

W9C2 - Drug Law: NSW Drug Offences

12.1 Drugs and the Criminal Law

- **Drug offences are purely statutory**
 - Governed by a **complex mix of Commonwealth and State legislation**, including:
 - **Criminal Code Act 1995 (Cth)**
 - **Drug Misuse and Trafficking Act 1985 (NSW)**
 - **Medicines, Poisons and Therapeutic Goods Act 2022 (NSW)**
- Legislatures often **disregard general principles** of criminal law when creating drug offences.
 - Criminal law is used **flexibly and reactively** to address perceived **social and administrative problems**, rather than as a **minimum threshold** for state interference in liberty.
- **Mostyn, Gibbon & Cowdery (2012)**
 - Statute commonly bypasses common law procedures
 - AR and MR, golden thread
- **Examples of Legal Fictions & Doctrinal Stretching**
 - **Deemed drug**: Court assumes a substance is a prohibited drug even if it's not proven as such.
 - **Deemed supply**: If a person possesses more than a certain quantity, they must prove they are **not** a supplier (i.e. burden shifts to the defendant).
 - **Criminalisation of preparatory acts**: Conduct criminalised **before** it would otherwise constitute an attempt in general criminal law.

12.5.3 Drug Misuse and Trafficking Act 1985

- The DMTA is the **primary legislation** regulating illegal drug offences in NSW.
 - does **not distinguish** between different drugs in terms of harm or seriousness, except in maximum penalties for **cannabis leaf/plant**.

Scope of Prohibited Substances

- **Schedule 1** lists over **350** prohibited drugs and plants.
 - Examples of **prohibited drugs**:
 - Amphetamines (speed), methylamphetamine (ice), Cannabis (leaf, oil, resin), Cocaine, heroin, MDMA (ecstasy), LSD, psilocybin (magic mushrooms), fentanyl, oxycodone
 - **Prohibited plants**:
 - Cannabis plant, coca plant, opium poppies

- Also prohibits **80+ precursor chemicals** used to manufacture drugs.
- **Part 2C** creates offences for “**psychoactive substances**” not listed in Schedule 1.

User vs Trafficker Distinction

- **Users** → viewed as victims
 - Subject to **summary offences**: e.g. possession (s 10), self-administration (s 12)
 - Penalty: **max 2 years imprisonment** (s 21)
- **Traffickers**
 - Face **indictable offences**: supply (s 25), cultivation (s 23), manufacture (s 24)
 - Max penalty can be **life imprisonment** (s 33(3)) for large commercial quantities

Deemed Supply Provisions


- A key controversy is **s 29 – deemed supply**:
 - If person **possesses ≥ traffickable quantity**, they are **presumed to be supplying** the drug.
 - **No need for prosecution to prove intent** to supply.
 - Burden shifts to **accused** to disprove intent (e.g., prove it was for personal use).
- Undermines:
 - **Presumption of innocence**
 - **Woolmington principle** (prosecution bears burden of proof)
 - **He Kaw Teh** (requirement of mens rea)

12.6 NSW Summary Offences

Summary Offences – DMTA

- **Penalty** → Max: **20 penalty units or 2 years’ imprisonment (or both)** — *applies to most summary offences (s 21)*

s 10 – Possession of prohibited drugs

- Offence to **possess** any prohibited drug
-  Exemptions: for **lawfully prescribed/supplied drugs** (e.g., s 10(2)(a)–(d))

s 11 – Possession of equipment for drug use

- Offence to possess **equipment** for drug administration
- *Excludes* hypodermic syringes/needles (s 11(1A)) – key **harm reduction measure**

- a very effective harm-reduction measure introduced in 1987 to prevent the spread of blood-borne viruses, especially HIV and hepatitis.

s 12 – Self-administration

- Offence to **administer or attempt to administer** a prohibited drug to **oneself**

s 13 – Administration to others

- Offence to **administer or attempt to administer** a prohibited drug to **another person**

s 14 – Permitting administration

- Offence to **permit another person** to administer or attempt to administer a prohibited drug to **you**

Definition of “use” and “administer” (s 5)

- Includes:
 - Ingestion
 - Injection
 - Smoking
 - Inhalation (fumes or otherwise)
 - **Any other means** of introducing drug into the body

12.6.1 Possession of prohibited drugs

- **Summary offence** under s 10
- Also forms the **basis for indictable offence** of **supply** under s 29 **deemed supply** (if amount \geq traffickable quantity)
- **Prohibited drug vs plant:**
 - **Prohibited drug** → summary offence (s 10)
 - **Prohibited plant** → indictable offence (s 23(1)(c))

To establish possession in drug offences, prosecution must prove:

1. **Physical control** of the item
 - a. Actual custody or ability to access
2. **Intention to control** (or awareness of the existence and nature of the item)
 - a. Knowledge that the substance is present and **is a drug**

12.6.1.1 Actus reus: Physical control

Filippetti (1984) 13 A Crim R 335 at 336-9	
Court	NSWCCA
Material Facts	<ul style="list-style-type: none">Filippetti lived in a house with five others: his fiancé, mother, younger brother, and an unrelated de facto couple.Police searched the house based on info that Filippetti was selling Buddha sticks (cannabis).Filippetti handed over a small amount of cannabis from his bedroom, admitted it was for personal use.Police found indian hemp that def said was hisPolice later found 800g of Buddha sticks hidden inside the lounge room chair cushion — where all six residents had free access.His mother was sitting in that chair at the time.
Issues	<ul style="list-style-type: none">Could the prosecution prove exclusive possession of the drugs in the lounge room chair by Filippetti beyond reasonable doubt?
Reasoning	<p>Street CJ</p> <ul style="list-style-type: none">Does not initially establish exclusive possession unless there was other accompanying evidencePossession requires exclusive physical control<ul style="list-style-type: none">Living room was shared spaceThe Crown failed to eliminate the possibility that another resident (esp. his mother) possessed the drugs.
Outcome	<ul style="list-style-type: none">Conviction quashed appeal allowed
Ratio	<ul style="list-style-type: none">Where drugs are found in shared premises, the prosecution must prove beyond reasonable doubt that the accused had exclusive

	physical control
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Dib (1991) 52 A Crim R 64

- **Facts:**
 - Mr and Mrs Dib charged with deemed supply (s 29) for heroin found in their home.
 - Heroin found in foil in a vase on top of a fridge. Their daughter had authorised access to the house.
- **Legal Principle (Hunt CJ at CL):**
 - To prove possession (when not in manual possession), Crown must show the accused had:
 - **Knowledge** of the drug (per *He Kaw Teh*).
 - **Right to exclude others** from the premises or container.
- **Held**
 - Appeal against conviction dismissed (despite misdirection to the jury).
 - Jury accepted incriminating **admissions** made by Mr and Mrs Dib.

Delon (1992) 29 NSWLR 29 (NSWCCA)

- **Facts:**
 - Accused had hidden drugs in a **leaf-covered hole** in a public laneway.
 - Not in his manual possession at time of police discovery.
- **Held:**
 - Accused was in **constructive possession**.
 - Applied principle from *Williams v Douglas (1949)*:
 - Possession includes cases where a person hides drugs in a way that allows them to **reclaim** them at will and where others are unlikely to discover them **except by accident**.

12.6.1.2 Mens rea: Intention to control the drug

He Kaw Teh (1985) 157 CLR 523

- **High Court held:** For Commonwealth offences, **mens rea is required** unless clearly excluded by statute.