

WORKSHOP EXAMPLES

Example 1:

It is alleged that BD, when an inmate of Long Bay Gaol, stabbed another inmate, V, in the head and behind the right ear, with a scissor blade fashioned into a “shiv”. BD told W, a prison guard, who witnessed the assault where the shiv was hidden, and V’s DNA was found on the shiv when it was recovered. BD said nothing to V before or at the time of the attack. The doctor who treated V’s injuries gave a statement some months ago which did not specify the depth of the wound. BD is charged with one charge under s35 Crimes Act. Both BD and V are still fellow inmates at Long Bay.

Q: What would be an appropriate offer and why?

A:

- **To prove an offence under s33, you MUST PROVE that BD “wounded or caused GBH” to V AND that BD had “INTENT to cause grievous bodily harm”.**
- **On these facts, it is clear that the PROSECUTION CAN PROVE that BD committed the assault – ID**
- **But, how CAN THEY PROVE “WOUNDING” OR “INTENT”?**
- **CREATE THE DOUBT in the mind of the ODPP re an element of the offence and point to any relevant; facts, law, directions, discretion, etc.**
- **A PLEA TO S35 OR EVEN S59 would reflect what the DPP can prove and provide sufficient sentencing scope.**

Example 2:

SC was supplying heroin on “The Block” at Redfern. Police did a controlled operation and two undercover detectives (UC’s) purchased small amounts from SC for cash on seven occasions; 22 June (twice), 24 June, 29 June, 30 June, and 6 July. On 26 July, police went back looking for someone else and SC offered them more heroin, so they bought some more. The UC’s knew SC well and distant video, taken from the top of Redfern Police Station, showed SC talking to the 2 UC’s. Police charged SC with 15 charges; 7 counts under s25(1) Drug Misuse and Trafficking Act (each with a back-up possess) and one count under s25A of Ongoing Supply.

Q: What is an appropriate plea? Why?

A:

- **s25A creates the offence of supplying a prohibited drug MORE THAN 3 TIMES IN 30 CONSECUTIVE DAYS (ie: 22 June – 6 July). 26 July sits outside that period. The offence of s25A attracts a maximum sentence of 20 years, but the whole of the criminality is wrapped up in one offence.**
- **The extra offence of s25(1) on 26 July can go on a Form One.**

EXAMPLE 3:

Two brothers sold prohibited drugs from their home at Hurlstone Park using a system of coloured balloons which corresponded to different weights. The evidence against KC, a trained accountant, consisted of the following:

1. ***An induced statement from KC’s brother, YC, that they had sold 50 grams of heroin per week from June 2002 to the time of their arrest in January 2004, and 50 grams of cocaine from November 2003 to January 2004. YC gave three statements to police. He lied in the first and disclosure by the ODPP show that he had convictions for fraud, and received a 50% reduction on his sentence to give this evidence.***

2. ***Police executed three search warrants; in August 2002, January 2003 and November 2003. The first two reveal remnants of coloured balloons with traces of heroin, and “Profit and Loss Accounts” for three weeks, showing sales of 20 grams per week. The last was just various coloured balloons with no traces of any drug.***
3. ***Telephone intercepts from December 2003-January 2004, with thousands of apparent orders from customers for “the usual”, a “big one” or a little one” and sometimes “one”, a “point”, or a “half”, of “oakie”, “Pepsi”, “harry”, “horse” with no mention of money and arrangements to deliver. An expert on drug terms gave a statement as to the meaning of these terms. KC identifies himself on the phone when making an appointment with the doctor. KC tells you his brother is a liar, but admits to dealing in cocaine and heroin.***

Q:

- a) ***What are the appropriate charges against KC?***
- b) ***Would you XX YC at committal – what are the consequences?***
- c) ***What other advantage can you extract from the ODPP?***

A:

- 1) **Two charges:**
 - a) **Supply heroin between August 2002 and January 2004 – (the period commences with the first warrant) AND**
 - b) **Supply cocaine between December 2003 and January 2004 (only the time of the TI’s – ignore the search warrant, because no drug on balloons and only co-accused’s evidence; s165 warning re YC’s evidence).**
- 2) **The defence did this and lost the 25% discount they’d have otherwise got – reduced to 15%.**
- 3) **The amount of the drug – if the judge accepted YC’s evidence, he’d sentence KC on the basis of 50 grams per week, but the agreed facts**

can assert much less than that.

EXAMPLE 4:

HW was a senior accountant at a firm in Western NSW; he was also addicted to gambling. As part of his duties to pay the company's expenses, he had unchecked access to the company's bank accounts. Over four years, he defrauded the company of increasing large amounts on 458 occasions, motivated by his gambling and to buy the affection of his wife. In total he defrauded his employer of about \$4 million. Each occasion was the subject of a charge under s178BA of the Crimes Act. He was interviewed by police and immediately broke down and admitted his wrongdoing. He has never been in trouble with the law and comes to you and wants you to keep him out of gaol.

Q: What is an appropriate offer for the ODPP?

A: NOT ONE ROLLED-UP OFFENCE – it does not provide sufficient scope for sentence. He will need a NPP of at least 3 or 4 years and a lengthy parole period, so have to give sufficient scope for sentence. FOUR CHARGES, ONE FOR EACH YEAR.

EXAMPLE 5:

The victim accountant, DL, has a client YT, who unbeknown to DL, is a drug dealer. YT enters into an abortive “money laundering” exercise with DL's brother-in-law and the brother-in-law has lost \$850K in drug money. YT decides to scare DL into compensating him by throwing acid on DL. He asks HA to help. HA hires DS to drive the getaway car and MS and RN to do the job. DS drives MS and RN to DL's home and pour HCL down his throat, from which he dies 3 weeks later. DS knew that they were instructed to scar DL, but did not think the acid would kill DL. Police wire up an informer and get good LD admissions by HA. They confront DS who collapses and

confesses all, including the identity of all but YT. DS becomes your client – what do you do?

A:

- Engineer a PLEA TO MURDER on the basis of the facts above – he knew he was part of a COMMON PURPOSE TO COMMIT GRIEVOUS BODILY HARM, so it can't be anything less than murder.
- Get the statement from DS by INDUCEMENT.
- Arrange for him to get into the SPC.
- **NB:** DS got 12 ½ years NPP, HA got 13 ½ with discounts of assistance and YT got life when he took it to trial.

EXAMPLE 6:

PS is charged with six break and enters. They were all committed over a period of three consecutive days on 6 different houses, all within about 100 metres radius. In all 6 break and enters, a plasma TV was stolen, but other property was stolen, each different for each house. He is linked to three of the break and enters by the following evidence:

- *The perpetrator called a taxi from the phone in the victim's premises and GPS navigation support to each of the taxis show that the perpetrator was dropped within 20 metres of the accused's home.*
- *The three cab drivers all say that the perpetrator told them his father was a taxi driver. PS's father was a taxi driver.*
- *The recordings on two of the three calls to the taxi company have been lost, but one can be clearly identified as the accused's voice.*
- *The remaining three are linked because they occurred on the same night as the others and were nearby.*

Q: *What is an appropriate offer to the DPP?*

A:

- Can the ODPP lead the evidence of the three with taxi calls to each of the others? It has to have “significant probative value” – is it enough probative value that they were on the same night in the same area? It is possible another thief was working that night, stealing plasmas.
- Try to get the other three knocked out.
- Offer a plea to two BE&S, with one on a Form One.

OTHER EXAMPLES, IF TIME ALLOWS:

- *An 18 year-old is charged with the (deemed) supply¹ of 13 ecstasy tablets and he admits that he had them on him, intending to supply. Police download his SMS messages on his mobile phone, which provide evidence of other arrangements to supply different drugs on other occasions.*
- *A sexual assault victim gives evidence of one count of indecent assault on one occasion, but also includes evidence of the defendant’s sexual advances on other occasions which are not charged.*
- *Your client is charged with a serious assault, causing horrific injuries to the victim which are clearly set out in a shocking colour pictures. The injuries are adequately described in the sentence facts which incorporate the victim’s account and doctor’s report.*

APPENDIX

Crimes Act 1900 No 40

4A Recklessness

For the purposes of this Act, if an element of an offence is recklessness, that element may also be established by proof of intention or knowledge.

Part 3 Division 6 Acts causing danger to life or bodily harm

¹ See ss25(1) and s29 Drug Misuse and Trafficking Act.

33 Wounding or grievous bodily harm with intent

(1) Intent to cause grievous bodily harm

A person who:

- (a) wounds any person, or
- (b) causes grievous bodily harm to any person, with intent to cause grievous bodily harm to that or any other person is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

(3) Alternative verdict

If on the trial of a person charged with an offence against this section the jury is not satisfied that the offence is proven but is satisfied that the person has committed an offence against section 35, the jury may acquit the person of the offence charged and find the person guilty of an offence against section 35. The person is liable to punishment accordingly.

35 Reckless grievous bodily harm or wounding

(1) Reckless grievous bodily harm—in company

A person who, in the company of another person or persons, recklessly causes grievous bodily harm to any person is guilty of an offence.

Maximum penalty: Imprisonment for 14 years.

(2) Reckless grievous bodily harm

A person who recklessly causes grievous bodily harm to any person is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(3) Reckless wounding—in company

A person who, in the company of another person or persons, recklessly wounds any person is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(4) Reckless wounding

A person who recklessly wounds any person is guilty of an offence. Maximum penalty: Imprisonment for 7 years.

59 Assault occasioning actual bodily harm

- (1) Whosoever assaults any person, and thereby occasions actual bodily harm, shall be liable to imprisonment for five years.
- (2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in the company of another person or persons. A person convicted of an offence under this subsection is liable to imprisonment for 7 years.

Drug Misuse and Trafficking Act 1985 No 226

25 Supply of prohibited drugs

- (1) A person who supplies, or who knowingly takes part in the supply of, a prohibited drug is guilty of an offence. [Penalty on indictment: imprisonment for a term of 15 years, or both].

25A Offence of supplying prohibited drugs on an ongoing basis

(1) **Offence provision**

A person who, on 3 or more separate occasions during any period of 30 consecutive days, supplies a prohibited drug (other than cannabis) for financial or material reward is guilty of an offence.

Maximum penalty: 3,500 penalty units or imprisonment for 20 years, or both.

(2) **Same prohibited drug not necessary**

A person is liable to be convicted of an offence under this section whether or not the same prohibited drug is supplied on each of the occasions relied on as evidence of commission of the offence.

(3) **Jury must be satisfied as to same 3 occasions of supply**

If, on the trial of a person for an offence under this section, more than 3 occasions of supplying a prohibited drug are relied on as evidence of commission of the offence, all the members of the jury must be satisfied as to the same 3 occasions in order to find the person guilty of the offence.

(4) **Alternative verdict—relevant supply offences**

If, on the trial of a person for an offence under this section, the jury is not satisfied that the offence is proven but is satisfied that the person has, in respect of any of the occasions relied on as evidence of commission of the offence under this section, committed a relevant supply offence, the jury may acquit the person of the offence charged and find the person guilty of the relevant supply offence, and the person is liable to punishment accordingly.

178BA Obtaining money etc by deception

- (1) Whosoever by any deception dishonestly obtains for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever shall be liable to imprisonment for 5 years.

Crimes Act

18 Murder and manslaughter defined

- (1)
 (a) Murder shall be taken to have been committed where the act of the accused, or thing by

him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

- (b) Every other punishable homicide shall be taken to be manslaughter.

Evidence Act 1995 No 25

Chapter 3 Part 3.6

98 The coincidence rule

- (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
- (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Evidence Act 1995 No 25

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[Chapter 1 Part 1.2 Section 4](#)

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4 Courts and proceedings to which Act applies

- (1) This Act applies to all proceedings in a NSW court, including proceedings that:
- (a) relate to bail, or
- (b) are interlocutory proceedings or proceedings of a similar kind, or
- (c) are heard in chambers, or
- (d) subject to subsection (2), relate to sentencing.
- (2) If such a proceeding relates to sentencing:
- (a) this Act applies only if the court directs that the law of evidence applies in the proceeding, and
- (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters—the direction has effect accordingly.
- (3) The court must make a direction if:
- (a) a party to the proceeding applies for such a direction in relation to the proof of a fact, and
- (b) in the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding.
- (4) The court must make a direction if the court considers it appropriate to make such a

direction in the interests of justice.

191 Agreements as to facts

(1) In this section:

agreed fact means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

(2) In a proceeding:

- (a) evidence is not required to prove the existence of an agreed fact, and
- (b) evidence may not be adduced to contradict or qualify an agreed fact, unless the court gives leave.

(3) Subsection (2) does not apply unless the agreed fact:

- (a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors representing the parties and adduced in evidence in the proceeding, or
- (b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.