

TOPIC 1 - REVIEW OF BASIC PRINCIPLES

1.1 - INTRODUCTION AND REVIEW OF PRINCIPLES

WHAT IS A CRIME?

- 'A crime (or offence) is a legal wrong that can be followed by criminal proceedings which may result in punishment.' → Prof. Glanville Williams
- 'Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State.' → **Proprietary Articles Trade Association v Attorney General (Canada) 1931 AC 310**

AIMS OF THE CRIMINAL LAW

- Many theories that try to facilitate our understanding of what should make something criminal.
 - Liberal
 - Conservative
- The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. → **John Stuart Mill**
- Where certain immoral activities threaten its existence, society is justified in using the criminal law to punish such behaviour even where it occurs in private and between consenting adults. → **Lord Devlin**
- The law may be justified in protecting people from themselves in order to ensure the smooth running of society. → **Professor HLA Hart**

KEY JUSTIFICATIONS FOR CRIMINALISATION

1. The prevention of harm;
2. The public interest; and
3. Morality

R v Brown (1993) → *Personal Freedom*

- **Overview:** A group of adult men willingly took part in sado-masochistic sexual activities over a period of time. All participants consented, the acts took place in private, and no one involved complained to the police. Some of the activities caused actual bodily harm. The case only came to light accidentally during an unrelated police investigation.
- **Key Legal Issue:** Can a person legally consent to serious harm being inflicted on them?
- **The majority judges argued that:**
 - The law has a duty to protect individuals from serious harm;
 - Allowing consent could lead to violence being socially accepted;
 - Society has an interest in setting limits, even on private behaviour; and
 - They accepted that personal freedom is important, but said it is not absolute.
- **The minority judges disagreed, arguing that:**
 - Adults should be free to make private decisions about their own bodies;
 - The law should not interfere in consensual acts between adults; and
 - Criminalising this behaviour was an unjustified interference with personal liberty
 - **Lord Templeman:** 'Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.'
 - **Lord Jauncey:** 'Furthermore, the possibility of proselytisation and corruption of young men is a real danger even in the case of these appellants and the taking of video recordings of such activities suggests that secrecy may not be as strict as the appellants claimed to your Lordships.'
 - **Lord Mustill:** 'What I do say is that these are questions of private morality; ...the state should interfere with the rights of an individual to live his or her life as he or she may choose no more than is necessary to ensure a proper balance between the special interests of the individual and the general interests of the individuals who together comprise the populace at large.'

DEFINITION OF CRIMINAL ELEMENTS

Actus Reus

Refers to the non-mental or external elements of an offence.

- **Commission:** the accused is liable for a positive act
- **Omission:** the accused is liable for failing to act
- **Result crime:** it is the result of the accused's actions which is punished (e.g., murder)
- **Conduct crime:** it is the accused's conduct which is punished, regardless of the consequences (e.g., possession of drugs)

Mens Rea

Refers to the mental or fault elements of an offence.

- *Actus non facit reum nisi mens sit rea*: as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all
- **Subjective test:** refers to the actions or mental state of the accused
- **Objective test:** refers to the actions or mental state of a hypothetical reasonable person
- The principal fault elements are:
 - Intention (cf, motive);
 - **Intention:** the actual determination of committing a crime
 - **Motive:** the reason behind the intention to commit a crime
 - Recklessness → knowledge of the consequence is necessary (ie, foresight);
 - Knowledge (cf, 'wilful blindness');
 - Negligence (ie, a lack of due care amounting to a gross departure from the standard expected of a reasonable person).

NON-MENS REA OFFENCES

Strict Liability

- The offence is constituted by the external element only, subject to the defence of honest and reasonable mistake (HRM) of fact
 - *Proudman v Dayman (1941) 67 CLR 536 (HCA)*

Absolute Liability

- The offence is constituted by the external element only.
- Did the act happen? If yes, liability follows
- The below table ranges from least serious crimes (absolute liability) to most serious crimes

Absolute Liability	Strict Liability	Mens Rea Crimes
Quasi-criminal/ regulatory	Quasi-criminal/ regulatory	'Real' crimes
Requires AR (the act) (No MR needed)	Requires AR (the act) (No MR needed)	Requires AR (the act) AND MR (the mental state). Eg, Intent or Recklessness or Negligence
No defences available	Only 1 defence available → HRM of Fact	All defences available → Self-defence,;
Eg, Speeding ticket	Eg, Pollution offence	Eg, Murder, Rape, Theft etc.

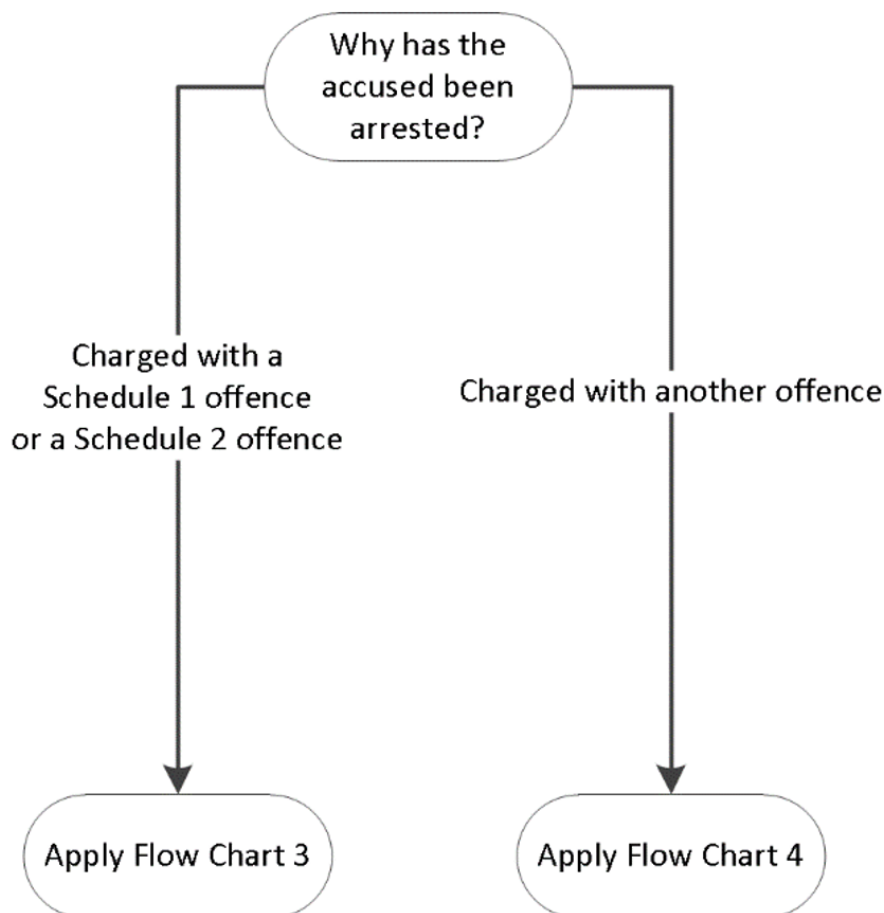
Section 4AAA Bail Act 1977 (Vic)

Offences in respect of which bail must not be refused

- (1) Despite anything to the contrary in any other provision of this Act, a bail decision maker who is deciding whether to grant bail to a person accused of an offence must not refuse bail if—
 - (a) the person is accused only of offences against the Summary Offences Act 1966 that are not referred to in Schedule 3; and
 - (b) the person does not have a terrorism record; and
 - (c) if the bail decision maker is a court, no exception under subsection (2) applies.
- (2) An exception applies for the purposes of subsection (1)(c) if—
 - (a) the court has determined under section 8AA that there is a risk that the person will commit a terrorism or foreign incursion offence; or
 - (b) the person was previously granted bail in respect of any of the offences of which the person is accused and that bail was subsequently revoked.
- (3) A reference in this Act to a bail decision maker considering, deciding or determining whether to grant bail (however described) includes a reference to a bail decision maker who is prohibited from refusing bail by subsection (1).

Example: Section 5AAAA(1) requires a bail decision maker considering the release on bail of an accused to make inquiries of the prosecutor as to whether certain instruments are in force against the accused. Under subsection (3), the bail decision maker must make these inquiries even if subsection (1) prohibits the bail decision maker from refusing bail.
- (4) Nothing in this section limits the power of a court to revoke bail.

Flow Chart 1 – Terrorism record or terrorism risk



6. Judge's summing up and jury directions (CPA s 238)
7. Jury verdict
8. If Defendant is found not guilty, that's it → they leave
9. If Defendant is found guilty, there will be a plea hearing → this will happen after the trial. Between the trial and plea hearing, the defendant will be held on remand in custody
 - a. Prosecution and Defence will argue for an appropriate sentence
10. The judge will then sentence the Defendant

CONDUCT OF TRIAL: ADVERSARIAL SYSTEM

Our system is adversarial – the prosecution (P) and defence (D) take turns to present their cases:

OUTLINE OF PROCEDURAL STEPS IN A CRIMINAL MATTER

Step	Procedure	Provision
1	DIVISION 4 – OPENING ADDRESSES Opening addresses: 1. Prosecution presents their opening address 2. Defence responds to Prosecutions opening	Overview: CPA ss 224 & 225 Section 224 Criminal Procedure Act 2009 (Vic) Opening address by prosecutor (1) The prosecutor must give an opening address to the jury on the prosecution case against the accused before any evidence is given in the trial. (2) If documents have been served and filed by the prosecution under Part 5.5, the prosecutor must restrict himself or herself to the matters set out in those documents when opening the prosecution case, unless the trial judge considers that there are exceptional circumstances. (3) For the purposes of subsection (2), a change of legal practitioner does not constitute exceptional circumstances. (4) Despite subsection (2), the prosecutor is not restricted to a verbatim presentation of the summary of the prosecution opening as served and filed under Part 5.5. (5) The trial judge may limit the length of the prosecution opening. Section 225 Criminal Procedure Act 2009 (Vic) Response of accused to prosecution opening (1) In all trials before a jury, immediately after the prosecutor's opening, the accused— (a) if represented by a legal practitioner, must present; (b) if not represented by a legal practitioner, may present— to the jury the response of the accused to the prosecution opening prepared in accordance with Part 5.5. (2) If documents have been served and filed by the defence under Part 5.5, the accused is restricted to the matters set out in those documents when presenting the response of the accused to the prosecution opening, unless the trial judge considers that there are exceptional circumstances. (3) For the purposes of subsection (2), a change of legal practitioner does not constitute exceptional circumstances. (4) Despite subsection (2), the accused is not restricted to a verbatim presentation of the response of the accused to the summary of the prosecution opening as served and filed under Part 5.5. (5) The trial judge may limit the length of the response of the accused.
2	Case for the prosecution is heard	

SENTENCING → NOT EXAMINABLE

SOURCES OF LAW

- In Victorian the source for our sentencing framework is dispersed between the three branches of government, the legislature, the judiciary and the executive
 - Crimes Act 1958 (Vic)
 - Sentencing Act 1991 (Vic)
 - Children, Youth and Families Act 2005
- Common law – previous court judgments
- Various Acts and Regulations creating particular offences, for example:
 - Crimes Act 1958 deals with a range of crimes, including injury offences
 - Road Safety Act 1986 deals with a range of driving offences, including drink driving and drug driving

IMPRISONMENT		FINE (current 2026 penalty unit = \$203.51)	
Level	Max Term of Imprisonment	Level	Max Fine
1	Life	1	-
2	25 years	2	3,000 penalty units
3	20 years	3	2,400 penalty units
4	15 years	4	1,800 penalty units
5	10 years	5	1,200 penalty units
6	5 years	6	600 penalty units
7	2 years	7	240 penalty units
8	1 year	8	120 penalty units
9	6 months	9	60 penalty units
		10	10 penalty units
		11	5 penalty units
		12	1 penalty unit

SENTENCING PROCESS

- The sentencing of an offender takes place following either a trial or guilty plea. The sentencing judge will consider the various sanctions available, relevant principles and purposes, and common law and statutory limitations.
- Within this framework the sentencing judge is typically granted considerable discretion.
 - Individualised justice
 - Fair sentencing
- Instinctive synthesis (gut feeling)

SENTENCING PURPOSES

Section 5 Sentencing Act 1991 (Vic)

Sentencing guidelines

(1) The only purposes for which sentences may be imposed are—

- (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or

3.4 - SUDDEN OR EXTREME EMERGENCY

SUDDEN OR EXTRAORDINARY EMERGENCY

In Victoria, the common law defence of necessity was abolished in 2014, and replaced with a new statutory defence of sudden or extraordinary emergency.

Section 322R Crimes Act 1958 (Vic)

Sudden or extraordinary emergency (response has to be *reasonable*)

- (1) A person is not guilty of an offence in respect of conduct that is carried out in circumstances of sudden or extraordinary emergency.
- (2) This section applies if—
 - (a) The person reasonably believes that—
 - (i) circumstances of sudden or extraordinary emergency exist; and
 - (ii) the conduct is the only reasonable way to deal with the emergency; and
 - (b) The conduct is a reasonable response to the emergency.
- (3) This section only applies in the case of murder if the person believes that the emergency involves a risk of death or really serious injury.

R v Dudley and Stephens (1884) 14 QBD 273

Necessity is of three sorts:

1. necessity of conservation of life;
2. necessity of obedience; and
3. necessity of the act of God or of a stranger.

DURESS

Section 322O Crimes Act 1958 (Vic)

Duress

- (1) A person is not guilty of an offence in respect of conduct carried out by the person under duress.
- (2) A person carries out conduct under duress if—
 - (a) the person reasonably believes that—
 - (i) subject to subsection (3), a threat of harm has been made that will be carried out unless an offence is committed; and
 - (ii) carrying out the conduct is the only reasonable way that the threatened harm can be avoided; and
 - (b) the conduct is a reasonable response to the threat.
- (3) A person does not carry out conduct under duress if the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.
- (4) This section only applies in the case of murder if the person believes that the threat is to inflict death or really serious injury.

R v Olga Runjanjic, R v Erica Kontinnen (1991) 53 A Crim R 362

The availability of the defence is the subject to a condition that the accused has not failed to avail himself of an opportunity which was reasonably open to him to render the threat ineffective (**R v Brown**). There is therefore a subjective and an objective aspect of the test.

There is the question whether the will of the accused was actually overborne. There is then the further question whether the will of a person of reasonable firmness in his situation would have been overborne.

TOPIC 4 - ATTEMPTS

4.1 - ATTEMPTS

- Attempts to commit crimes were unknown to the early common law as offences in themselves.
- First became punishable by the efforts of the Court of Star Chamber to stamp out historical incidents of dueling.

- (3) **IMPOSSIBILITY:** A person may be guilty of attempting to commit an offence despite the existence of facts of which he or she is unaware which make the commission of the offence attempted impossible.

TWO CATEGORIES OF IMPOSSIBILITY

1. Legal impossibility

- Covers two types of case:
 - i. First the accused must believe their objective to be criminal when in fact it is not (e.g., adultery is not an offence)
 - ii. The second type involves accused persons who are outside the class of those defined by the law as capable of committing particular crimes (e.g., children; doli incapax)

Britten v Alpgut [1987] VR 929:

- **Legal impossibility** = the commission of an offence will be legally impossible where the accused attempts to commit an offence that is unknown to the law.
- **Murphy J Held:** In the law of attempt the emphasis lies on the criminal intent of the actor, rather than on the patent criminality of the act which he performed. The intention which the Crown must prove is an intention to bring about each element of the crime alleged to be attempted, and it must be proved that this intention is accompanied side by side by an act sufficiently proximate to the offence attempted to take it out of the class of mere preparatory acts.

2. Factual impossibility

- Factual Impossibility is understood as the commission of an offence where the accused attempts to commit an offence but the circumstances are such that the elements of the offence cannot be made out. In such cases, so long as the accused's conduct is sufficiently proximate, he or she may nonetheless be found guilty of the attempt.

EXAM SCRIPT: Under s 321N(3), and supported by the concept of factual impossibility, [Defendant] can still be guilty of an attempt even if the result was impossible due to unforeseen facts.

TOPIC 5 - PROPERTY OFFENCES 1

5.1 - THEFT

INTRODUCTION

State and Territory level

- Protection of private property through offences such as theft, obtaining a financial advantage by deception; fraud.

Commonwealth level

- Aim to protect Commonwealth property as well as giving effect to Australia's obligations arising from the ratification of international instruments

REFORM OF THEFT LAWS

- In the 1960s the Criminal Law Revision Committee (CLRC) in the UK recommended the abolition of the common law of larceny.
- 'extreme complexity including offences such as larceny, larceny as a bailee, larceny by a trick, embezzlement, fraudulent conversion etc. n of the common law of larceny.' (Waller and Williams)
- CLRC recommended that the Theft Act 1968 (UK) be enacted.
- This formed the basis of the property offences enacted by the Crimes (Theft) Act 1973 (Vic).

THE ELEMENTS OF THEFT

PHYSICAL ELEMENTS

1. **Property** (*can't steal something that is not property*)
2. **Belonging to another**
3. **Appropriates** (*upsurping the owner's rights*)

FAULT ELEMENTS

4. **With an intention to permanently deprive**
5. **Dishonesty**

Section 71 Crimes Act 1958 (Vic)

Definitions

- (1) In this Division—
gain and loss are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and—
 - (a) **"gain"** includes a gain by keeping what one has, as well as a gain by getting what one has not; and
 - (b) **"loss"** includes a loss by not getting what one might get, as well as a loss by parting with what one has; **"goods"** except in so far as the context otherwise requires, includes money and every other description of property except land and includes things severed from the land by stealing;
"property" includes money and all other property real or personal including things in action and other intangible property.
 - Special forms of property:
 - Land and things forming part of land can only be stolen in the limited circumstances specified in **Crimes Act 1958 s 73(6)** (see below)
 - Wild animals are regarded as property, but may only be stolen in the circumstances specified in **Crimes Act 1958 s 73(7)** (see below)
- (2) In this Division property shall be regarded as **belonging to any person** having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

Section 72 Crimes Act 1958 (Vic)

Basic definition of theft (*outlines the elements of theft*)

- (1) A person steals if he **dishonestly appropriates property belonging to another** with the **intention of permanently depriving** the other of it.
- (2) A person who steals is guilty of theft; and "thief" shall be construed accordingly.

Section 73 Crimes Act 1958 (Vic)

Further explanation of theft

- (1) This section has effect as regards the interpretation and operation of section 72 and, except as otherwise provided in this Division, shall apply only for the purposes of that section and not otherwise.
- (2) A person's **appropriation** of property **belonging to another** is not to be regarded as **dishonest**—
 - (a) **Dishonesty - claim of right:** if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
 - (b) **Dishonesty - consent:** if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
 - (c) **Dishonesty - belief that the owner cannot be found:** (except where the property came to him as **trustee or personal representative**) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
- (3) **Willingness to pay:** A person's appropriation of property belonging to another may be **dishonest** notwithstanding that he is willing to pay for the property (*wanting to pay for it doesn't make you honest and render the accused innocent*)
- (4) Any **assumption by a person of the rights of an owner amounts to an appropriation**, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.
- (5) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.
- (6) A person cannot steal **land**, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say—
 - (a) when he is a trustee or personal representative, or is authorized by power of attorney, or as liquidator of

SUMMARY

Theft	OPD	OFAC
Appropriation	Obtaining	Obtaining
Property (s 73(6)-(7))	Property	Financial Advantage
Belonging to another (s 73(8)-(11))	Belonging to Another	
Intention to permanently deprive	Intention to permanently deprive	
	Deception	Deception
Dishonesty (s 73(2)-(3))	Dishonesty	Dishonesty

SUMMARY OF THE CRIMES ACT DIVISION 2

- **Theft and definitions: ss 71-74**
 - Theft-related offences (all underlain by theft):
 - Robbery: s 75
 - Armed Robbery: s 75A
 - Burglary: s 76
 - Aggravated burglary: s 77
- **Fraud and blackmail offences:**
 - Obtaining property by deception: s 81
 - Obtaining financial advantage by deception: s 82

TOPIC 6 - PROPERTY OFFENCES 2

6.1 - ROBBERY

ROBBERY

Section 75 Crimes Act 1958 (Vic)

Robbery

- (1) A person is guilty of robbery if he *steals*, and immediately before or at the time of doing so, and in order to do so, he *uses force* on any person or puts or seeks to put any person in fear that he or another person will be then and there subjected to force.
- (2) A person guilty of robbery, or of an assault with intent to rob, is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum).

THE ELEMENTS OF ROBBERY

- **Physical Element (see theft)**
 - The external elements of theft [Steals];
 - The use of force on any person (does not require aggression); or
 - Putting or seeking to put any person in fear that he or she would then and there be subjected to force;
 - Immediately before or at the time of committing the theft
 - Therefore, those who are using force after stealing to escape, would not be liable for offence of robbery → **R v Hale [1978]**
- **Fault Element**
 - The fault element for theft (intention to permanently deprive + dishonesty → see theft);
 - An intention to use force or the threat of force in order to steal: the use or threat of force was in order to steal → **R v Dawson and James [1976] 64 Cr App R 170**
 - There need not be force in connection with an act of violence → **R v Galas and Mikhael (2007)**

Did do to commit theft	Did do to commit theft	Intended to steal, assault or damage property	Intended to steal, assault or damage property	Intended to steal, assault or damage property
	Armed		Armed	Person present
				Knowledge or recklessness about presence

TOPIC 7 - DRUG OFFENCES

7.1 - DRUG OFFENCES

SUMMARY

- Drug offences make up a large proportion of criminal offences in terms of policing and trials at both the lower and higher courts.
- Drug offences typically derogate from the universal and fundamental principles such as the burden of proof and the presumption in favor of subjective mental states.
- Drug offences closely conforms to a *'technocratic model of criminal justice.'*

DRUG OFFENCES IN AUSTRALIA

- The key federal offences are contained in two statutes:
 - **Criminal Code (Cth), Pt 9.1** – Serious drug offences
 - **Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990 (Cth)**
- Drug offences tend to be classified in two ways:
 1. Regulation/control
 2. Prohibition

POLICY ISSUES

- Decriminalisation
- Harm minimisation
- Australian history of drug offences: Desmond Menderson, *From Mr Sin to Mr Big – A History of Australian Drug Laws: the impetus for criminalization of drugs in a complex interaction of factors that include racism, the rise of the medical profession, bureaucratic attitudes, the pressure of the international community, the emergence of a drug mythology and political convenience.*

SUMMARY OF RELEVANT PROVISIONS

- **Section 75: Use** of a drug of dependence
- **Section 73: Possession** of a drug of dependence
- **Sections 71-71AC: Trafficking**

1 – DRUG USE

Section 75 Drugs, Poisons and Controlled Substances Act 1981 (Vic)

Use of a drug of dependence

A person who, without being authorized by or licensed under this Act or the regulations or the Voluntary Assisted Dying Act 2017 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.

THE ELEMENTS OF USE OF A DRUG OF DEPENDENCE

- External elements:
 - The substance in question was a **drug of dependence**; and
 - D **used**, or attempted to **use**, that substance.
- Fault element:
 - Mental state is n/a → see below analysis

EXTERNAL ELEMENTS

MEANING OF 'DRUG OF DEPENDENCE'

Section 4 Drugs, Poisons and Controlled Substances Act 1981 (Vic)

Definitions

"drug of dependence" means a substance that is—

- (a) a drug—
 - (i) specified in **column 1 of Part 1** of Schedule Eleven; or
 - (ii) included in a class of drug specified in column 1 of Part 1 of Schedule Eleven; or
- (b) any fresh or dried parts of any plant specified in **column 1 of Part 2** of Schedule Eleven; or
- (ba) prescribed as a drug of dependence in accordance with section 132AA whether specified as included in Part 1, Part 2 or Part 3 of Schedule Eleven; or
- (c) a drug—
 - (i) specified in **column 1 of Part 3** of Schedule Eleven; or
 - (ii) included in a class of drug specified in column 1 of Part 3 of Schedule Eleven—
and includes—
- (d) any form of a drug specified in column 1 of Part 1 or column 1 of Part 3 of Schedule Eleven, whether natural or synthetic, and the salts, analogues, derivatives and isomers of that drug and any salt of those analogues, derivatives and isomers; and
- (e) Any—
 - (i) drug specified in, or drug included in a class of drug specified in column 1 of Part 1 or column 1 of Part 3 of Schedule Eleven, whether natural or synthetic; or
 - (ii) salts, analogues, derivatives or isomers of a drug specified in column 1 of Part 1 or column 1 of Part 3 of Schedule Eleven; or
 - (iii) salt of any analogue, derivative or isomer mentioned in subparagraph (ii)—
contained in or mixed with another substance.

MIXTURES AND UNUSABLE PORTIONS (**NOT-EXAMINABLE**)

- 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 **section 4** → **Coviello**

MEANING OF 'USE'

Section 70(1) Drugs, Poisons and Controlled Substances Act 1981 (Vic)

Definitions

"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.

FAULT ELEMENT

UNDERSTANDING MENS REA ELEMENT

- The provision contains no explicit mental state. Is it a strict liability offence? What is the starting point?
 - Presume the **offence requires mens rea**

- *Has that presumption been rebutted? Establish if there is a mens rea element using 4 He Kaw Teh elements:*
 1. Do any words point in either direction?
 - Perhaps – smoking, heating/burning, introducing all seem to be intentional acts
 2. 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
 3. Will strict liability assist in the enforcement of the law?
 - Probably not. Not a big problem with people unintentionally using drugs
 4. Other drug offences have been interpreted to require D to have intended to **possess**, **traffick**, etc
- Conclusion → **Probably a mens rea offence**

2 – DRUG POSSESSION

Section 73 Drugs, Poisons and Controlled Substances Act 1981 (Vic)

Possession of a drug of dependence

- (1) A person who without being authorized by or licensed under this Act or the regulations or the Voluntary Assisted Dying Act 2017 or the regulations under that Act to do so has or **attempts** to have in his **possession** a **drug of dependence** is guilty of an indictable offence and liable—
 - (a) where the court is satisfied on the balance of probabilities that—
 - (i) the offence was committed in relation to a quantity of cannabis or tetrahydrocannabinol that is not more than the small quantity applicable to cannabis or tetrahydrocannabinol;
 - (ii) the offence was not committed for any purpose related to **trafficking** in cannabis or tetrahydrocannabinol—
to a penalty of not more than 5 penalty units;
 - (b) subject to paragraph (a), where the court is satisfied on the balance of probabilities that the offence was not committed by the person for any purpose relating to **trafficking** in that drug of dependence—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; or
 - (c) in any other case—to a penalty of not more than 400 penalty units or to level 6 imprisonment (5 years maximum) or to both that penalty and imprisonment.
- (2) Where a person has in his **possession**, without being authorized by or licensed under this Act or the regulations or the Voluntary Assisted Dying Act 2017 or the regulations under that Act to do so, a **drug of dependence** in a quantity that is **not less than** the **traffickable quantity** applicable to that drug of dependence, the possession of that drug of dependence in that quantity, is prima facie evidence of **trafficking** by that person in that drug of dependence.

THE ELEMENTS OF POSSESSION OF A DRUG OF DEPENDENCE

- External elements:
 - **Drug of dependence** (see above discussion - section 4)
 - **Possession**
 - **Statutory definition** → section 5
 - **Common law definition** → **Physical custody/control**
- Fault elements:
 - **Knowledge** (in relation to cases of **deemed possession**)
 - **Intention to possess** (common law)

EXTERNAL ELEMENTS

MEANING OF 'POSSESSION'

Statutory definition

Section 5 Drugs, Poisons and Controlled Substances Act 1981 (Vic)

Meaning of **possession**

Without restricting the meaning of the word "**possession**", any substance shall be **deemed** for the purposes of this Act to be in the possession of a person so long as it is **upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever**, unless the person satisfies the court to the contrary.

TOPIC 2 - CRIMINAL PROCEDURE

ARREST → *Crimes Act 1958 (Vic); Criminal Procedure Act 2009 (Vic); Magistrates' Court Act 1989 (Vic)*

LAWFULNESS OF ARREST

The first contentious issue is whether or not the arrest of [Defendant] was lawful. [Defendant] will argue that they were unlawfully arrested by [arrestor].

[Defendant] has a right to liberty and should not face arbitrary arrest or be deprived of their liberty (*s 21 Vic Charter*). Any deprivation of liberty must occur solely on established grounds and in accordance with the statutory requirements as outlined in the *Crimes Act (Vic) 1958 ('CA')*.

ARREST WITH A WARRANT

ISSUE OF WARRANT

Generally, no person shall be arrested without a warrant unless legislation allows otherwise (*s 457*).

[Defendant] can be arrested if there is a warrant made for their arrest. For a warrant to be issued, certain conditions must be met:

- Upon the filing of a charge sheet (*s 6 CPA*), an application (made in person, by post, by electronic communication or otherwise: *s 12(3) CPA*) may be made to the registrar of the Magistrates' Court for the issuance of:
 - a summons to answer to the charge directed to the accused; or
 - *Note: application can be made by the informant or a person on behalf of the informant (s 12(2) CPA)*
 - a warrant to arrest in order to compel the attendance of the accused
 - *Note: application must be made by the informant personally (s 12(2) CPA)*
- The registrar must issue a summons or warrant to arrest if satisfied that the charge discloses an offence known to law (*s 12(4) CPA*)

However, the registrar must not issue a summons or warrant unless satisfied by sworn or affirmed evidence, whether oral or by affidavit, that:

- It is probable that [Defendant] will not respond to a summons (*s 12(5)(a) CPA*); or
- [Defendant] has absconded, is likely to abscond, or is evading service of an issued summons (*s 12(5)(b) CPA*); or
- A warrant is required or authorised by any other Act, or there is other good cause (*s 12(5)(c) CPA*).

OTF, it is [likely/unlikely] that a Registrar will issue a warrant for the arrest of [offender] because...

Note: The warrant may also specify that [Defendant] be released under certain bail conditions (s 62 MCA).

SERVICE OF WARRANT

As the Registrar has issued a warrant for arrest under *s 12(4)(b) CPA*, [police officer] is required to serve the warrant on [Defendant].

Pursuant to *s 13 CPA*, the warrant must be accompanied by a copy of the charge sheet, a notice that contains a summary of the relevant division of the Act (depending on the offence type), advice that [Defendant] should seek legal advice and contact details for Victoria Legal Aid.

EXECUTING WARRANT: ENTRY AND SEARCH OF PREMISES

Based on these facts, [police officer] has obtained an arrest warrant for [Defendant]. Arrest warrants grant the authority to break, enter, and search any place where [Defendant] is suspected to be located (*s 64(1)(a) MCA*).

PHYSICAL ELEMENT	CONDUCT CONSTITUTING ATTEMPT Pursuant to s 321N(1), the Prosecution must prove that [Defendant]'s conduct was: (a) more than merely preparatory to the commission of the offence; and (b) was immediately and not remotely connected with its commission <u>Merely preparatory</u> To determine if the conduct passed the threshold of "<i>mere preparation</i>," the court will use two primary guidelines: • The "Last Act" Test: Prosecution will argue [Defendant] performed the last act they believed was necessary to complete the offence (<i>R v Eagleton (1855)</i>; <i>R v Robinson [1915]</i>) • The "Substantial Step" Test: Alternatively, Prosecution will argue [Defendant] took steps that were substantial and strongly corroborative of their criminal intent (<i>DPP v Stonehouse [1978]</i>) <u>Immediately connected</u> [Defendant] will argue, however, that their actions were "too remote" and constituted mere preparation rather than a sufficiently proximate attempt. While [Defendant] may have [prepared tools/scouted location], it is advised to [Defendant] that these actions may be considered too remote under the <i>Robinson</i> principle, as they represent mere preparation and lack the immediate connection to the actus reus of [principal offence] required by s 321N(1)(b).
FAULT ELEMENT	MENTAL STATE Prosecution must prove that [Defendant]: (a) Intended that the principal offence be committed (s 321N(2)(a)); and (b) Intended or believed that any fact or circumstance required for the offence would exist at the time it was to take place (s 321N(2)(b)). The Prosecution must prove [Defendant]'s subjective state of mind at the time of the actus reus. They will rely on <i>Mohan [1976]</i> to argue that [Defendant] made a specific "<i>decision to bring about a certain consequence</i>". • Intention: This refers to the actual determination to commit the crime • Note: Intention is distinguished from motive in the sense of an emotion leading to action While motive provides the "reason behind the intention" to commit a crime, it is not an element that the Prosecution must prove. Rather, they must prove the "specific intent" or "aim" of [Defendant] to bring about the criminal result. It is advised to [Defendant] that recklessness and negligence are irrelevant for an attempt. Prosecution must prove a subjective, specific intent to commit the completed crime.
POTENTIAL DEFENCES	VOLUNTARY DESISTANCE If [Defendant] abandoned the act, they may argue they never formed a final intent or that the act was not proximate. Prosecution will argue, however, that once [Defendant] was sufficiently advanced in their attempt, voluntary desistance does not provide a legal excuse or absolve them of liability (<i>R v Page [1933]</i>). IMPOSSIBILITY Factual Impossibility: Prosecution will argue that under s 321N(3), [Defendant] is guilty even if the commission of the offence was impossible due to facts they were unaware of (<i>e.g., attempting to steal from an empty pocket</i>).

	Legal Impossibility: [Defendant] is advised that they cannot be guilty of an attempt if they mistakenly believed they were committing a crime that is actually unknown to the law (Britten v Alpogut) (e.g., <i>adultery is not a criminal offence</i>).
PENALTY	PENALTIES If found guilty, [Defendant] is generally liable for a penalty one step lower than the maximum for the principal offence (s 321P). (e.g., <i>If the principal offence is Level 1 (Life), the attempt is Level 2 (25 years maximum)</i>) <u>Note:</u> • If the penalty is not in the statutory table, it cannot exceed 60% of the maximum prescribed for the relevant offence → s 321P(1)(b) • If the maximum penalty is not fixed by law, [Defendant] is liable to Level 6 imprisonment (5 years) → s 321P(1)(c)
CONCLUSION	If Prosecution can prove both the proximate conduct and the specific intent BRD, and the attempt is not a case of legal impossibility, [Defendant] will be found guilty of an attempt of [name of offence] (maybe include: <i>even if the result was impossible due to unforeseen facts or circumstances</i>).

TOPIC 5 & 6 - PROPERTY OFFENCES → Crimes Act 1958 (Vic)

THEFT	
[Defendant] may be guilty of theft pursuant to section 72, provided that the Prosecution can establish BRD that [Defendant]: (1) appropriated, (2) property, (3) belonging to another, (4) with the intention of permanently depriving the other of it, and (5) did so dishonestly. It is advised to [Defendant] that if found guilty, theft is an indictable offence carrying a maximum penalty of Level 5 imprisonment (10 years) (s 74(1)).	
APPROPRIATES	1 – APPROPRIATION (PHYSICAL ELEMENT) P must prove that [Defendant] appropriated the property by assuming any of the rights of the owner (s 73(4)). Prosecution will argue that an appropriation occurred through an adverse interference with or usurpation of the owner's rights (R v Morris). • <i>This includes acts such as taking, using, selling, or even merely refusing to return the property.</i> Prosecution may further rely on W (a child) v Woodrow to argue that even using property for its ordinary purposes (e.g., <i>travelling as a passenger in a car without consent</i>) constitutes an assumption of owner's rights and establishes appropriation. [Defendant] will argue, however, that if the owner legitimately consented to the taking, there is no appropriation (R v Roffel) (s 73(2)(b)). Prosecution will counter-argue that if consent was obtained through fraud, misrepresentation, or deception, the consent is invalid and an appropriation has occurred (R v Baruday). • Note: <i>If [Defendant] acquired the property for value and in good faith, no later assumption of rights constitutes theft (s 73(5)).</i>
PROPERTY	2 – PROPERTY (PHYSICAL ELEMENT) Prosecution must establish that the item constitutes "property" under section 71(1), which includes money and all other property, real or personal, including other intangible property. • Note: <i>split property up into each individual item in an exam.</i>

TOPIC 7 - DRUG OFFENCES → *Drugs, Poisons and Controlled Substances Act 1981 (Vic)*

USE OF A DRUG OF DEPENDENCE

[Defendant] may be guilty of using a drug of dependence pursuant to s 75, provided that the Prosecution can establish the external and fault elements of the offence.

It is preliminarily advised to [Defendant] that this offence applies to both the actual use and the attempted use of a drug of dependence.

DOD	EXTERNAL ELEMENT: DRUG OF DEPENDENCE (DOD) Prosecution must prove the substance used was a drug of dependence as defined in section 4 and listed in Schedule 11. ● Scope: This includes natural or synthetic forms, as well as any salts, analogues, derivatives, or isomers. ● Mixtures: The substance remains a DOD even if mixed with another substance. ● Unusable Portions: Under the principle in <i>Coviello</i>, even "unusable" parts (<i>like stems or stalks</i>) are included if they fit the statutory definition. ● Visibility: Following <i>Bocking v Roberts</i>, the amount must be sufficient and visible to justify a conclusion of current possession/use rather than merely indicating past use. OTF, it is apparent that the drug allegedly used by [Defendant] is [insert name of drug], which is listed in Part [1, 2 or 3] of schedule 11 and thus constitutes a DOD.
USE	EXTERNAL ELEMENT: USE Prosecution must prove [Defendant] "<i>used</i>" [insert drug]. Under s 70, "use" in relation to a DOD means to: (a) Smoke a DOD; (b) Inhale fumes caused by heating or burning a DOD; or (c) Introduce a DOD into the body of a person (<i>e.g., injecting or ingesting</i>). OTF, it is alleged that [Defendant] [insert alleged use] the DOD which meets this statutory definition of drug use. EXTERNAL ELEMENT: ATTEMPTED USE If the use was not completed, [Defendant] may still be charged with attempted use under s 75, as the provision has been drafted to encompass both actual and attempted drug use.
INTENTION	FAULT ELEMENT: INTENTION While the statute is silent on a mental state, Prosecution must satisfy the presumption of mens rea established in <i>He Kaw Teh v R (1985)</i>. Prosecution must prove [Defendant] intended to use a drug of dependence. Prosecution does not need to prove [Defendant] intended to use the particular drug found (<i>e.g., if they thought it was heroin but it was actually cocaine</i>); they only need to prove an intent to use a DOD.
EXCEPTION	AUTHORISATION [Defendant] will not be guilty if the possession was authorised or licensed under this Act or the <i>Voluntary Assisted Dying Act 2017</i> (<i>e.g., a pharmaceutical prescription</i>) (s 73(1)). Onus of Proof: Under s 104, [Defendant] bears the legal burden to prove authorisation on the BOP.

PENALTY	<i>USE OF DOD</i> The maximum penalty depends on the type of drug used by [Defendant]: • Cannabis or THC: no more than 5 penalty units (\$1,017.55 based on 25-26 rates) → s 75(a) • Other Drugs: no more than 30 penalty units (\$6,105.30 based on 25-26 rates) and/or Level 8 imprisonment (1 year) → s 75(b) OTF, as [Defendant] allegedly used [insert drug], it is advised that they may face maximum penalties of [insert max penalty]. <i>ATTEMPTED USE OF DOD</i> It is advised to [Defendant] that the penalty for an attempt under the <i>Drugs Act</i> is the same as for the completed offence. However, if they were to be charged under s 321M (attempts), the lower penalties in s 321P would apply if found guilty of an attempt of use.
CONCLUSION	Guilty: If Prosecution proves the deliberate use of a <i>Schedule 11</i> substance BRD, and [Defendant] cannot prove a lawful authorisation on the BOP, [Defendant] will be found guilty of use of DOD. Acquittal: As the Prosecution will likely fail to prove [<i>specify the missing element, e.g., the fault element of intention</i>] BRD, their legal burden will not be satisfied, and [Defendant] must be acquitted.
POSSESSION OF A DRUG OF DEPENDENCE	
[Defendant] may be guilty of possession of a drug of dependence pursuant to s 73(1) provided that the Prosecution can establish the external and fault elements BRD. It is preliminarily advised to [Defendant] that there are two distinct pathways for Prosecution to prove possession: 1. Common Law Possession; or 2. Statutory Deemed Possession under s 5	
DOD	Prosecution must prove the substance in question was a drug of dependence under s 4. <i>Apply the same as use above.</i>
POSSESSION	<i>OPTION 1: STATUTORY DEEMED POSSESSION</i> Prosecution will rely on s 5 to argue that [Defendant] is "<i>deemed</i>" to be in possession because the substance was: (a) On land or premises occupied by them: This applies even if [Defendant] is not the sole occupier, is temporarily absent, or if others also have access, provided they have the ability to control access to the premises; or (b) Used, enjoyed, or controlled by them in any place whatsoever: "Control" has its ordinary meaning of exercising a directing influence or power (<i>Williams v Douglas; DPP Brooks</i>) → Note: This applies if the drug is in [Defendant]'s car or concealed by them. <u>The Fault Element (Knowledge)</u> Once Prosecution proves occupation or control, the burden shifts to [Defendant]. To rebut the presumption, [Defendant] must "satisfy the court to the contrary" by proving, on the BOP, that they had no knowledge of the drug's existence. → Note: Per <i>Momicilovic</i>, this is a legal burden placed on the defendant.

PART 1 OF SCHEDULE 11 OF THE DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT 1981 (simpler quantity regime)						
DRUG	PURE <i>2 - Commercial Quantity</i>			PURE <i>3 - Traffickable Quantity</i>		
Alprazolam (Xanax)	n/a			0.5 grams		
Oxycodone	n/a			5 grams		
Phencyclidine / PCD (angel dust)	0.1 kilograms			0.001 grams		
Psilocybin / Psilocin (shrooms)	0.1 kilograms			0.1 grams		
Temazepam	n/a			3 grams		
PART 2 OF SCHEDULE 11 OF THE DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT 1981 (cannabis/weed)						
PLANT	PURE <i>1A - Large Commercial Quantity</i>		PURE <i>2 - Commercial Quantity</i>		PURE <i>3 - Traffickable Quantity</i>	
Cannabis (weed)	250 kilograms 1,000 plants		25 kilograms 100 plants		250 grams 10 plants	
PART 3 OF SCHEDULE 11 OF THE DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT 1981 (detailed quantity regime - street drugs)						
DRUG	PURE <i>1A - Large Commercial Quantity</i>	MIXED <i>1B - Large Commercial Quantity</i>	PURE <i>2 - Commercial Quantity</i>	MIXED <i>2A - Commercial Quantity</i>	MIXED <i>3 - Traffickable Quantity</i>	PURE <i>3A - Traffickable Quantity</i>
Amphetamine	750 grams	1 kilogram	100 grams	500 grams	3 grams	n/a
Cocaine	750 grams	1 kilogram	250 grams	500 grams	3 grams	n/a
Diacetylmorphine (Heroin)	500 grams	750 grams	50 grams	250 grams	3 grams	n/a