

CCP OFFENCES

Drugs

Drug Misuse and Trafficking Act 1985

Possession

"Prohibited drug" → under s 3 = specified in Schedule 1 (summarised form below)

Drug	Traffickable quantity	Small Quantity	Indictable Quantity	Commercial Quantity	Large Commercial Quantity
Amphetamine	3 g	1 g	5g	250 g	1 kg
Cannabis plant	-	5 plants	10 plants	250 plants	1000 plants
Cannabis leaf	-	30 g	1000 g	25 kg	100 kg
Cannabis oil	-	2 g	10 g	500 g	2kg
THC	3 g	1g	5g	0.5 kg	2kg
Cocaine	3 g	1g	5g	250 g	1kg
Heroin	3 g	1g	5g	250 g	1kg
LSD	0.003g	0.0008g	0.005 g	0.0005 kg	0.002 kg
MDMA	3 g	0.8g	5g	0.5 kg	2 kg

Deemed possession

- s 7 Deemed possession of prohibited drug etc
 - For the purposes of this Act and the regulations, a prohibited drug, Schedule 9 substance or prohibited plant in the order or disposition of a person, or that is **in the order or disposition of the person jointly with another person** by agreement between the persons, shall be deemed to be in the possession of the person.

Summary offence

- Possession of prohibited drugs
- s 10 Possession of prohibited drugs
 - 1) A person who has a prohibited drug in his or her possession is guilty of an offence.
 - 2) Nothing in this section renders unlawful the possession of a prohibited drug by:
 - Statute, direction by Commissioner of Police, lawful subscription (personal + assist)
- **HKT** → Possession requires proof of:
 - Degree of control over item; and
 - An intention to control the item (proved by awareness of its existence); and
 - An intention to control a prohibited drug – inferred from proof of an awareness of its likely nature

Cases

- **Filipetti** = degree of control
 - Large number of persons occupying this small house → all use the room
 - Not enough evidence that the defendant had **EXCLUSIVE PHYSICAL CONTROL**

- **Dib** = degree of control
 - Must prove a **legal right to exclude all persons from the premises in which the property is situated**
 - Where there is no manual possession → on premises to which he has access
- **Amanatidis** – Intention to control
 - Prove **actual + exclusive possession** of the drug → custody or physical
- **Bush** (1975)
 - Aware at the time of the **likelihood of the existence of the substance** in question in his possession and of the likelihood that it **was a narcotic drug**
- **Baird** (1985)
 - Enough to prove the accused **BELIEVED** the substance was a prohibited drug
- **WILLIAMS** (case) → minute quantities
 - Quantity of the drug = enough to be visible to the naked eye → 'common sense and reality'
- **BUT – Paul v Collins**
 - Tablet only had minute amount of drug → **thought** to be MDMA = still satisfies

Indictable

- **Traffickable quantity** → s 29
 - Under schedule 1 = possession becomes supply – unless proved otherwise
- **Krakouer** (1988)
 - s 29 only comes into operation when prosecution proves the person was **actually in possession** of a not less than traffickable amount

Plants

- Possession of prohibited plant
 - Definition s 3 →
 - a) a cannabis plant cultivated by enhanced indoor means, or
 - (a1) a cannabis plant cultivated by any other means, or
 - b) any growing plant of the genus Erythroxylon or of the species Papaver Somniferum, Papaver orientale or Papaver bracteatum, + (c) not relevant

Supply

- Summary → waterpipes, ice pipes = s 11A
- S 40 Effect of certain representations
 - Any substance which is represented to be a prohibited drug (whether or not it is) is seemed a prohibited drug

Indictable offences

s 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.
- 2) A person who supplies, or who knowingly takes part in the supply of, an amount of a prohibited drug which is **not less than the commercial quantity** applicable to the prohibited drug is guilty of an offence.

NOTE: CL → **Carey** (case) → supply retains its ordinary meaning

Possession of traffickable quantity → **LIABLE UNDER s 25**

"supply"

S 3 definitions → **SUPPLY**

- (1) Supply includes **sell and distribute**, and also includes **agreeing to supply**, or **offering to supply**, or **keeping or having in possession for supply**, or **sending, forwarding, delivering or receiving for supply**, or **authorising, directing, causing, suffering, permitting or attempting** any of those acts or things.

Cases

- **"suffer" or "permit" supply: Jasper (2003)**
 - Element of awareness of the act → **KNOWLEDGE**
 - Element of failing to prevent the occurrence of the act by the person concerned
 - Legal capacity to control a situation and the failure to do so with the requisite accompanying state of mind
- **"offer to supply": Dendic (1987);**
 - A genuine, intended making of an offer with the intention that it is to be regarded as genuine by the offeree
- **Addison (1993)**
 - Intends the offer to the other party to be genuine
- **"cause supply": Castle v Olen (1985)**
 - More is required to constitute a 'causing; than a mere request to a friend to obtain and sell to the person charged a prohibited drug
 - Confined to cases where the prohibited act is done is done on the actual authority of the party
- **"send": Pinkstone (2004)**
 - Sending drugs does not require proof that they were received by someone
 - Innocent agents are not excused
- **"agree to supply" → s 26 conspiracy, s 27 incite to supply**
 - **Eade** → person urges another to go and obtain drugs so that the drugs may be supplied to the person doing the urging → cannot amount to incitement

"take part in"

S 6 – Meaning of **"take part in"**

- **For cultivation, supply of a prohibited plant AND manufacture, production, supply of a prohibited drug or psychoactive substance**
 - a) the person **takes, or participates in, any step, or causes any step to be taken**, in the process of that cultivation, manufacture, production or supply,
 - b) the person provides or **arranges finance** for any such step in that process, or
 - c) the person **provides the premises** in which any such step in that process is taken, or **suffers or permits any such step in that process to be taken in premises** of which the person is the owner, lessee or occupier or in the management of which the person participates.

CCP POLICY

Criminalisation

Criminal → Mala in se (Wrongful in itself), Mala Prohibita (Wrong because prohibited)

- Factors which affect the processes of criminalisation
 - Social, political, cultural & historical relativity
- **G Williams → The definition of Crime**
 - A legal wrong that can be followed by criminal proceedings which may result in punishment
 - An act that is condemned sufficiently strongly to have induced the authorities to declare it to be punishable before the ordinary courts

Justification

- **N Lacey - Legal Constructions of Crime**
 - Criminalisation framework allows accommodation of relevant practices of a variety of social actors and institutions
 - Acknowledges the relevance of a wide variety of disciplines to the analysis of these institutions
- **S Cohen – “Against Criminology”**
 - Criminalisation relates to the overall exercise of power in modern society
 - Power = centrally focussed, it is property, always operates in negative, repressive terms
 - Criminalisation = process of identifying an act deemed dangerous to the dominant social order and designating it as criminally punishable
 - Acts of conduct are deemed positive/negative, criminal/virtuous
 - The way problems are defined gives certain goals for knowing the solution
 - Defining a problem in terms of crime provides a particular notion of what counts as a solution: no crime or less crime

CONTRARY VIEW → Overcriminalisation

- **D Husak – “Overcriminalisation: The limits of the Criminal Law”**
 - Creates too much punishment
 - Many of these are unjust
 - Excessive in the sense they are imposed for conduct that every reasonable person believes our criminal codes should proscribe
 - Inflicted for conduct which should not have been criminalised
 - Punishments are too severe
 - Law exists to guide behaviour - this objective is undermined
 - The state cannot effectively stigmatize persons for engaging in conduct that few condemn and everyone performs
 - Opportunity for unjustified arrests increases - lives of ordinary citizens are more likely to be unfairly disrupted
 - Criminalisation is destructive of the rule of law - undermines the principle of legality

Law and Order

- Commonsense response to the question of what is crime is that everyone knows a crime if they see one and that a course in criminal law should by-pass this question
- **R Hogg and D Brown – Rethinking Law and Order**
 - Commonsense= built by popular and authoritative sources – assumed status
 - Elements of law and order commonsense
 - Soaring crime rates
 - "it is worse than ever" - nostalgia
 - The future is in the big cities
 - The criminal justice system is "soft on crime" and does not protect citizens
 - The "solution" is more police with more powers
 - We need "tougher penalties"
 - Victims should be able to get revenge through the courts

Penal Populism

- The competition to be 'tougher' on crime → more security (political)
- **J Pratt - Penal Populism**
 - Penal populism = product of deep social and cultural changes which extend across much of modern society
 - The rise - reflects a fundamental shift in the axis of contemporary penal power brought about by these changes
 - Tangentially linked to crime levels
 - As if the pillars on which the security and stability of modern life have been built are fragmenting
 - General fear, intolerance, suspicion, **expectation of security and order** (always disappointed)

Harm, Risk and Morality

- Only harmful acts should be criminal
- Immediate plausibility as a justification for criminalizing a given form of behaviour
- **JS Mill – "On Liberty"**
 - Whether the means used is physical force → legal penalties, OR moral coercion of public opinion
- **CONTRARY VIEW → DUFF**
 - All versions of the harm principle face the same problem → they can avoid the defect of under-inclusiveness only by so stretching the notion of harm that the principle ceases to set substantial independent constraints on the scope of the criminal law

Preventative Justice

- Criminal law = backward looking institution
 - Criminalisation of ordinarily harmless and seemingly innocent behaviour in order to allow authorities to intervene at an early stage
 - Incapacitation of suspected future wrongdoers
 - Extended sentences for past wrongdoers based on their predicted future conduct

- The challenges posed by preventative justice = go to the very core of the role of the state and the proper conception of the citizen
- **P O'Malley – "The politics of mass preventative justice"**
 - Focus on the risk of harm
 - Actuarial justice = jurisprudence of risk emerges that justifies the long-term incapacitation and risk-neutralisation of offenders
- **K Gunther - "Responsibility to Protect and Preventative Justice"**
 - Public interests and public values serve as a justification for a preventative policy
 - Culture of control primarily focuses on a strategy of 'punitive segregation'
 - Division between good and bad citizens
 - Majoritarian society = majoritarian right to protection and a corresponding responsibility to protect the majority against a minority of criminal offenders
 - Majoritarian attitude is balanced against the human rights of the minority offenders

Morality: The Hart/Devlin debate

- **P Devlin – The Enforcement of Morals**
 - Criminal law is based upon moral principle
 - Society is founded upon a fundamental agreement about good and evil
 - The way people behave and govern their lives
 - Society is not something physically held together - it is held 'by the invisible bonds of common thought'
 - Society may use the law to preserve morality in the same way it uses it to safeguard anything else that is essential to its existence
 - If there is no right to make judgments on morals - the law must find some special justification
 - There must be "toleration of the maximum individual freedom that is consistent with the integrity of society"
- **HLA Hart - Law Liberty and Morality**
 - The stock of shared moral beliefs changed from time to time
 - The burden of proof falls on those who would prohibit any given form of conduct
 - **Paternalism: the protection of people against themselves - "perfectly coherent policy"**
 - Actual institutions of any society are open to criticism
 - Human misery and the restriction of freedom are evils - that is why legal enforcement calls for justification

OFFENSIVENESS

- What is considered 'immoral' or offensive → changes over time
- Morality = prior state of affairs to which the law responds
- **Drug policy** → social stigma
 - OPIUM → used by middle class white women = perfectly legal
 - Lower classes use opium = social stigma = racist root of drug laws
- **Indigenous victims**
 - Initial virtual suspension of murder and rape laws
 - Consider terra nullius → white law applied → exercise of jurisdiction
 - 'morality' → dependent on social norms
- **Criminal association**
 - Combat terrorism and bkie gangs → scope