

2026 Criminal Law and Procedure 2 (LAW4332)

Full Topic List:

Topic 1: Introduction, Review of Basic Principles

Topic 2: Criminal Responsibility and Defences

Topic 3: Criminal Procedure

Topic 4: Complicity

Topic 5: Attempts

Topic 6: Property Offences

Topic 7: Strict and absolute liability

Topic 8: Drug offences

Topic 8 – Drug Offences

1. Overview of drug offences

1. use of drug of dependence (DOD) / introduction into body of another person, ss 75, 74
 - DOD
 - uses or attempts to use, s 75
 - introduces or attempts to introduce into body of another person, s 74
 - intention to use / introduce
 - authorisation and licencing, s 104 > also applies to possession and trafficking
2. possession of DOD, s 73
 - deemed possession, s 5
 - CL possession
 - MR component?
3. trafficking of DOD, ss 71-71F > part 2

2. Sources of drug offences

1. Criminal Code 1995 (Cth)
 - Chapter 9 – Dangers to the community
 - Part 9.1 – Serious drug offences
 - Includes trafficking and manufacture of controlled drugs; possession or import/export of border controlled drugs
 - Part 9.2 – Psychoactive substances
 - Specifically deals with new synthetic drugs
2. Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990 (Cth)
 - Includes dealing in drugs on airplanes and ships at sea, including manufacture and possession
3. Drugs (Controlled Substances and Poisons) Act 1981 (Vic) (Drugs Act or DA)
 - Includes use, introduction, possession, and trafficking of DOD - our focus
 - Possibly overlapping offending, which has been held to be constitutionally valid

3. Drug offences considered in this unit

1. Section 75: Use of a drug of dependence
2. Section 73: Possession of a drug of dependence
3. Sections 71-71AC: Trafficking

4. Use of a Drug of Dependence (DOD – s 75)

Statutory provision

S 75 - Use of drug of dependence

A person who, without being authorized by or licensed under this Act or the regulations or the Access to Medicinal Cannabis Act 2016 or the regulations under that Act to do so uses or attempts to use a drug of dependence is guilty of an offence against this Act and liable—

(a) where the court is satisfied on the balance of probabilities that the offence was committed in relation to cannabis or tetrahydrocannabinol—to a penalty of not more than 5 penalty units; and

(b) in any other case—to a penalty of not more than 30 penalty units or to level 8 imprisonment (1 year maximum) or to both that penalty and imprisonment.

Applicability to attempt

- Covers the attempt without applying s 321M CA
- An attempt under s 321M CA would result in a lesser penalty: s 321P CA
- Same penalty for use as for attempt to use

Elements

- ‘A person who...uses or attempts to use a drug of dependence is guilty of an offence against this Act...’
- Elements?
 1. The substance in question was a drug of dependence; and
 2. D used, or attempted to use, that substance.
 3. Mens rea/ Intention (although no explicit mental state listed)

Element 1- Drug of dependence

- The first element requires the prosecution to prove that the substance in question was a ‘drug of dependence’ (‘DOD’).
- This term is defined in s.4 of the *Drugs Act*, to include:
 - Any form of the drugs specified in Parts 1 and 3 of Schedule Eleven to the Act, whether natural or synthetic and even if they are contained in, or mixed with, another substance.
 - The derivatives and isomers of the drugs specified in Parts 1 and 3 of Schedule Eleven to the Act;
 - The salt of the abovementioned drugs, derivatives and isomers;
 - medicines and poisons classified as DOD
 - Any substances that are included in the classes of drugs specified above; and
 - The fresh or dried parts of the plants specified in Part 2 of Schedule Eleven.

Drug mixtures/ unstable portions

- The substances listed in Schedule 11 fall within the definition of a 'drug of dependence' even if they are contained in or mixed with another substance
 - Exception: The plants specified in Part 2 of Schedule 11.
- Unusable portions of a drug (such as the stems, roots and stalks of the cannabis plant) are still considered to be drugs of dependence, so long as they fit within the definition specified by s.4 (*Coviello*). Also, the weight at the time of discovery matters for determining the quantity, e.g. green, heavier plant materials, rather than dried materials as they would be used later (*Coviello*).

Minimum quantity

In the case of *Bocking v Roberts*, there was possession of hookah pipe with 20 micrograms of cannabis in it. This was microscopic trace quantities detectable only by chemical test suffice to proof possession. This case did not provide a clear answer and said it is no answer to say that the quantity of the drug in possession was so small that the law should not take it into account, however this has to be balanced by whether the traces were so slight that they really indicated no more than that at some previous time he had been in possession of the drug.

However, the case of *Williams v R* provided a more concrete position on this, which should be used as the binding precedent on this issue for this unit. In this case, the D had possession of minute quantity of Indian hemp in pockets of his coat. Court held possession of trace quantities only detectable by scientific means is not enough to make it 'reasonable as a matter of common sense to say that the person is currently in possession'. And thus the precedent set was that quantities detectable only by scientific means do not suffice.

Element 2- D used, or attempted to use, that substance.

The answer to what constitutes use is found in s 70 DPCSA:

"use" in relation to a drug of dependence means—

- (a) smoke a drug of dependence;
- (b) inhale the fumes caused by heating or burning a drug of dependence; or
- (c) introduce a drug of dependence into the body of a person.

- which could be eating, injecting, snorting via any apparatus, suppositories, etc

In practice, the reality is that this definition is wide/broad enough to cover any method by which a DOD enters a person's body or bloodstream.

Element 3- Mens rea/intention

The provision contains no explicit mental state. However, the *He Kaw Keh* established that a mens rea element is required.

He Kaw Keh analysis:

- What is the starting point?
 - Presume the offence requires mens rea

- Has that presumption been rebutted?
 - Do any words point in either direction?
 - Perhaps – smoking, heating/burning, introducing all seem to be intentional acts
 - Does the subject matter make it likely Parliament intended this to be a *mens rea* offence?
 - Drugs are considered to be a grave social ill – but this is use, not trafficking
 - Lowest level drug offence with minor penalties – so perhaps strict liability
 - Unlikely Parliament wanted to punish people who unintentionally use drugs
 - Will strict liability assist in the enforcement of the law?
 - Probably not. Not a big problem with people unintentionally using drugs
 - Other drug offences have been interpreted to require D to have *intended* to possess, traffick, etc (*He Kaw Teh*)
- Conclusion? A *mens rea* offence

How the mens rea element is to be assessed:

Therefore, per *He Kaw Keh*, the mens rea element for this offence has been interpreted to mean an **intention to use/possess a DOD**. It does not even need to be the particular drug in question, just any DOD.

The case of *Kural v R*; *Saad v R* had provided further principles in relation to this element. The court held that **intention to possess may be inferred from knowledge of the existence and nature of the substance at the time** that it was possessed. The court provided that it is not always necessary to prove actual knowledge of possession. Intention may be inferred from either (1) a belief that he or she possessed a DOD OR (2) awareness of the likelihood that he or she possessed a DOD (meaning a significant or real chance that he or she possessed a DOD).

Moreover, in the case of *Pereira v DPP* concerning the importation and possession of cannabis in a parcel for her son received by post, the accused deliberately failed to make inquiries about the substance possessed for fear of learning the truth. A combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter. Therefore the key principle from this case is that **'wilful blindness' may also suffice** to prove actual knowledge or awareness of the likelihood that she possess a DOD

Potential Element 4- Authorisation defence (unlikely to be an issue)

S 75 uses the phrase that a person who, **without being authorized by or licensed under this Act or the regulations or the Access to Medicinal Cannabis Act 2016 or the regulations under that Act to do so** uses or attempts to use a drug of dependence is guilty of an offence against this Act and liable

This means that a D may be authorised, eg under the:

- DA or its regulations (eg pharmaceutical prescriptions)
- Voluntary Assisted Dying Act 2017 (Vic) or its regulations