CRIMINAL OFFENCES - ELEMENTS

EXAM QUESTION 1 PROCEDURE

- Deal with each accused separately.
- For each accused, list all possible offences with which they could be charged.
- For each offence, establish:
    - Legal personhood (not *doli incapax*)
    - Actus reus (all elements including voluntariness)
    - Mens rea (at least one element, include HRMF where relevant)
    - Coincidence of actus reus and mens rea
    - Negate statutory defences (e.g. reasonable excuse)
    - Determine penalties.

LEGAL PERSONHOOD

All persons are assumed to hold legal personhood and criminal responsibility except for the following exceptions:

- Persons who were insane under the *M'Naghten Rules* at the time when they committed the actus reus;
- All children under 10 (*Children (Criminal Proceedings) Act 1987* s 5);

Children between 10 and 14 are *presumed* to be *doli incapax* (incapable of wrongdoing; lacks the capacity to hold a mens rea). This presumption must be rebutted by the prosecution by proof *beyond reasonable doubt* that the child *subjectively* knew their act was "seriously wrong" as opposed to merely "naughty or mischievous"; this is a question of knowledge of morality, not law. The presumption will be easier to rebut for older children. Surrounding circumstances may be relevant but the presumption is difficult to overturn.

- *C (A Minor) v DPP* (1995, House of Lords): The presumption must be rebutted by the prosecution by proof *beyond reasonable doubt* that the child *subjectively* knew their act was "seriously wrong" as opposed to merely "naughty or mischievous"; this is a question of knowledge of morality, not law.
- *CRH* (1996, NSWCCA): Attempt to conceal the offence does not rebut the presumption and should not be taken into account; this behaviour is just as consistent with mischievous behaviour as serious wrongdoing. Mere proof of the actus reus charged, no matter how horrifying the act, does not rebut the presumption.
- *BP, SW* (2006, NSWCCA): The fact that the victim was crying, screaming, struggling, and asked the accused to stop could assist to rebut the presumption because the accused likely knew that what they were doing was seriously wrong.
- *RP v The Queen* (2016, HCA): Clear evidence of victim distress is capable of rebutting the presumption; subnormal intelligence and understanding of the accused makes the presumption more difficult to rebut; knowledge of the infliction of some hurt and distress is not necessarily the same as knowledge of serious wrongdoing.

VOLUNTARINESS

A minimal degree of mental control (voluntariness) is required for every criminal offence as an aspect of the actus reus (disregarding the mens rea). In theory, arguments of voluntariness should not arise when the mens rea requires intent or recklessness, because similar evidence could more easily be used to prove the absence of the mens rea. Duress does not constitute involuntariness. The burden of proof of voluntariness lies upon the prosecution, but the defence must first raise the issue by indicating there is a reason the court should consider it.

- *Ryan* (HCA, 1967): Voluntariness of an act requires a consideration of the voluntariness of acts leading up to it. If a man holds up a service station and points a gun at the store attendant, and accidentally shoots the attendant through an involuntary action, he is not innocent, as the actions leading up to the shooting were voluntary; he placed himself in a situation where an involuntary shooting may arise.
- *Jiminez* (HCA, 1992): Similar principle to *Ryan* in the context of falling asleep while driving; a person who crashes while driving because they fell asleep at the wheel is obviously not acting voluntarily while asleep, but this still constitutes dangerous driving as they got into the car and starting driving while so tired they were likely to fall asleep; the foreseeableness of the accident makes it voluntary. A similar

- *Amanatidis* (NSWCCA, 2001): Intention (knowledge) of possession cannot necessarily be inferred from exclusive physical control, but must be proved beyond a reasonable doubt in the circumstances.
- **Note:** All of these mens rea cases may be applied to *all* other drug offences.

Statutory defences (s 10(2)):

- License or authorisation under the *Poisons and Therapeutic Goods Act 1966* (NSW);
- A poppy license under the *Poppy Industry Act 2016* (NSW);
- Authority granted by the Secretary of the Department of Human Health (possession for scientific research, instruction, analysis or study);
- Direction given by the Commissioner of Police under s 93G;
- Lawful prescription or supply;
- Care of another person who has lawful prescription or supply; when possession is for the sole purpose of administering, or assisting in the self-administration of, the person in accordance with the prescription or supply.

Maximum penalty: Fine of 20 penalty units, 2 years imprisonment, or both (s 21).

POSSESSION OF EQUIPMENT FOR ADMINISTRATION

Legislation: *Drug Misuse and Trafficking Act 1985* (NSW) s 11

Actus reus: s 11(1): Physical control of equipment for use in administration (see s 5 definition) of a prohibited drug (disregarding hypodermic syringes and needles (s 11(1A)), and persons or classes of persons prescribed by the regulations possessing equipment required to minimise health risks associated with intravenous administration of a prohibited drug (s 11(1B)).
Mens rea: Intention to possess the equipment, knowledge of the nature or likely nature of the equipment (*He Kaw Teh*, HCA 1985).

Statutory defences (s 11(2)):

- Medical practitioners, dentists, veterinary practitioners, pharmacists, or registered nurses or midwives acting in the ordinary course of their profession;
- Members of a prescribed profession acting in the ordinary course of their profession;
- Persons licensed or authorised for possession of the equipment under the *Poisons and Therapeutic Goods Act 1966* (NSW);
- Persons authorised to have possession of the equipment by the Secretary of the Department of Health;
- Persons possessing equipment for use in the administration of a lawfully prescribed and supplied prohibited drug.

Maximum penalty: Fine of 20 penalty units, 2 years imprisonment, or both (s 21).

SALE/SUPPLY/COMMERCIAL DISPLAY OF WATERPIPES/ICE-PIPES

Legislation: *Drug Misuse and Trafficking Act 1985* (NSW) s 11A

Actus reus: Sale, supply or display in or near (but in connection with) a shop (unless the accused can prove the display was not for a commercial purpose), of a waterpipe [bong] or ice pipe [crack pipe], including devices apparently intended for such purposes that cannot be used because they require an adjustment, modification, or addition. It is immaterial if the device was used, or intended to be used, for a purpose other than the administration (see s 5 definition) of a prohibited drug (see s 3 definition).

Mens rea: Intention to sell, supply, or display for a commercial purpose the device in question; knowledge of the nature or likely nature of the device (*He Kaw Teh*, HCA 1985).

Statutory defences: None.

Maximum penalty: Fine of 20 penalty units, 2 years imprisonment, or both (s 21).

POSSESS INSTRUCTIONS ON HOW TO MANUFACTURE DRUGS

POLICE POWERS

MOVE ON POWERS

Powers to give directions – *LEPRA* Pt 14

GENERAL DIRECTIONS IN PUBLIC PLACES

Legislation: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 197

Power: A police officer may give any direction to a person in a public place (s 197(1)).

Requirements:

- S 197(1): The officer must believe on reasonable grounds that the person's conduct in the place:
    - Is obstructing other persons or traffic; or
    - Constitutes harassment or intimidation of another person; or
    - Is causing, or is likely to cause, fear to another person, *and* would cause fear to a hypothetical (s 197(4)) reasonable person; or
    - Is for the purpose of unlawfully supplying, intending to unlawfully supply, or soliciting another person to unlawfully supply, a prohibited drug; or
    - Is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.
- S 197(2): The direction must be reasonable in the circumstances for the purpose of:
    - Reducing or eliminating the obstruction, harassment, intimidation or fear; or
    - Stopping the supply, or solicitation to supply, of the prohibited drug; or
    - Stopping the obtaining, procuring, or purchasing of the prohibited drug.
- S 197(3): The person need not be in the public place, but must be near the place, when the conduct is being engaged in.

MOVE ON DIRECTIONS TO INTOXICATED PERSONS IN PUBLIC PLACES

Legislation: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 198

Power: A police officer may give a direction to an intoxicated (s 198(5): noticeably affected speech, balance, coordination or behaviour, reasonable in the circumstances to believe that is a result of the consumption of alcohol or any drug) person in a public place to leave the place and not return for a specified period (s 198(1)).

Requirements:

- S 198(1): The officer must believe on reasonable grounds that the person's conduct in the place:
    - Is likely to cause injury to another person, damage to property, or other risk to public safety; or
    - Is disorderly.
- S 198(2): The direction must be reasonable in the circumstances for the purpose of:
    - Preventing injury or damage, or reducing or eliminating a risk to public safety; or
    - Preventing the continuance of disorderly behaviour in a public place.
- S 198(3): The period during which a person may be directed not to return to the public place is not to exceed 6 hours after the direction was given.
- S 198(4): The person need not be in the public place, but must be near the place, when the conduct is being engaged in.
- S 198(6): The police officer must give the person a warning that it is an offence to be intoxicated and disorderly in any public place at any time within 6 hours after the direction was given.

CONTINUATION OF INTOXICATED AND DISORDERLY BEHAVIOUR FOLLOWING MOVE ON DIRECTION

Legislation: *Summary Offences Act 1988* (NSW) s 9
Actus reus: Having been given a direction under *LEPRA* s 198 (s 9(2)), is, at any time within 6 hours of the direction, intoxicated (s 9(6): noticeably affected speech, balance, coordination or behaviour, reasonable in the circumstances to believe that is a result of the consumption of alcohol or any drug) and disorderly in any public place (s 9(1)).

give a summary of the Part 9 provisions. The person must sign an acknowledgement that the information has been given (s 122(3)).
- *Campbell* (NSWSC, 2008): The courts take the Div 3 safeguards (e.g. s 122) very seriously, and may overturn convictions based on evidence obtained through violation of the safeguards.

ADMISSIBILITY OF ADMISSIONS

TAPE RECORDING OF ADMISSIONS

Legislation: *Criminal Procedure Act 1986* (NSW) s 281
Requirement: S 281(2)(a)(i): Evidence of an admission is inadmissible unless there is available to the court a tape recording (including a video recording, audio recording, or separate but simultaneous video and audio recordings – s 281(4)) made by an investigating official of the interview in the course of which the admission was made.

Application and exceptions:

- S 281(1): This section applies only to admissions:
    - Made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence; *and*
    - Made in the course of official questioning; *and*
    - Relating to an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person.
- S 281(2)(a)(ii): If the prosecution establishes that there was a reasonable excuse (including mechanical failure, refusal of the person being questioned to have the questioning electronically recorded, or lack of availability of recording equipment in a period in which it would be reasonable to detain the person being questioned – s 281(4)) as to whether such a tape recording could not be made, a tape recording of an interview with the person who made the admission about the making and terms of the admission, in the course of which the person states that they made an admission in those terms *is sufficient*.
- S 281(2)(b): If the prosecution establishes that there was a reasonable excuse why none of the above tape recordings could be made.
- S 281(3): The hearsay rule and opinion rule in the *Evidence Act 1995* do not prevent any tape recording from being admitted and used in proceedings before the court as mentioned above.
- S 281(4): "Investigating official" includes a police officer (other than one engaged in covert investigations), or a person (other than one engaged in covert investigations) appointed by or under an Act whose functions include those prescribed by the regulations as relating to prevention or investigation of offences; "official questioning" means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.

EXCLUSIONS OF EVIDENCE

Legislation: *Evidence Act 1995* (NSW) ss 84, 85, 86, 89, 89A, 90, 138, 139

Grounds for exclusion:

- S 84(1): If the admission, or the making of the admission, was influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person making the admission or another person; or by a threat of such conduct. This issue must be raised by the accused (s 84(2)).
- S 85(2): If the circumstances of the admission were not such as to make it unlikely that the truth of the admission was adversely affected. S 85(3): The court must consider (among other matters) any relevant condition or characteristic of the accused (e.g. age, personality, education, mental/intellectual/physical disabilities), and, if the admission was made in response to questioning, the nature of the questions, the manner in which they were put, and the nature of any threat, promise, or inducement made to the person questioned.
- S 86(2): A document prepared by or on behalf on an investigating official is inadmissible to prove the contents of a question/representation/response unless the defendant has acknowledged that the document is a true record of the question/representation/response; this may be done by signing, initialling, or otherwise marking the document (s 86(3)).
- S 89(1): Subject to s 89A, unfavourable inferences (including to consciousness of guilt or credibility; s 89(4)) may not be drawn from failure or refusal to answer questions or respond to representations. This does not prevent

nature of the criminal law. This approach relies upon accurate prediction by the executive of future criminal activity. RISK JUSTIFICATION FOR CRIMINALISATION
    - **Low standard of "facilitation":** The "facilitation" standard in s 4(1)(b) and 4(1)(c) is an extremely low threshold that likely does not require intent or knowledge of serious crime related activity (not a criminal offence so no presumed mens rea arises), and hence applies broadly to "innocent" acts.
    - **Mens rea issues:** Courts potentially could (and should) impose mens rea requirements upon the orders, but it is likely that breach offences of orders silent on mens rea will be construed as strict liability offences, creating a further departure from the general principles of criminal law. LOUGHNAN NORMATIVE THEORY
- **ISSUES REGARDING CIVIL COURTS:** The orders are made by a civil court **(s 13(1))**, applying a civil standard of proof (on the balance of probabilities, *not* beyond reasonable doubt; **s 13(2)**), but create a criminal offence. This allows the orders to circumvent traditional protections, principles, and procedural safeguards of the criminal justice system – proof beyond reasonable doubt, presumption of innocence (the *Woolmington v DPP* "golden thread") – also Article 14(2) of the *International Covenant on Civil and Political Rights*. LOUGHNAN NORMATIVE THEORY
- **COERCIVE CREEP:** The legislation is symptomatic of the trend of "coercive creep" created in a hastily considered, populist reaction to isolated incidents. Over time, laws become more invasive, coercive, and broadly applicable in political response to community demand for "tough on crime" legislation. LOUGHNAN NORMATIVE THEORY
- **LACK OF PARALLEL RIGHTS PROTECTION:** The legislation is based on similar UK legislation (see Second Reading Speech), but the UK *Human Rights Act 1998* stipulates that executive and judicial orders inconsistent with human rights can be struck down. The principle of legality does not apply to judicial orders as they are not legislation, and cannot be applied to the legislation as it is clearly intended to erode common law rights. RISK JUSTIFICATION FOR CRIMINALISATION

CRIMINALISATION

JUSTIFICATIONS FOR CRIMINALISATION

HARM

- *Mill* (1970): The only purposive basis for interference with individual liberties is the prevention of harm to *others* (not self-harm). Compulsion and punishment may only occur upon this basis. (This only applies to sane adults).
- *Hunter, Saunders, and Williamson* (1993): The harm condition espoused by Mill is difficult to apply to borderline or debatable cases (e.g. pornography, drugs). Diverse and competing interests must be weighed, and borderline categories are ultimately variable. Even affirmative uses do not necessarily escape or solve the problem of harm.
- *Duff* (2007): All versions of the harm principle face the same problem: that they only avoid the fundamental issue of under-inclusiveness by stretching the notion of harm so far that the principle no longer substantially constrains the criminal law.
    - Harm justification clearly inapplicable to SCPOs; concept of harm cannot be stretched so far as to include status offences and no actual wrongdoing is required for the making (or, depending on terms, the breach) of a SCPO.

RISK

- *O'Malley* (2013): Preventative justice focuses on identifying risk of harm in order to prevent harm. Preventative justice has proliferated and diversified in the 20th century, particularly through "actuarial justice" – a jurisprudence of risk. Risk-based offences sometimes require no harm component whatsoever (e.g. drink driving). The sanction in such offences is also sometimes risk-based (e.g. disqualification of driving license for drink driving). The measurability of risk can lead to "mass preventative justice" – e.g. through speed cameras detecting unprecedented volumes of offending.
- *Gunther* (2013): Preventative justice is justified by public interest and exemplifies the transition from a welfarist paradigm (attempting integration of offenders into society by means of social reform and rehabilitation) of criminal law policy to a culture of control (punitive segregation of the majority from criminal offenders). Public interest issues are fused with issues of fundamental rights protection; human rights are used as a rhetorical

Within several weeks of the next Act coming into operation, three decisions to grant bail in high-profile cases created public fear and anger, fuelled by media misrepresentations. The NSW Premier and AG quickly caved to the media pressure and announced a review by former AG Hatzistergos. The Review Report makes 12 recommendations, the most troubling 3 being:

- Omitting the "purposes" section of the Act, including the stated requirement of regard to the presumption of innocence and general right to be at liberty, and relocating the requirement to the preamble, as its operation was apparently "problematic or at least confusing"; a claim which the authors could not attach to any existing judgment. Resort to the preamble in statutory interpretation is rare; the clear purpose is to reduce the Court's attention to the presumption of innocence, weakening the principle.
- Collapsing the two-stage unacceptable risk test into one. This was based on the ability to impose conditions prior to a finding of "unacceptable risk", alleged problems in the application of the test, and the community not understanding why an accused who was found to present an unacceptable risk could be released, even with strict bail conditions. The authors found this claim also unsupported by judgments. The clear intent is to allow bail conditions to be imposed even in the absence of an "unacceptable risk", in clear conflict with the NSWLRC Report on bail. Adding the additional layer of "bail concerns" also creates greater confusion, rather than simplifying the consideration.
- Introduce "show cause" offences, to increase consistency and "reassure the community" in relation to serious offenders. The primary reason for community anxiety is the misrepresentation by the media and the government of bail as a symbolic judgment of guilt; a pre-trial condemnation of alleged behaviour. This is not the true purpose of bail. The difference between a "show cause" test and offence-based "presumptions" is purely semantic. The requirement also fails to consider risk factors relating to bail, and further complicates the operation of the unacceptable risk test.

The government has described the changes as "common sense" in their bid to appear "tough on crime" and attempt to convince the public that bail refusals will increase. Rather, they have merely introduced complicated and unnecessary changes to a regime that was barely twelve months old.

- Used as an example of the trajectory of reform moving from bad to worse on a populist basis ("tough on crime" approach); violations of the presumption of innocence; illogical Parliamentary decisions not supported by evidence; and reaction to isolated incidents (historical contingency).