Guide, CDPP, Edition 7.2
- Prosecution Policy, CDPP
- CDPP's unfitness to be tried/to plead guide
- Commonwealth Criminal Law Third Edition by Troy Anderson SC, DCJ
- Judicial Commission's Sentencing Bench Book on Sentencing Commonwealth offenders



The basics

Summary practice

Summary/indictable

Sentencing options

Use of s20(1)(b) recogs

Specific bail provisions for CAM and terrorism in s15AA, 15AAA, 15AB.

Mental health applications – s20BQ and s20BV

Indictable practice

- EAGP discount regime does not apply.
- No judge alone trials, no majority verdicts
- Sentences of 3 years and under – no parole
- Sentences of over 3 years – parole
- One non-parole period for multiple sentences
- Parole is very different!
- Fitness is different
- Mandatory sentences and mandatory minimums



Important sections Crimes Act



- **s4G-J** – summary disposal/on indictment
- **s15AA, AAA, AB** – bail for terrorism offence/advocating terrorism – exceptional circumstances, child sex offences – “circumstances exist” to grant bail.
- **s16A** – equivalent of s21A C(SP)A
- **s16AAA** – mandatory minimum sentences for child sex offenders
- **s17A** – gaol threshold
- **s19AB, AC** – non-parole period (total term of over 3 years) v recognisance release order under s20(1)(b)
- **s19AKA** onwards – parole, revocation of parole
- **s19AHA** – sentencing errors
- **s20** recogs
- **s20AC** – ICO breaches go before the court, not SPA
- **s20BQ** – summary mental health applications
- **s20BV** – psychiatric probation orders



There is no election!

Anything with a maximum penalty of **12 months or over is indictable**: s4G of the *Crimes Act 1914* (Cth).

BUT a matter with a **maximum penalty of 10 years or less is capable of summary disposal** with the **consent** of the prosecution and the defence: s4J(1).

Anything with a **maximum penalty of over 10 years is not capable of summary disposal** and is strictly indictable.

Where dealt with summarily:

If the maximum penalty is 5 years or less the maximum penalty in the Local Court is 12 months or a fine of up to 60 penalty units. (s4J(3)(a)).

If the maximum penalty exceeds 5 years but does not exceed 10 years, the maximum penalty in the Local Court is 2 years or 120 penalty units. (s4J(3)(b)).

Section 20BQ

- No specific fitness provisions for summary matters.
- Section 20BQ rough equivalent to s14.
- Suffering from mental illness within meaning of civil law of the State, or ID.
- More appropriate to deal with the person this way than according to law.
- Dismiss charge and discharge into care of responsible person unconditionally or subject to conditions for period of up to 3 years, or attend upon a person or place for assessment or treatment or unconditionally.
- Power to adjourn, grant bail, make other orders as appropriate.
- At any time, whether or not plea entered, or if already convicted(?).
- Not require a causal link between condition and offending.
- **Unenforceable, CDPP often oppose for this reason.**
- **Section 20BV – Psychiatric probation orders(!!)**



Commonwealth sentencing options

- Dismissing the charge
- Bond without conviction
- Bond with conviction
- Fine
- Imprisonment
- Orders under State law



Bomb Threat

Dismissing the charge

- Section 19B(1)(c) of the Crimes Act
- Section 10 equivalent
- Things the court should take into account:
 - The character, antecedents, age, health or mental condition of the person
 - The extent (if any) to which the offence is of a trivial nature; or
 - The extent (if any) to which the offence was committed under extenuating circumstances

The screenshot shows the Services Australia website. At the top, there is a blue header with the 'Services Australia' logo on the left, a search bar with the text 'Search' and a magnifying glass icon in the center, and the 'myGov' logo on the right. Below the header, there is a navigation bar with links for 'Professionals', 'Businesses', and 'Community groups'. Underneath this, a secondary navigation bar lists 'Living arrangements', 'Ageing', 'Work', 'Education', and 'Health and disability'. The main content area features a breadcrumb trail: 'Home > Living arrangements > Natural disaster > Natural disaster support > New South Wales East Coast Severe Weather and Flooding, May 2025 > Australian Government'. The title of the page is 'Australian Government Recovery Payment'. Below the title, a paragraph begins with 'A lump sum payment to help people affected by New South Wales East Coast severe weather and flooding that started in May 2025'.

Bond without conviction

- Section 19B(1)(d) of the Crimes Act
- Equivalent to CRO without conviction
- Max good behaviour bond is 3 years (s19B(1)(d)(i))
- Probation or other condition, 2 years (s19B(1)(d)(iii))



Bond with conviction

- Section 20(1)(a) Crimes Act
- Similar to CRO with conviction
- The offender must give security undertaking.
- Good behaviour up to 5 years and any other conditions.
- For instance conditions under s20(1)(a)(iv) to undertake a specified counselling program – this sort of condition cannot exceed 2 years
- If condition imposed that they are subject to supervision by Community Corrections, they must also specify the condition that the person will not travel interstate or overseas without the written permission of the community corrections officer (s20(1A))



Fine

- Section 4B, 4D Crimes Act
- Available for offences punishable by fine
- But available when the offence doesn't specify a fine – s 4B(2)
- Formula to calculate max fine is 5 x maximum term of imprisonment
- Penalty Unit = \$330
- Can get term of imprisonment AND a fine



Imprisonment

- Last resort s17A(1)
- No statutory ratio except for certain offences (terrorism, treason, espionage etc) s19AG(1) – 75%
- It REALLY matters whether the sentence is above or below 3 years
- If more than 3 years, must impose a NPP
- For certain offences mandatory NPP (eg people smuggling)
- For certain offences there is a mandatory minimum head sentence (eg CAM offences where prior conviction, or certain related offences)



Orders under State law

- State options available (not all)
- Section 20AB – when sentencing a federal offender allows the court to impose a State or Territory order of a specified type.
- **Available:**
 - ICO
 - CCO
 - CRO with conviction
- **Not available:**
 - CRO without conviction
 - Section 10A
 - Fine without conviction
 - Fine and a bond as two different penalties
 - NOTE: ICO breach does not go to SPA, it follows steps in s20AC.
 - Breaches of ICO, CCO and CRO have to be called up by the CDPP.



Commonwealth sentencing options

Sentencing option	Is it available for <u>Cth</u> offences?
ICO	YES, breach <u>has to</u> be called up by CDPP and goes back before the sentencing court, not SPA.
CCO	YES, breach has to be called up by CDPP.
CRO with conviction	YES, breach has to be called up by CDPP.
CRO without conviction	NO
19B <i>Cth Crimes Act</i>	YES
20(1)(a) recognisance <i>Cth Crimes Act</i>	YES, breach <u>has to</u> be called up by CDPP.
20(1)(b) recognisance <i>Cth Crimes Act</i>	YES, breach <u>has to</u> be called up by CDPP.



Section 20(1)(b) – neglected and misunderstood!



Sentence of 3 years or less.

Release immediately or after serving a term of imprisonment.

Can have a fully or partially suspended sentence.

Good behaviour for up to 5 years.

Security undertaking by offender.

Release forthwith only in exceptional circumstances for certain offences.

Breach call up by CDPP. Range of options for breach including a fine.

Commonwealth parole: an unfair system

Lack of rehabilitative focus, more about risk

50% of Cth offenders get parole compared to nearly 90% NSW State offenders

Majority of decisions made by one man sitting in Canberra

Lack of transparency

No appeal or review

Sex offenders rarely get parole, even when not eligible for programs

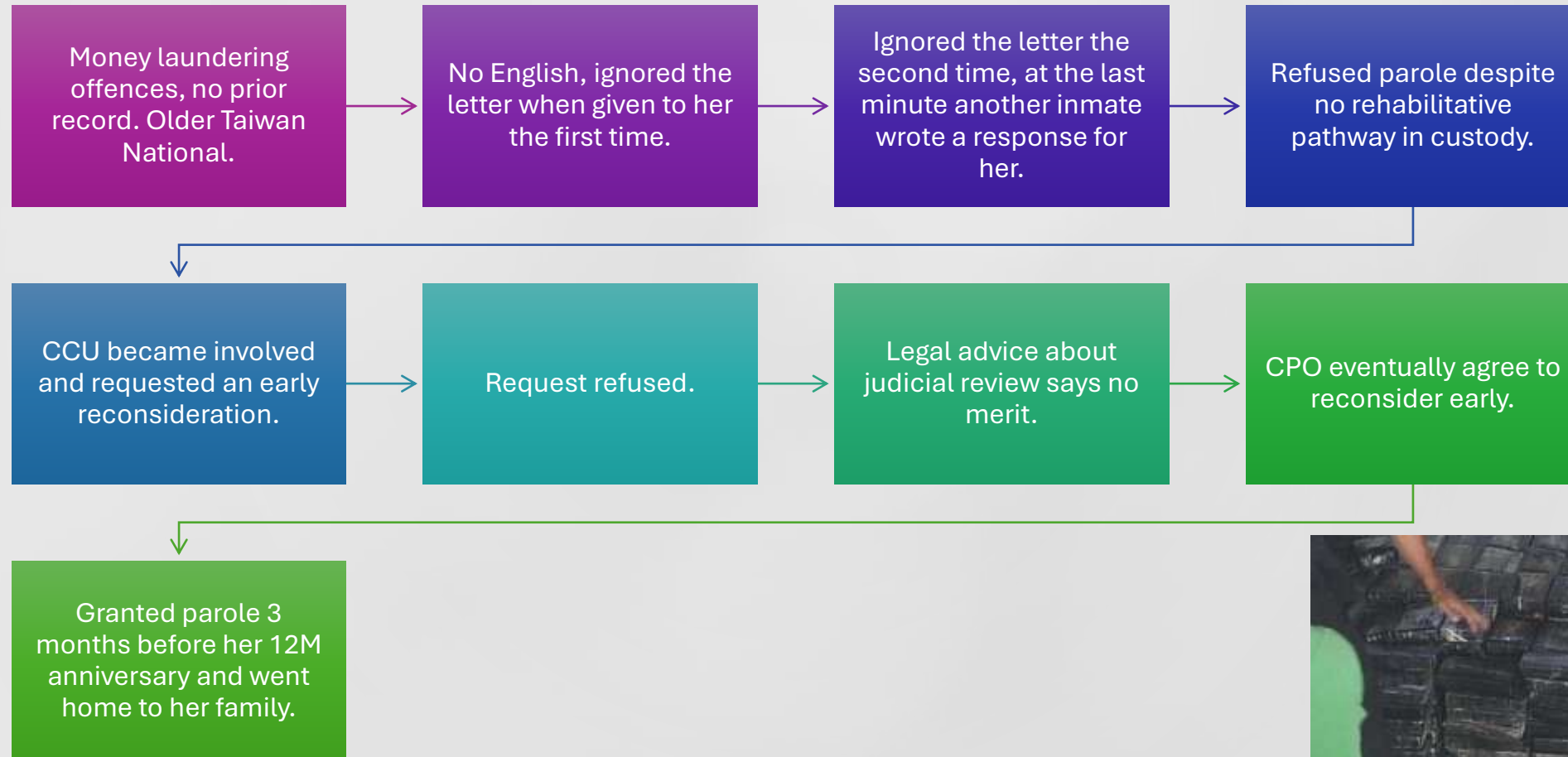


“Adverse comments” letter

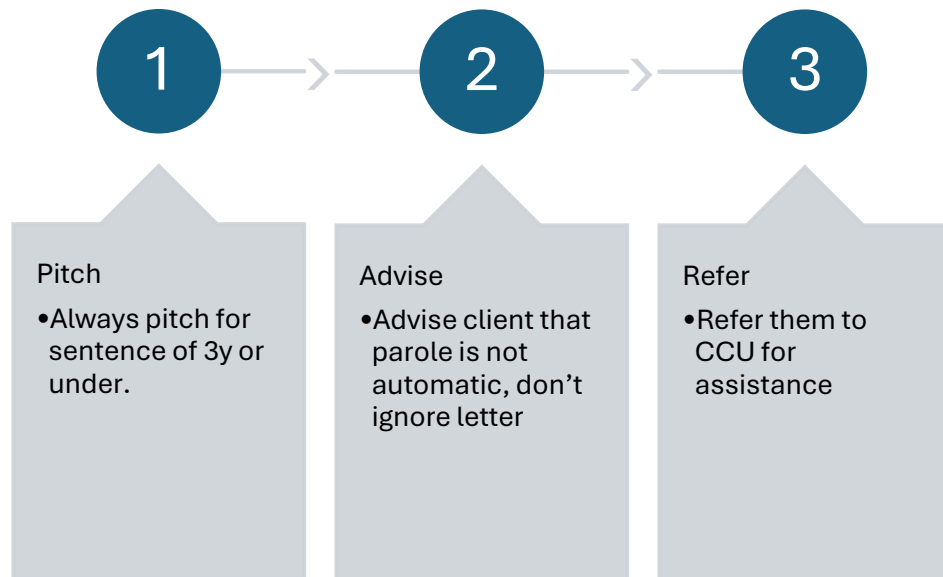
You have not provided information about how you plan to avoid association with pro-criminal individuals after your release from custody. You have also not evidenced the strategies you will use in order to maintain or develop pro-social relationships to reduce your risk of reoffending. Your lack of strategies to disconnect from pro-criminal influences could increase your risk of reoffending. It could also undermine any efforts you do make upon release to lead a law-abiding life.

Given the above, the decision-maker may determine that your release on parole at this time would not benefit your rehabilitation or lawful reintegration into the community, and would pose an unacceptable risk to the safety of the community.

An example



Cth parole take aways





Fitness – matters heard on indictment

- Fitness is determined in accordance with State procedures. Once a finding of unfitness is made, the procedures and consequences are determined by the Crimes Act 1914 (Cth).
- In NSW, that is Part 4 Div 1 & 2 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020
- Fitness test in s36
- Section 20AB Crimes Act 1914 – consequences of preliminary finding unfit

Requirement for a prima facie case

Different to State regime

- If a person is found unfit, court must determine whether there is a prima facie case: s20B(3)
- Question for judge not jury
- Unfit person may give evidence, make an unsworn statement or raise any defence, court may seek other evidence as it considers likely to assist: s20B(7)

This is not a special hearing

- Test is: A prima facie case is established if there is “evidence that would (except for the circumstances by reason of which the person is unfit to be tried) provide sufficient grounds to put the person on trial: s20B(6)



Requirement for a prima facie case

- Crown may provide the Court with a crown case statement and the brief of evidence that would be relied upon at trial
- Parties can make submissions
- If no prima facie case → dismiss charge and order release under s20BA(1)
- If prima facie case → court has the option of dismissing the charge pursuant to s20BA(2). (Same test as for s19B).
- If charge is not dismissed:
 - Person likely to become fit within 12M: s20BB
 - Person unlikely to become fit within 12M: s20BC
- Subsequent reviews by the AG
- Interesting case: Laxale by his tutor v Sydney Local Health District [2024] NSWSC 994

