

Week 1 – Drug Offences

Big picture

- What is the boundary between licit and illicit drugs?
- Why are alcohol and tobacco more legally permissible than other drugs such as marijuana or heroin?
- Do the meanings of drugs pre-exist the criminal law or does the criminal law contribute to the meanings of drugs?
- Are the meanings of particular drugs and their criminalization linked to the purported deviancy of particular marginalized groups in society, and how does this deviancy fit into broader racial, gender and other anxieties?

General principles:

- ‘guilty mind’ – subjective mens rea
- ‘golden thread’ – P must prove all elements BRD
- ‘innocent until proven guilty’ – presumption of innocence of D

Week 1 focus: how does the criminal law treat drug use, production and distribution?

Drug laws

- No roots in common law
- Legislative creations
- Legislative NSW and Commonwealth
 - Drug Misuse and Trafficking Act 1985 (NSW)
 - Poisons and Therapeutic Goods Act 1966 (NSW)
 - Criminal Code (Cth) (Chapter 9 Dangers to the Community, Part 9.1 -Serious drug offences)
- Note: re Cth legislation, the significance of the Constitution (s 51(i)(xxi) and international conventions

Poisons and Therapeutic Goods Act 1966 (NSW) (CB 1083)

- Based on the Poisons List maintained by NSW Health and contains 9 schedules
- Schs 4, 8 & 9 – drugs that are likely to be abused
- The Act primarily relates to substances in schs 2-8
- In the Act:
 - - Sch 4 = restricted substances
 - - Sch 8 = drugs of addictions
 - - All other drugs in the schedules are poisons
- It is a criminal offence to engage in wholesale supply of poisons or restricted substances without a wholesalers licence (ss 9 & 11); or to engage in general supply

without being a medical professional of a type listed in this Act or without holding a general supply licence (s 10)

Maximum penalty = 15 penalty units and/or imprisonment for 6 months, or 20 penalty units and/or two years imprisonment if the substance is a prescribed restricted substance

Prescribed Restricted Substances

- Prescribed restricted substances include benzodiazepines e.g Valium and Serepax, the barbiturates and anabolic steroids (The 2008 Act cl 61 and Appendix D)
- Offences of possession or attempt to possess only apply to prescribed restricted substances (s 16). Maximum penalty for possession = 20 penalty units and/or 6 months imprisonment unless the substance is an anabolic or androgenic steroid in which case the imprisonment rises to 2 years
- If a person is in possession of a certain quantity then the presumption is that possession is for the purposes of supply (s 4(1)) unless the accused rebuts the presumption. This increases the maximum penalty to 2 years imprisonment or 20 penalty units (s 9(3)(a))
- Appendix D = quantities
- Onus of proof is on the accused and the prosecution doesn't have to show mens rea for supply

Drugs of addiction

- Identified in sch 8 & have further restrictions for prescription
- The prescriptions that apply depend on whether the medical practitioner believes the person is a "drug dependent person". This means any person "who has acquired... an overpowering desire for the continued administration" of a drug of addiction (s 27)
- Medical practitioners must have special authorisation from the Department of Health before they can prescribe to people they believe to be addicts (ss 28-29)
- Any breach of regulations has a maximum penalty of 20 penalty units and/or two years imprisonment (s 26)
- Any medical practitioner who prescribes in breach or without authority is exposed to 2 penalty units (ss 28 and 44)
- If the Department prohibits practitioners from possessing or supplying and they breach this, there is a maximum penalty of 20 penalty units (s 18AA)
- Heroin cannot be provided under any circumstances

International conventions

- Hague Convention 1912
- Geneva Conventions 1925
- Geneva Conventions 1931
- Single Convention on Narcotic Drugs (1961)

- Convention on Psychotropic Substances (1971)
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) TB860

Drug Misuse and Trafficking Act 1985 (NSW) (DMTA)

- Definition of drug defined in s 3 & Sch 1
- Prohibited drug defined in s 3 & Sch 1
- Over 350 drugs and plants listed in Schedule 1
- Over 50 steroidal agents added to Schedule 1 in 2014 as part of the 'one punch'/assault causing death reforms
- Also prohibits the possession of over 80 precursor chemicals (used to make drugs)

Summary Offences (Pt 2 Div 1)

- Possession of prohibited drugs (s 10)
- Self-administration (s 12)
- Possession of equipment for administration
- Administration to others (s 13)
- Permitting someone to administer to you (s 14)
- S 21: Penalties

Section 10

10 Possession of prohibited drugs

(1) A person who has a prohibited drug in his or her possession is guilty of an offence.

Penalty: 20 penalty units or 2 years imprisonment, or both See exceptions in sub-s (2).

See other possession offences: ss 11, 11B, 11C

What does possession mean?

- A degree of physical control of the item (AR)
- An intention to control the item (*He Haw Teh*) (MR)
- An intention to control a prohibited drug – inferred from proof of awareness of its nature)

Physical Control

See *Filippetti* (1984) 13 A Crim R 335

- *Filippetti* lived in a house owned by his father and occupied by him, his fiancé, his mother, his younger brother and another de facto couple. Police conducted a search of the house on the basis that he was selling Buddha sticks (a cannabis product). *Filippetti* handed over a small quantity at first and admitted he used them occasionally but after more search the police found 800 grams of Indian hemp in a chair in the lounge room. *Filippetti* denied knowledge of the drug but later withdrew this claim

- The conviction was quashed as there wasn't enough evidence to enable the jury to rule out the possibility that the Buddha sticks were in the possession of one of the other occupants of the house and they were in the conclusive control of the accused

See also *Dib* (1991) 52 A Crim R 64 (CB 1088) and *Micallef* (2002) 136 A Crim R 127 (CB 1089)