

## Drugs and the Criminal Law

### 1. Introduction

This note provides a brief overview of drugs in the criminal law including underlying rationales for the law, and a summary of relevant offences relating to possession and supply of drugs. It will also briefly consider the effect of intoxication by drugs on the substantive criminal law.

### 2. Intoxication by drugs and the substantive criminal law

The link between criminal behaviour and intoxication by drugs or alcohol is a complex one which governments have long tried to address. The use of 'legal highs' and the problem of 'county lines' gang-led drug dealing have made prosecution and wider solutions to this perceived social problem more difficult. Furthermore, defendants in criminal trials often commit crimes whilst intoxicated through alcohol or drugs. The courts need to strike a balance between public protection and the essential principle of only convicting those who are blameworthy and have full mens rea for an offence.

In substantive criminal law terms, the defendant's use of drugs can affect both the actus reus and the mens rea of the offence. In the context of unlawful act manslaughter, there is a potential break in the chain of causation. A defendant might plead automatism or deny mens rea due to intoxication. If addicted, the court might consider that the addiction is an abnormality of mind for the purposes of diminished responsibility in a murder case. The effect of drugs on the criminal law can be seen in omissions liability (Khan), in manslaughter cases (Kennedy), and in intoxication cases (Majewski).

There are also offences which specifically criminalise the possession, supply and trafficking/importation of drugs. The following section briefly explores how the criminal law deals with possession and supply of illegal drugs.

### 3. Legislative framework

The most important piece of legislation that is relevant to drug crimes in England and Wales is The Misuse of Drugs Act 1971. The main offences are as follows:

#### 3.1. The offences

These are:

- Possession of a controlled drug (section 5(2))
- Possession with intent to supply another person;
- Production, cultivation or manufacture of controlled drugs;
- Supplying another person with a controlled drug;
- Offering to supply another person with a controlled drug;
- Import or export of controlled drugs; and
- Allowing premises you occupy or manage to be used for the consumption of controlled drugs or the supply or production of controlled drugs.

The terms used in these offences are explored in further detail below.

### 3.2. 'Controlled' drugs

This Act deals with what are known as 'controlled' drugs, which are those which are deemed too dangerous to the general public to be left unregulated. It is an offence to possess or supply a controlled drug – supply being the more serious crime. It is also an offence to allow premises (owned or managed) to be used in connection with controlled drugs – it is the owner who is responsible for any drug related crimes, even when that owner does not occupy the property. The prosecution will have to prove that the defendant had 'knowledge' that their property was being used in connection with controlled drugs.

The Act divides controlled drugs into three different categories:

- Class A Drugs: these are regarded as the most dangerous of drugs and include cocaine, heroin, crystal meth and ecstasy. It is important to be aware that if any Class B drug is injected, it will be deemed as a Class A drug.
- Class B Drugs: this classification covers, amongst others, cannabis, ketamine and amphetamine. New drugs deemed harmful that are classified and criminalised by a Temporary Class Drug Order also fall within Class B.
- Class C Drugs: this category includes mild tranquilisers and anabolic steroids.

### 3.3 'Possession'

Section 5(2) Misuse of Drugs Act 1971 makes it an offence for a person to have a 'controlled' drug in their possession. This is not a conduct crime, but one for which the actus reus is defined by a state of affairs or a set of circumstances meaning that there is no need for the defendant to have bought or to have obtained the drug, merely to be in possession of it. Section 37(3) specifies that this means that 'possession shall be taken to include anything subject to his control which is in the custody of another' (for example, if X is helping D to carry their luggage upstairs then controlled drugs in D's suitcase will remain in D's possession while X carries it). The common law explored this issue further in the case of *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 which decided that the defendant must know that they have the object containing the drugs, even if they do not know they have the drugs themselves: see Chapter 3, 3.4.4 "Drug offences". This seems to imply more than the definition in s37(3) and to be a policy-based consideration – the courts are giving effect to the object of the Act which is to prevent harm to the public by punishing drug misuse.

### 3.4 'Supply'

Section 5(3) of the Misuse of Drugs Act makes it an offence to be in possession of a controlled drug with an intent to supply. Supply includes distributing. The intention to supply may be inferred from a number of circumstances including the quantity of the drug and any equipment or cash found on the defendant or at premises occupied by D.

### 3.5 Defences

Section 5(4) gives D a defence to possession (but not supply) if they can prove either that they took the drug to prevent someone else from committing an offence and took reasonable steps to dispose of it as soon as possible; or that they took possession in order to deliver it as soon as possible into the custody of someone legally entitled to take custody.

Under section 28 MDA 1971, the defendant has a defence as long as they did not know or suspect or have reason to suspect 'the existence of some fact alleged by the prosecution that the prosecution must prove in order to establish the offence charged'. This might include for example not knowing about or having any reason to suspect the existence of the drug. This would not include a mistaken belief on the type of drug D is in possession of.

Note that the wording of the statute appears to place the burden of proof upon the defendant. In *R v Lambert* [2002] 2 AC 545, the House of Lords held that the defendant only bears an evidential burden in relation to the lack of knowledge, belief or suspicion: see Chapters 1 and 3.

### 3.6 Psychoactive Substances

The Psychoactive Substances Act 2016 received Royal Assent on 28 January 2016. The Act makes it an offence to produce, supply, offer to supply, possess with intent to supply, possess on custodial premises, import or export psychoactive substances. The maximum sentence is 7 years' imprisonment.

### 3.7 Drugs as medication

Following The Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations 2018 (SI 2018/1055), cannabis can be prescribed for medicinal use by a doctor on the General Medical Council's specialist register. However, medicinal use is not a defence if the cannabis was not prescribed by a specialist (see Chapter 7, 7.2.4). Other drugs are strictly regulated under the Medicines Act 1968 and are classified differently.

## 4 Sentencing

The penalties concerning drug crimes will ultimately depend on the class of the drug in question and the nature of the offence charged. The penalty that is likely to be administered will also depend on the nature of the crime: there are more serious penalties for supplying (up to life imprisonment) a controlled drug than there are for possession. These are not explored in detail here.

### References

Misuse of Drugs Act 1971

Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations 2018 (SI 2018/1055)

Modern Slavery Act 2015

Psychoactive Substances Act 2016

*R v Lambert* [2002] 2 AC 545

Warner v Metropolitan Police Commissioner [1969] 2 AC 256

Giles Stephenson and Anna Richardson 'New Psychoactive Substances in England 'A review of the evidence' Crime and Policing Analysis Unit, Home Office Science, October 2014

[www.drugwise.co.uk](http://www.drugwise.co.uk)