Chapter 10

Dealing

SUMMARY

This chapter considers the offences for dealing in controlled drugs contained in the Misuse of Drugs Act 1975 and considers options to deal with problems arising from these offences.

INTRODUCTION

10.1 The Misuse of Drugs Act 1975 creates offences for dealing in controlled drugs. This includes sale and supply, possession for sale or supply, importation, exportation, manufacture, production and cultivation. As currently drafted, these offences are potentially problematic because of the broad range of activities that they cover. The offence of possession for supply and the presumption of supply, which reverses the onus of proof, is also controversial. This chapter will consider the structure of the dealing offences in detail.

CURRENT OFFENCES

10.2 Section 6(1) of the Misuse of Drugs Act provides that no person shall:

(a) import into or export from New Zealand any controlled drug, other than a controlled drug specified or described in Part 6 of Schedule 3; or

(b) produce or manufacture any controlled drug; or

(c) supply or administer, or offer to supply or administer, any Class A controlled drug or Class B controlled drug to any other person, or otherwise deal in any such controlled drug; or

(d) supply or administer, or offer to supply or administer, any Class C controlled drug to a person under 18 years of age; or

(e) sell, or offer to sell, any Class C controlled drug to a person of or over 18 years of age; or

(f) have any controlled drug in his possession for any of the purposes set out in paragraphs (c), (d), or (e).

10.3 Under section 7(1)(b), it is an offence to “supply or administer, or offer to supply or administer, any Class C controlled drug to any other person, or otherwise deal in any such controlled drug”.

10.4 It is also an offence under section 9 of the Act to cultivate prohibited plants.

SALE AND SUPPLY

Should sale and supply be treated differently?

10.5 Under the Misuse of Drugs Act, supply is defined to cover distributing, giving or selling.[715] It therefore covers gratuitous supply.

10.6 In contrast, sale requires some form of consideration or value. The Act distinguishes sale from supply according to the class of the drug in question.

10.7 It is an offence under section 6 to supply Class A and B drugs, whether the supply is for consideration or not. But, under section 6, it is only an offence to supply Class C drugs to a person under 18 or to sell them to a person of or over 18 years of age. Supply of Class C drugs to adults is dealt with in section 7 and is treated as having a lower level of criminality – that is, the same criminality as a possession or use offence.

10.8 The harm caused by drugs is the primary rationale for the criminalisation of dealing. However, the distinction between sale and supply in relation to Class C drugs reflects a view that the culpability of an offender is greatest when supply is coupled with a profit. It is difficult to see why a profit motive would aggravate a Class C drug offence but not an offence involving Class A or B drugs. In any event, we are not convinced that this view is correct. The supply of a large quantity of drugs will always cause significant harm, whether or not any money changes hands. It does not seem right that an offender who supplies these drugs without consideration should invariably be considered to be less culpable than an offender who makes a profit, no matter how small. While the profit motive aggravates culpability and is therefore relevant to sentence, it is not so central to the legislative objective to the extent that it justifies a separate offence. For example, the fact that a large-scale dealer makes a large profit will substantially aggravate an offence and require a sentence at the upper end of the spectrum. But so too will the fact that a commercial dealer supplies a large quantity of drugs to a vulnerable young person for free for the purposes of developing a future market.

10.9 In our view, therefore, the scale of the transaction is more important to an assessment of culpability than whether it can be proved that money changed hands. The degree of profit involved will remain relevant to this assessment; a very small quantity will suggest non-commercial offending, while a very large quantity will suggest offending motivated by profit. However, a focus on scale recognises that other factors are equally as relevant, particularly the amount of drugs involved in the transaction and the overall size of the offender's dealing operation.

10.10 For these reasons, we consider that the scale of offending rather than proof of sale is a more accurate measure of the culpability of the offender. Distinguishing offences of supply in this way removes the need to distinguish sale from supply.

715 Misuse of Drugs Act 1975, s 2.

Q19 Should the scale of supply rather than whether or not the supply was for profit be the focus of the supply offence?

Scale of supply

10.11 If it is accepted that supply should be distinguished according to the scale of the offending rather than whether a sale has taken place, it is necessary to consider how this should be done. There appear to be two options:

(a) include scale as an element of the substantive offence; or

(b) treat scale as a sentencing matter.

Should scale be part of the offence?

10.12 The first option is to incorporate scale in the definition of the offence. This approach has been adopted in a number of Australian jurisdictions. In those jurisdictions, offences are framed in terms of the quantity of drugs rather than the class of drug involved (as is the case in New Zealand).

10.13 An example of this approach is that taken to drug trafficking in Australia's Federal Criminal Code. There are three graded offences:

- base level trafficking, which covers sales or other prohibited conduct involving any quantity of a controlled drug;
- trafficking in "marketable quantities" (a "marketable quantity" is defined, for example, as 25,000 grams or more of cannabis and 250 grams or more of methamphetamine);
- trafficking in "commercial quantities" (a "commercial quantity" is defined, for example, as 125,000 grams or more of cannabis and 750 grams or more of methamphetamine).

10.14 A legal presumption also operates in relation to all three offences. Where the amount of the drug involved is a "trafficable quantity", it is presumed that the defendant intended to sell the substance or believed that another person intended to sell the substance.[716] A "trafficable quantity" is set, by way of example, at 250 grams or more of cannabis and at 2 grams or more of methamphetamine.[717] The defendant has the burden of proving that he or she did not have the requisite intention.

716 Criminal Code 1995 (Cth), 302.5. See also commercial cultivation of controlled plants (ss 303.4–303.7), commercial manufacture of controlled drugs (ss 305.3–303.6), and pre-trafficking controlled precursors (ss 306.2–306.5) which follow a similar pattern to trafficking. Importing and exporting follow a different pattern. The offences are based on the quantities as above. There are two offences relating to importing or exporting any quantity, one with a defence if the person proves he or she did not intend to sell or did not believe that another person intended to sell the substance (s 307.3) and one without such a defence and a correspondingly lower penalty (section 307.4).

717 As the trafficable quantities are lower than commercial and marketable quantities, the presumption will always operate where a person is charged with trafficking in commercial or marketable quantities.

10.15 If offences were to be defined according to the scale of the offending, some distinctions on the basis of quantity along the Australian lines would need to be made. The Australian Model Criminal Code Officers Committee, on which the Federal Criminal Code is based, considered that "[q]uantity provides the most realistic measure of the commercial magnitude of the unlawful enterprise".[718]

10.16 However, quantity often presents an incomplete picture of the scale of the offending. To get a full picture of scale it may be necessary to take into account other circumstances. For example, in *R v Fatu*, the Court of Appeal noted that the ability to assess the full extent of a methamphetamine manufacturing operation depends "on chance, the evidence of manufacture on hand at the time of police intervention, volumes of precursor materials located and the availability of extrinsic evidence (for example, in the form of electronic intercepts)".[719] Despite expressing concern about basing sentencing on activity that the Crown has not directly proved, the Court noted that it needed to take a realistic view and that the "practical potential of the operation" must be relevant to an offender's sentence.[720]

10.17 We agree. The quantity of drugs actually seized, or otherwise proved to have been supplied, is only one measure of scale.

10.18 However, considerations beyond quantity are too diverse to be readily incorporated into an offence definition in the substantive offence. Moreover, an offence structure that focuses on scale risks the possibility that offenders may tailor their offending to fit within a lesser offence. For example, a dealer might keep only a small amount of drugs at his or her premises, and an importer might bring small but frequent quantities into the country.

Should scale be a sentencing matter?

10.19 The second option, that scale be reflected in the sentence an offender receives, is the current position in New Zealand. This allows more flexibility as to the factors that can be taken into account when determining the seriousness of supply. In addition to quantity, such factors include:

- the value of drugs involved;
- any evidence of supply taking place (tick lists, payment records, cash reserves, asset accumulation);
- the offender's role (unexplained income, the identity of the customers, how sale was initiated).

10.20 We favour this option. Judges have shown an ability to effectively consider these factors when assessing the scale of offending. From time to time the Court of Appeal has also issued guideline judgments that have created bands of seriousness,

718 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code: Chapter 6: Serious Drug Offences: Report* (1998) 67.

719 *R v Fatu* [2006] 2 NZLR 72, para 37.

720 Ibid, para 40.

with accompanying sentence ranges, for different scales of offending.[721] Guideline judgments provide a mechanism to ensure a consistent approach is taken to assessments of scale.

Q20 Do you agree that the scale of offending should be treated as a sentencing matter rather than be reflected in the offence?

Social supply

10.21 Although scale should generally be treated simply as a sentencing matter, there is a class of supply that we consider should be carved out for separate treatment. This class of supply is "social supply", where supply is of a very low level, among friends or acquaintances, without profit or with a very small profit, and with no significant element of commerciality.

10.22 The reasons for distinguishing this type of offending are that:

- the absence of any significant commerciality makes its criminality more analogous to possession;
- the circumstances of the offending tend to justify a more lenient sentencing response, with less reliance on imprisonment and greater use of all other options, including diversion into treatment.

10.23 Treatment can be incorporated into the court process in a variety of ways, through intermediate court-based diversion programmes through to full drug courts, and from pre-charge through to post-sentence. We discuss the need for greater use of drug treatment in the court system more fully in chapter 15.

10.24 The offence in section 7(1)(b) (supply of a Class C drug to adults) is effectively a social supply offence. It treats the supply of Class C drugs without profit as involving the same criminality as a possession or use offence. A review of the Parliamentary debates at the time the Misuse of Drugs Act was passed suggests that the offence was primarily aimed at the giving or sharing of marijuana cigarettes between adults.[722]

10.25 However, the offence is currently limited in scope. It only applies to Class C drugs, and focuses solely on whether money has changed hands. As noted above, we have reservations about this latter approach, particularly its failure to have regard to equally important factors such as the amount of drugs involved. We think a new, broader approach is required.

10.26 It is necessary to consider how that approach might be implemented. The first option is to create a separate offence. However, it would be difficult to frame such an offence and to provide a precise statutory definition of what constitutes social supply. Although social supply would always involve small amounts of the drug in question, there would be a number of other relevant factors to consider, such

721 See for example, *R v Fatu*, above n 719, for supply of methamphetamine; *R v Urlich* [1981] 1 NZLR 310 for dealing in class A drugs; *R v Wallace* [1999] 3 NZLR 159 the guideline judgment for dealing in Class B drugs; *R v Terewi* [1999] 3 NZLR 62 for cannabis cultivation and dealing; and *R v Xie* [2007] 2 NZLR 240 for importation of pseudoephedrine.

722 In these debates, one MP, Dr Wall referred to this type of behaviour as "a social 'shout'" (18 July 1975) 399 NZPD 3148.

as whether the offender was using the drugs, whether the supply was among friends and acquaintances and whether any profit or commerciality was involved. These factors could not be accurately incorporated into a statutory definition.

10.27 Nor would it be workable to establish an offence of social supply based solely on the amount of drug supplied. The relevant amount would vary from drug to drug and would need to be set on a drug by drug basis much like the presumption for supply. This would be difficult to implement, and require significant work to establish and keep up-to-date. It would also entail arbitrary thresholds.

10.28 These difficulties have led us to the view that social supply should be distinguished at a sentencing level. Doing so would ensure there are appropriate penalties and therapeutic options available to people who engage in social supply.

10.29 There is some evidence that this would be largely in line with public opinion on the seriousness of such conduct and the way in which it should be responded to. As part of the Law Commission's current review of maximum penalties across all major offences, it commissioned Colmar Brunton in 2009 to undertake public consultation on how criminal offences should be ranked in terms of seriousness. Eight focus groups in Auckland, Wellington, New Plymouth, Christchurch and Ashburton were given 28 selected crime scenarios and asked to rank them. They then discussed the reasons for their respective rankings and were asked to re-rank the scenarios following the discussion. One of the scenarios was possession for social supply. Prior to the discussion it was ranked 28, the least serious offence (below minor theft) and after the discussion it was ranked 26.[723]

10.30 One option for dealing with social supply is to introduce a presumption against imprisonment. Such a presumption exists currently for supply of a Class C drug to an adult under section 7(1)(b).

10.31 We suggest that the presumption could apply where the judge was satisfied that the following circumstances indicating social supply existed:

- the supply was in small quantities;
- the offender was also using the drugs;
- the supply was to friends or acquaintances;
- the offending was not motivated by profit.

10.32 Unlike the provision in section 7, this would apply regardless of the class of the drug.

Q21 Should social supply be treated differently from other types of supply for all classes of drugs? Should the factors that indicate social supply be broadened as set out in paragraph 10.31?

Q22 If so, do you agree that social supply should be dealt with as a sentencing matter rather than through the creation of a separate offence?

723 Colmar Brunton *Review of Maximum Penalties: Consultation to Understand Public Reasoning for Ranking Crime* (Wellington, 2009).

PART 1: Current approach

PART 2: Proposals for reform

Q23 Should there be a presumption against imprisonment in cases of social supply?

Maximum penalties

10.33 Currently the maximum penalties for supply offences depend on the class of drug in question. The question of how to set maximum penalties in a new legislative regime will depend, in part, upon the decisions made in relation to the classification system. This includes whether New Zealand continues to have different classes of drugs and, if so, how many classes there are.

10.34 Offences under section 6 carry a maximum penalty of imprisonment for life in relation to a Class A drug, 14 years imprisonment in relation to a Class B drug and eight years imprisonment in any other case.[724] If a person is convicted of an offence in relation to a Class A or B drug and a sentence of imprisonment is imposed, the court must consider whether to also impose a fine.

10.35 The maximum penalty for cultivation under section 9 is seven years imprisonment.[725] The maximum penalty for supply of a Class C drug under section 7(1)(b) is three months imprisonment and/or a $500 fine.

10.36 The penalties in place in other jurisdictions tend to depend on the offence structure and whether the jurisdiction in question has a classification system in place. Penalties in other jurisdictions tend to be set having regard to the following factors:

- the quantity of the drug in question;[726]
- a drug's classification;[727]
- a drug's quantity and classification; or
- a high maximum penalty for all offending.[728]

10.37 While it is difficult to draw direct comparisons given the different approaches, looking at the sentences for the most serious offending in each jurisdiction is nevertheless instructive. Table Two below sets out the maximum penalties for the most serious level of supply or trafficking in New Zealand, Australian jurisdictions, Canada, and the United Kingdom.

724 Misuse of Drugs Act 1975, s 6(2). Where a person is summarily convicted in relation to a Class C drug the maximum penalty is one year imprisonment or $1000 fine (Misuse of Drugs Act, 1975, s 6(3)). As part of the Criminal Procedure (Simplification) Project, it is proposed to remove those maximum penalties that apply upon summary conviction.

725 The maximum penalty is 2 years imprisonment or $2000 when tried summarily.

726 Criminal Code (Cth); Criminal Code 2002 (ACT); Drug Misuse and Trafficking Act 1985 (NSW); Controlled Substances Act 1984 (SA); Drugs, Poisons and Controlled Substances Act 1981 (Vic).

727 Controlled Drugs and Substances Act SC 1996 c 19 (Canada); Misuse of Drugs Act 1971 (UK).

728 Misuse of Drugs Act (NT); Drugs Misuse Act 1986 (Qld).

TABLE TWO: Comparison of maximum penalties across jurisdictions		
Jurisdiction	Offence	Penalty
Misuse of Drugs Act 1975 (NZ)	Supply of Class A drugs (section 6)	Life
Criminal Code (Cth)	Trafficking in commercial quantities	Life or 7500 penalty units or both
Criminal Code 2002 (ACT)	Trafficking in large commercial quantities	Life
Drug Misuse and Trafficking Act 1985 (NSW)	Supply in large commercial quantities (section 25)	Life or 5000 penalty units
Misuse of Drugs Act (NT)	Supply of commercial quantities of a Schedule 1 drug to an adult (section 5)	25 years
Drugs Misuse Act 1986 (Qld)	Trafficking Schedule 1 drug (section 5) Supplying Schedule 1 drug (section 6)	25 years 20 years
Controlled Substances Act 1984 (SA)	Trafficking in large commercial quantity	Life or $500,000 or both
Misuse of Drugs Act 2001 (Tas)	Trafficking (section 12)	21 years
Drugs, Poisons and Controlled Substances Act 1981 (Vic)	Trafficking in large commercial quantities	Level 1 imprisonment (life) and 5000 penalty units
Misuse of Drugs Act 1981 (WA)	Supplies (section 6(1))	25 years or $100,000 or both
Controlled Drugs and Substances Act SC 1996 c 19 (Canada)	Trafficking in Schedule 1 or 2 drug (section 5)	Life
Misuse of Drugs Act 1971 (UK)	Supply of Class A drug	Life

10.38 As shown, the maximum penalties for the most serious offending are broadly similar across jurisdictions, ranging from 20 years to life imprisonment. In a number of the Australian jurisdictions, much higher penalties are available for dealing in large quantities of drugs classified as Class B or C in New Zealand. Conversely, much lower penalties are available for dealing in small quantities of drugs classified as Class A here. However, this is a consequence of the different offence structures in these jurisdictions. In practice it is of little significance, as the nature of the drugs involved will be taken into account by the judge in determining a sentence within the maximum penalty prescribed in Australian jurisdictions.

10.39 Under section 6, the maximum penalty for supply of a Class C drug to a person under 18, or for sale of a Class C drug to a person of or over 18, is eight years imprisonment. In contrast, under section 7 the maximum penalty for supplying a Class C drug to a person over 18 is three months imprisonment. We propose that these offences be combined into a single offence (see above, paragraphs

10.5–10.10 and below paragraph 10.52). It is therefore necessary to consider what the maximum penalty for the worst class of such an offence should be (presumably large-scale commercial supply to minors).

10.40 In the context of the Law Commission's current review of maximum penalties, it has developed a systematic methodology (as yet unpublished) for determining the relative seriousness of different offences. Based on that methodology, the offence of dealing in Class C drugs under section 6 is regarded as having an equivalent seriousness ranking to 22 other offences, of which 13 have current maxima of either five years or seven years imprisonment. Moreover, Class C drug dealing is the only offence in the statute book with a maximum penalty of eight years, thus making it out of step with the framework of maximum penalties. We therefore propose that the maximum penalty for the new combined offence be seven years.

10.41 We do not anticipate that this would necessarily result in a reduction in actual sentence levels. We note that in 2004 to 2006 90% of sentences were at or below two and a half years imprisonment and the highest sentence was six years two months.

10.42 A maximum penalty of seven years would be the same as the penalty that currently attaches to cultivation under section 9. This would make it consistent with the approach taken to Class A and B drugs, where supply has the same maximum penalty as manufacture.

Q24 Should the current maximum penalties for the supply of Class A (imprisonment for life) and Class B (14 years imprisonment) drugs be maintained?

Q25 Do you agree that seven years imprisonment is an appropriate maximum penalty for the supply of Class C drugs?

Presumptions for and against imprisonment

10.43 Section 6 contains a presumption of imprisonment in relation to dealing in Class A drugs.[729] As noted above, section 7 contains a presumption against imprisonment for supply of Class C drugs to adults.

10.44 Presumptions for and against imprisonment are a form of statutory guidance about the type of sentence that should be given. Apart from those in the Misuse of Drugs Act, the only statutory presumptions in existence are for murder and sexual violation.[730]

729 Where an offence relating to Class A drugs is committed under paragraph (c) (supply) or (f) (possession for supply), or against (a) (importation and exportation) or (b) (production or manufacturing) in circumstances suggesting intention to supply the drugs under paragraph (c), there is a presumption in favour of imprisonment: Misuse of Drugs Act 1975, s 6(4).

730 Sentencing Act 2002, s 102; Crimes Act 1961, s 128B.

10.45 We have earlier proposed that there be a statutory presumption against imprisonment in relation to social supply. This will replace the presumption against imprisonment in section 7.

10.46 We think that a statutory presumption of imprisonment may still be appropriate in relation to the most serious dealing offences – for example, large-scale commercial dealing of Class A drugs. Offending of this magnitude is of the highest culpability and is likely to cause significant harm to the community. Imprisonment in all but the most exceptional cases therefore seems appropriate. However, the current presumption will need to be modified to exclude social supply.

10.47 We doubt whether this presumption should extend to large-scale dealing of Class B and C drugs. The current presumption in favour of imprisonment does not do so. The allocation of drugs to these classes indicates that they are inherently less harmful than Class A drugs. While current tariffs do prescribe imprisonment, particularly for substantial dealing, a statutory presumption in favour of imprisonment for all dealing other than social supply is arguably unnecessary.

Q26 Should there be a presumption in favour of imprisonment for Class A drugs in cases of large-scale commercial offending?

Q27 Do you agree that the presumption of imprisonment should not extend to Class B and C drugs?

Should supply to under 18 year olds be treated separately?

10.48 As noted above, the Act makes a distinction between the supply of Class C drugs to adults (the offence in section 7(1)(b)) and the supply of Class C drugs to young people (the offence in section 6(1)(d)). This distinction is based on a view that there is greater harm involved in the supply of drugs to young people. It is currently necessary to single this conduct out in relation to Class C drugs, as supply of Class C drugs to persons over 18 years of age under section 7(1)(b) is treated as a less serious offence. The current section 6(1)(d) does not sit well with our proposed removal of the distinction between sale and supply.

10.49 There may still be justification for having an offence of supply to those aged under 18, with a higher maximum penalty than general supply.[731] The rationale for this offence would be to protect young people on the basis of evidence showing that drug use is more harmful to young people than to adults and in light of the particular vulnerability of children and young people. The latest New Zealand research suggests that drug use before the age of 15 increases the risk of a range of poor outcomes, including involvement in crime and early pregnancy.[732]

731 This could not of course apply to supply of Class A drugs as the penalty is life.

732 See Candice L Odgers and others "Is it Important to Prevent Early Exposure to Drugs and Alcohol among Adolescents" (2008) 19 Psychological Science 10.

10.50 In the Australian Federal Criminal Code, there are a number of distinct offences relating to the supply of drugs to children, including supply for the purposes of trafficking, and the use of children in trafficking activities.[733]

10.51 In the Law Commission's recent review of crimes against the person, it recommended that certain victim-specific offences (assault on a child and male assaults female) be repealed.[734] This was on the basis that victim-specific offences:[735]

- may lead to inconsistent charging practice as the victim-specific offence will inevitably overlap with the generally applicable offence and police have discretion at the charging stage to select the offence under which the offender will be charged;
- create an arbitrary disparity from singling out some aggravating factors as more important than others;
- risk ad hoc specific offences being randomly inserted in the statute book every time an issue about a particular group of victims arises that causes political or public concern.

10.52 For these reasons, we do not believe that a specific offence of supply to those aged under 18 is justified. The maximum penalty for the generic offence instead needs to be set at a sufficiently high level to cater for cases where the supply is to a child or young person. This fact can then be treated as an aggravating factor at sentencing.[736]

Q28 Do you agree that, in relation to Class C drugs, supply to those under 18 years of age should be an aggravating factor on sentence rather than a separate and more serious offence?

Q29 Are any other offences in this area required?

POSSESSION FOR SUPPLY

Nature of the offence

10.53 The offence of possession for supply in section 6(1)(f) of the Misuse of Drugs Act differentiates possession for the purposes of supply to others from possession of a small quantity of drugs for personal use.

10.54 The Act treats possession for supply as similar to the offence of supply.

733 Criminal Code (Cth), s 309.

734 New Zealand Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (NZLC R 111, Wellington, 2009) paras 3.21–3.22, 3.29.

735 Ibid, para 3.4.

736 See Sentencing Act 2002, s 9(1)(g).

Presumption of supply

10.55 The key legal issue arising in relation to the offence of possession for supply is the matter of proof of the defendant's intention to supply the drugs. Under the Misuse of Drugs Act, this is addressed by the presumption contained in section 6(6) which provides:

> For the purposes of subsection (1)(f), a person is presumed until the contrary is proved to be in possession of a controlled drug for any of the purposes in subsection (1)(c), (d), or (e) if he or she is in possession of the controlled drug in an amount, level, or quantity at or over which the controlled drug is presumed to be for supply (see section 2(1A)).

10.56 This presumption reverses the onus of proof so that, to avoid a conviction, a defendant who is in possession of the requisite quantity of the drug in question must prove on the balance of probabilities that he or she was not in possession of the drug for supply.

10.57 The Misuse of Drugs Act was influenced by the United Nations Single Convention on Narcotic Drugs 1961. In the Commentary to this Convention, the United Nations General Assembly endorsed the use of presumptions:[737]

> If Governments choose not to punish possession for personal consumption or to impose only minor penalties on it, their legislation could very usefully provide for a legal presumption that any quantity exceeding a specified small amount is intended for distribution. It could also be stipulated that this presumption becomes irrebuttable if the amount in the possession of the offender is in excess of certain limits.

10.58 There are a number of arguments for having such a presumption. If there was no presumption, it would sometimes be difficult for the prosecution to prove that the accused was in fact in possession of the drug for the purposes of supply. There might be nothing more than the possession of a suspiciously large quantity of the drug from which to determine the purpose. In that event, the prosecution would potentially have to call expert evidence about the ordinary patterns of use of the particular drug in order to demonstrate to the jury that the accused possessed more of the drug than would usually be possessed by a high user of the drug. This would be time-consuming and expensive. In other words, it is the practicalities of proof that are said to justify the reversal of the onus of proof.

10.59 A related argument put forward in support of placing the onus of proof on the defendant is that the defendant must give evidence about his or her own usage, something that he or she is uniquely placed to prove. However, this argument has dubious validity. The defendant may sometimes be the only person able to provide evidence on the point, but this will not invariably be so. There will often be surrounding circumstances from which the intent to supply can be readily inferred, so that it can be easily proved by the prosecution. These will include the quantity of the drug having regard to the type of drug involved, the packaging of the drugs (if any), unexplained profits and assets held by the defendant, assorted paraphernalia that might indicate commercial activities involving drugs, comings and goings from the defendant's premises, and telephone records.

737 United Nations *Commentary on the Single Convention on Narcotic Drugs 1961* (United Nations) article 4, para 21.

10.60 In this respect, possession for supply is no different from an offence such as burglary, which requires proof of entry with intent to commit a crime. That intent will sometimes be peculiarly within the knowledge of the defendant, but much more often will be obvious from his or her other conduct. The argument that a reverse burden is justified because the defendant is uniquely placed to prove an element of the offence only has force where inferences can rarely be drawn from surrounding circumstances.

10.61 In *R v Hansen,* a majority of the Supreme Court held that the presumption in section 6(6) is inconsistent with section 25(c) of the New Zealand Bill of Rights Act 1990 and is not a justified limitation under section 5 of that Act.[738]

10.62 Section 25(c) affirms the right of those charged with an offence to be presumed innocent until proven guilty according to law. This long-standing principle of criminal law requires the State to prove a defendant's guilt beyond reasonable doubt. In general, any provision which requires a defendant to disprove on the balance of probabilities the existence of a presumed fact, particularly where that fact is an important element of the offence, is inconsistent with the right to be presumed innocent.

10.63 Given the Supreme Court's conclusion in relation to the presumption in section 6(6), the question arises as to how to best address the problems of proof that the presumption seeks to remedy, while respecting the fundamental protection conferred by section 25(c). We consider that there are four options:

(a) to remove the presumption;
(b) to repeal the offence of possession for supply;
(c) to establish an evidential onus;
(d) to retain the presumption, but in a form that can be justified under section 5 of the Bill of Rights Act.

Option (a) – No presumption

10.64 The first option is to have the offence of possession for supply without any presumption. This is the situation in Canada, where there is an offence of possession for the purpose of trafficking but no presumption in the legislation.[739] This would be consistent with the Bill of Rights Act. However, its practical effect would be likely to be increases in cost and time due to the prosecution having to call expert witnesses to make out the case. It would be likely to make it significantly more difficult to prove that a person intended to supply the drugs in his or her possession.

10.65 This approach also overlooks the fact that a presumption is likely to facilitate consistency in charging practice. In the absence of such a presumption, individual police officers will have to determine whether a quantity is sufficient to charge as possession for supply or not. These decisions are likely to vary from one police district and one police officer to another. The potential for such inconsistency was recognised recently in the United Kingdom, after a proposal to introduce an

738 *R v Hansen* [2007] 3 NZLR 1 Tipping, Anderson and McGrath JJ. Elias CJ did not think that section 5 should be considered and Blanchard J considered that the limitation was justified under section 5.

739 Controlled Drugs and Substances Act SC 1996 c 19, s 5(2).

evidential burden based on the quantity of the drug possessed was abandoned in 2006. Caroline Flint MP (a member of the relevant House of Commons Standing Committee) commented on the dangers of adopting *de facto* thresholds:[740]

> I understand that in parts of the country the CPS and the police often look at the amount of possession informally. While that is not enshrined in guidance, they use it as a guide for whether they can take a case to court or not. That has not had the rigour of consultation and could lead to inconsistencies in different parts of the country.

10.66 This concern has also been recognised in New Zealand. In an affidavit prepared for the purposes of the *Hansen* case (but which the Supreme Court declined to admit), a specialist adviser in drug policy for the New Zealand Police deposed that without a legislative presumption of supply set at a particular quantitative threshold, there would be the potential for significant inconsistencies in charging practice.[741]

Option (b) – No offence of possession for supply

10.67 The second option is to repeal the offence of possession for supply and simply have an offence of possession. This could be done in two ways:

(a) by dividing possession into two categories depending on quantity, with the offence relating to the higher quantity having a higher maximum penalty; or

(b) by having one possession offence which has a high maximum penalty and relying upon judicial sentencing guidance as to different scales of offending.

10.68 These approaches would both comply with the Bill of Rights Act. They would also avoid the necessity of having to call expert witnesses to prove that the amount was above levels ordinarily possessed for personal use.

10.69 An example of approach (a) can be seen in Queensland where there is no offence of possession for supply but the penalties for possession depend on the amount of drug involved. The worst offending, involving large quantities of a Schedule 1 drug, has a maximum penalty of 25 years, the same as the maximum penalty for supply of Schedule 1 drugs.[742]

10.70 Approach (a) runs the risk that those dealing in drugs would simply modify their behaviour by moving and possessing drugs in smaller quantities in order to avoid the risk of conviction for the more serious offence. However, this is equally true of the current situation where transactions can be structured to avoid attracting the presumption of supply.

740 Charlotte Walsh "On the Threshold: How Relevant Should Quantity be in Determining Intent to Supply?" (2008) 19 International Journal of Drug Policy 479, 482.

741 Affidavit of Michael Webb sworn on 9 February 2006 for the purposes of *R v Hansen*, above n 738, para 14.

742 Drugs Misuse Act 1986 (Qld), s 9.

10.71 If approach (a) was taken it would be necessary to determine the quantity of drugs at which the higher penalty level applied. This would need to be set at a level that is likely to be inconsistent with personal use. The expert advisory committee proposed in chapter 9 could be asked to advise government on the quantity of drugs that would attract the aggravated penalty level.

10.72 A person charged with possession under the single offence in approach (b) would be liable to a single maximum penalty, and an intent to supply would be treated as an aggravating factor that would need to be proved by the prosecution beyond reasonable doubt under section 24(2)(c) of the Sentencing Act 2002. That would in effect be no different from leaving the possession for supply offence intact but removing the presumption.

10.73 In contrast, the twin offences in approach (a) would arguably have a different result. Since the aggravated possession offence would be indicative of supply, the fact that possession was for personal use would become a mitigating factor on sentence, which would need to be proved by the defendant on the balance of probabilities under section 24(2)(d) of the Sentencing Act 2002. In other words, the question of supply would shift from the trial stage to the sentencing stage, but with the onus and standard of proof remaining the same as that applying under the current presumption.

Option (c) – Evidential onus

10.74 The third option would be to adopt an evidential onus. This would operate so that, in the absence of any evidence to the contrary, it would be presumed that the drugs were intended to be supplied, with the defendant bearing the burden of raising that evidence. However, the legal burden would not shift and once the defendant had displaced the presumption by raising sufficient evidence of the issue, the prosecution would have to prove guilt beyond reasonable doubt, including disproving the defendant's contention that he or she did not intend to supply. This type of presumption is more likely to be seen as consistent with the Bill of Rights Act.[743]

10.75 The Misuse of Drugs Act 1971 (UK) has an evidential presumption in subsections 5(4A) and (4B), which were inserted in 2005. Subsection (4A) provides that in proceedings for possession for supply, under section 5(3), a defendant who possesses over the prescribed amount of the substance is presumed to possess it for supply. However, subsection (4B) provides that subsection (4A) does not apply "if evidence is adduced which is sufficient to raise an issue that the accused may not have had the drug in his possession with intent". This change was introduced after the House of Lords decision in *R v Lambert*, which read down the previous legal presumption as an evidential presumption in order to be consistent with the Human Rights Act 1998 (UK).[744]

743 See discussion in *R v Hansen*, above n 738. See also *R v Lambert* [2002] 2 AC 545, where the House of Lords read down a presumption in the United Kingdom's Misuse of Drugs Act 1971 to be an evidential burden. Notwithstanding the approach of the House of Lords in *Lambert,* the Parliamentary Joint Committee on Human Rights, in considering a proposed evidential presumption to be contained in the Misuse of Drugs Act 1971, concluded that it was unable to reach a definitive view on the compatibility of the proposed evidential burden in these sections due to the fact that the prescribed amounts that would lead to the burden being imposed were not found within the legislation itself.

744 *R v Lambert,* above n 743.

10.76 A disadvantage of an evidential presumption is that the distinction between this and no presumption is a subtle one that is likely to be difficult for juries to understand. More importantly, it is unlikely to adequately address the problems caused by not having any presumption. Unless the quantities of drug involved are very substantial, the defendant will almost always claim that he or she possessed the drugs for his or her own use, meaning that the prosecution must prove that the defendant possessed for the purposes of supply. Therefore, in a practical sense there is very little difference between an evidential presumption and no presumption. As Blanchard J said in *Hansen*:[745]

> [In] the vast majority of cases, a requirement for an evidential burden to be surmounted, dischargeable by adducing or pointing to some evidence which, if believed, could support the defence, would in practical (as opposed to theoretical) terms be no different from a requirement that the Crown discharge the onus of proving the requisite purpose of the accused beyond reasonable doubt.

10.77 However, other judges in *Hansen* did not share Blanchard J's view. One of the reasons for considering that the presumption was not justified under section 5 of the Bill of Rights Act was the fact that an evidential onus could have been adopted. Both Tipping and McGrath JJ considered that the impairment of the right was more than reasonably necessary because of the possibility of an evidential onus. As Tipping J said:[746]

> It seems to me that a presumption rebuttable in terms of an evidential onus does put the Crown in a materially better position than if there was no presumption at all… I have not been persuaded that the level of forensic advantage likely to be derived by the Crown from this more easily rebutted presumption would fail to sufficiently serve the overall objective.

10.78 Tipping J also considered that the limit of the presumption was not proportionate to the objective and considered that "an evidential onus would sufficiently serve the purpose but without the same risk of convicting innocent persons".[747]

10.79 We share Blanchard J's assessment that the evidential onus cannot work effectively to address the difficulties of proof in a possession for supply case.

Option (d) – Retain the reverse onus

10.80 The final option is to retain the reverse onus. Two main concerns about section 6(6) emerge from the judgments in *Hansen*. The first is that the presumption in section 6(6) does not minimally impair the right as an evidential onus could be adopted (see our discussion of this option above).[748]

10.81 The majority also expressed concern as to the lack of clarity about the basis on which the amount of the drug was set, and whether this created a risk of wrongful conviction. This led to a view that the limit on the right was not proportionate.[749] Elias CJ doubted whether a reverse onus provision could ever

745 *R v Hansen*, above n 738, para 79.

746 Ibid, para 128.

747 Ibid, para 135.

748 Ibid, paras 128, 135 and 224.

749 Ibid, Tipping J para 135, McGrath J para 214, Anderson J paras 276– 280.

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be justified.[750] However, there were suggestions in some other judgments that a reverse onus might be considered justified under section 5 if it were set at a high enough level to reduce or avoid the possibility of wrongful convictions resulting from operation of the presumption.

10.82 McGrath J referred to the 1975 Parliamentary debates on the enactment of the Misuse of Drugs Act, which shows that the rule of thumb for presumption levels was one month's supply for a moderate user.[751] He considered that where the person is in possession of an amount close to the margins, it may not satisfy the rational connection test and may lead to wrongful convictions.[752] However, his Honour declined to discuss whether the new process adopted in 2000 for setting the levels provided a more rational connection.[753]

10.83 Arguably Tipping J went further when he expressed concern about whether the presumption level in relation to cannabis plant "suggests that a supply purpose is probable, or highly probable or indeed exists beyond reasonable doubt".[754] In his view:[755]

> If the level were set for each drug on the basis that possession at that level could of itself reasonably support a conclusion of possession for supply beyond reasonable doubt, there could be little objection to some form of presumption arising at that level. If the selected level was designed to show that supply was highly probable, there might be room for some concern but not much. If the level is designed to suggest only the probability of supply, by which I mean a bare balance of probabilities conclusion, then the risk of wrongly convicting people must be significant.

10.84 His Honour took the view that:[756]

> …the Expert Committee and the Minister should be given clearer and firmer parliamentary direction on this crucial topic. Rather than having the limit influenced by the concept of a reasonable amount for personal use, I consider that to achieve compliance with s 5 Parliament should require the Minister to be satisfied that possession of the trigger amount gives rise to a high probability that such possession is for supply. Likewise any non-exhaustive indicators suggestive of a supply purpose should be consistent with that high probability.

10.85 In cases of large-scale commercial supply, it will make no difference where the burden of proof lies; the amounts will lead to a natural inference of supply, and any defence claim to the contrary will be rejected as implausible. However, there are a substantial group of cases in the middle where the absence of a reverse burden would significantly affect the prosecution's ability to secure a conviction for any offence other than possession. In such cases, while the volume of drugs might generally indicate possession for supply, it will nevertheless be impossible for the prosecution to preclude possession for personal use beyond reasonable doubt.

750 Ibid, para 41

751 Hon T M McGuigan 399 NZPD (18 July 1975) 3143 cited in ibid, para 210.

752 *R v Hansen*, above n 738, para 214.

753 Ibid, para 216.

754 Ibid, para 138.

755 Ibid.

756 Ibid, para 147.

10.86 The difficulty with Tipping J's suggestion that the presumption be set at a very high level is that it takes insufficient account of this substantial group of cases in the middle. A presumption set at this level is likely to apply to only a small number of cases. The practical effect of such a change may not be very different from removing the presumption altogether.

10.87 In our view, if the reverse onus is retained it must be set at a level that achieves the original Parliamentary objective of addressing the problems of proof arising in this area. Blanchard J also took the view in *Hansen* that any remedy to address the problem of proof must be effective, which is why he was persuaded that the reverse onus was necessary.[757]

10.88 This would suggest that the presumption should be required to be set at a level where the amount is unlikely to be for personal use. However, while clarifying that the presumption amounts are to be set on this basis might go some way towards achieving Bill of Rights Act consistency, there remains a significant risk that a court would find this threshold too low.

10.89 If the legal presumption currently contained in section 6(6) is retained, how should the threshold for the presumption in favour of possession for the purpose of supply be set? Since 2000, the Misuse of Drugs Act has contained a prescribed process by which the presumption is set. The Act establishes an Expert Committee to advise the Minister, among other things, on "the level at and over which controlled drugs to which clause 2 of Schedule 5 applies are presumed to be for supply".[758] The Governor-General by Order in Council may, on the recommendation of the Minister, set the amount at which a drug is presumed to be for supply.[759] Before making such a recommendation the Minister must consult with the Expert Advisory Committee on the amount and have regard to:[760]

(a) the amount of the drug that could reasonably be possessed for personal use, including, without limitation, levels of consumption, the ability of the drug to create physical or psychological dependence, and the specific effects of the drug; and

(b) the amount, level, or quantity at and over which the drug is presumed to be for supply in other jurisdictions; and

(c) any other matters that the Minister considers relevant.

10.90 Regarding this process, Blanchard J said in *Hansen* that "it can be inferred that the current legislative scheme ensures that each trigger level is fixed at a quantity most unlikely to be in someone's possession except for the purpose of supply".[761]

> Assuming that the Expert Committee follows the statutorily mandated process, it is most unlikely that a person acquiring a drug for consumption only could inadvertently take himself or herself over a trigger level set by the Expert Committee. It is important to emphasise that the Court does not have before it any evidence that any trigger levels have been inappropriately set.

757 Ibid.

758 Misuse of Drugs Act 1975, s 5AA(1)(b)(iii).

759 Misuse of Drugs Act 1975, s 4(1B).

760 Misuse of Drugs Act 1975, s 4B(3) and (4).

761 *R v Hansen*, above n 738, para 78.

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10.91 However, while there is a process for setting levels now in place, there is no requirement for the levels to be regularly reviewed or for them to be amended as evidence of changes in drug use and supply patterns come to light. As a result, none of the levels have in fact been reviewed since the process was put in place. This was no doubt a substantial factor in the concerns held by the majority in *Hansen* with respect to the presumption level for cannabis, given that this level has not been changed since 1965 when the presumption was first enacted in New Zealand.

10.92 There also seem to be problems in the consistency of the presumption level across different types of drugs, especially regarding Class A drugs. For example, the level at which the presumption of possession for supply operates is 5 grams of methamphetamine but only 0.5 grams of heroin or cocaine. Evidence suggests that all these drugs are dealt with in similar quantities.

10.93 Accordingly, if the presumption were to be retained, the current presumption levels would have to be reviewed to ensure that they are not out of date. Furthermore, we consider that it would be necessary for the legislation not only to prescribe a robust process for setting the levels, but also to require that the levels be kept under regular review so that there is less danger of the amounts becoming out of date.

10.94 On balance we consider the difficulties associated with any attempt to achieve a reverse onus provision that is consistent with the Bill of Rights Act outweigh its possible advantages. Given the differing approaches of the judges in *Hansen*, it would be impossible to predict with any certainty that the presumption would be found by a court to be consistent with the Bill of Rights Act unless it was set at a level which is unlikely to be effective.

10.95 Accordingly, our tentative view is that the best option is to create an aggravated possession offence based on the possession of a quantity of drugs that is generally inconsistent with personal use (option (b)). The Expert Advisory Committee on Drugs should be asked to advise government on the quantity of drugs that would attract the aggravated offence.

Q30 Do you agree that the offence of possession for supply should be repealed and replaced with two possession offences: simple possession and aggravated possession (the latter involving a quantity that is indicative of supply)?

Q31 If not, which of the following options do you favour:

(a) remove the presumption;

(b) establish an evidential presumption;

(c) retain the presumption at its current levels; or

(d) retain the presumption, but set at levels that are more likely to be found justified under the Bill of Rights Act?

Structure of the offence of possession for supply

10.96 If an offence of possession for supply is retained, the next question is how to structure such an offence. The offence currently covers possession for the purposes of sale or supply under section 6(1)(c), (d) and (e). If the distinction between sale and supply were removed, this would have a flow-on effect for the offence.

10.97 As discussed above in relation to supply, the scale of offending should not dictate the substantive offence but should instead be dealt with as a sentencing matter.

10.98 As with supply, possession for supply can be committed where no commercial activity is involved and the drugs are intended to be shared socially among friends. We consider that the possession of drugs for the purposes of social supply should be treated in the same way as social supply and there should be a presumption against imprisonment.

10.99 This presumption should apply where the following circumstances indicate possession for social supply:

- the supply was in small quantities;
- the offender was also using the drugs;
- the supply was to friends or acquaintances;
- the offending was not motivated by profit.

Q32 If the offence of possession for supply is retained, do you agree that there should be a single offence and a presumption against imprisonment where the possession is for the purpose of social supply?

Maximum penalties

10.100 The penalties for this type of offending in other jurisdictions vary depending upon the offence structure in that jurisdiction and how the issue of possession for supply is treated. Some jurisdictions define trafficking to cover what is considered to be possession for supply in New Zealand.[762] Others have a separate offence as in New Zealand.[763] Others have no such offence and it is dealt with under possession.[764] However, despite these differences in approach, the maximum penalties for the worst offending across all jurisdictions considered are the same as for supply (see Table Two).

10.101 However, it is open to question whether the penalty for possession for supply should be the same as for supply itself. Possession for supply is an inchoate offence. Arguably, it should be treated as more like an attempt and therefore attract a lesser penalty.

Q33 What should the maximum penalties for possession for supply be?

762 See, for example, Criminal Code (Cth) and Criminal Code 2002 (ACT).

763 See, for example, Misuse of Drugs Act 1971 (UK), s 5(3); Controlled Drugs and Substances Act SC 1996 c 19 (Canada), s 5(2).

764 See, for example, Drugs Misuse Act 1986 (Qld), s 9 and Misuse of Drugs Act (NT), s 9.

IMPORT, EXPORT, PRODUCTION, MANUFACTURE AND CULTIVATION

Structure of the offences

10.102 The other dealing activities covered by the Misuse of Drugs Act are importation, exportation, production, manufacture and cultivation. There is a question about whether there is any reason for treating these offences any differently than supply.

10.103 On the one hand, these offences involve making a substance available to members of society, through importation or creation, which would not otherwise be available. Such offences are therefore analogous to offences of supply or possession for supply; both sustain the drugs market.

10.104 On the other hand, there is an argument in favour of different and more serious treatment due to the dangers involved in some manufacturing processes. For example, the manufacture of methamphetamine, cannabis oil or home bake all involve dangerous chemicals. This may justify treating manufacture as more serious than other dealing offences due to the added potential harm arising.

10.105 However, we do not regard this harm as such a significantly aggravating factor that it warrants a separate offence and enhanced maximum penalty that would apply to almost all drugs. While some harm may arise through the manufacturing process, this is no more significant than many other aggravating factors (for example, supply to children) and it can be adequately addressed in sentencing. The main drug with which additional harm from the manufacturing process is associated (methamphetamine) already carries a maximum penalty of life imprisonment and no enhancement would be possible.

10.106 We favour treating all the dealing offences in the same way.

Q34 Do you agree that:

(a) there should be a single offence, with scale of offending dealt with as a sentencing matter; and

(b) importation, exportation, production, manufacture and cultivation should have the same maximum penalty as supply?

Own use or offending for social supply

10.107 Importation, exportation, production, manufacture and cultivation can all be done for social supply or for a person's own use. That type of dealing activity can be distinguished from the seriousness of commercial dealing.

10.108 At a minimum, we think that, where circumstances suggest that the drugs are for the offender's own use or for sharing socially, the offending should be treated in the same way as social supply and a presumption against imprisonment should apply. These circumstances are likely to be:

- dealing in small quantities;
- evidence that the drug was for the offender's own use and possibly also for supply to friends or acquaintances;
- the absence of a profit motive.

10.109 In chapter 11, we discuss whether to go further so that any new approach that is taken to personal use offences should also apply to cultivation of small amounts of a prohibited plant (particularly cannabis) and, perhaps, to other dealing activities for personal use.

Q35 Do you agree that importation, exportation, production, manufacture and cultivation for personal use or for social supply should be distinguished from other forms of dealing?

Q36 If so, is a presumption against imprisonment the most appropriate way to make this distinction?

Maximum penalties

10.110 As with supply, the maximum penalty for importing, exporting and manufacture of Class A drugs is life imprisonment. This is similar to maximum penalties for the most serious level of these types of offending in comparable jurisdictions, where the maximum penalties range from 20 years to life imprisonment.

10.111 However, there is a considerable difference between the maximum penalty for cultivation in New Zealand and the penalties in other jurisdictions. In New Zealand, the maximum penalty for cultivation is seven years imprisonment. This penalty applies regardless of the class of drug in question. In contrast, the maximum penalties in other jurisdictions are consistently much higher. For example, in a number of jurisdictions, where very large quantities of plant are cultivated commercially, the penalty is life[765] or 25 years.[766] In other jurisdictions cultivation is defined to fall within the manufacturing or producing offence and accordingly has high maximum penalties. For example, in Queensland, the penalty is 25 years for producing a Schedule 1 drug in large quantities.[767] Like New Zealand, Tasmania has one maximum penalty (21 years imprisonment) for cultivation, which applies regardless of the drug or the amount.[768]

10.112 The reason for the low penalty in New Zealand probably reflects the fact that the majority of cultivation in New Zealand is likely to be cannabis. However, this does not explain the inconsistency with Australia where this is also likely to be the case. Canada and the United Kingdom, which both have high maximum penalties

765 See Criminal Code (Cth), Criminal Code (ACT), Drugs Misuse and Trafficking Act 1985 (NSW); Controlled Substances Act 1984 (SA); Drugs Poisons and Controlled Substances Act 1981 (Vic).

766 Misuse of Drugs Act (NT).

767 Drugs Misuse Act 1986 (Qld), s 8. See also Controlled Drugs and Substances Act SC 1996 c 19 (Canada), s 7 where the penalty is life for Schedule I or II drugs, although cannabis is excluded from this, the maximum penalty for cannabis being 7 years and see Misuse of Drugs Act 1971 (UK) where the penalty for production of Class A drugs is life.

768 Misuse of Drugs Act 2001 (Tas), s 7; See also Misuse of Drugs Act 1981 (WA) where the penalty for cultivation with an intention to sell is 25 years.

in respect of cultivation, specify different penalties for cannabis outside the normal classification system. These are seven years in Canada[769] and 14 years on indictment and 12 months on summary conviction in the United Kingdom.[770]

10.113 Currently the presumption in favour of imprisonment applies to importation, exportation, production, manufacture and cultivation of Class A drugs even where these activities are undertaken for personal use or for sharing with friends. Consistent with our view in paragraph 10.108 above, we think that personal use and social supply should be excluded from that presumption.

Q37 Do the maximum penalties for these offences need to be revised?

Q38 Do you agree that the presumption of imprisonment for importation, exportation, production, manufacture and cultivation of Class A drugs should be excluded where the offending is for the purposes of personal use or social supply?

ADMINISTERING

10.114 Sections 6(1)(c) and (d) and 7(1)(b) refer to the offence of administering. This offence is not defined in the Act. In the United Kingdom, where there is an offence of supply but not of administration, the Court of Appeal held that a defendant who injected another person (Fowler) with Fowler's own heroin could not be convicted of supply.[771] New Zealand commentaries have suggested that this case offers an example of when a charge of administering rather than supply is appropriate.[772]

10.115 Where the person administering the drug also supplies it, he or she can (and should be) charged with supply. However, there needs to be a separate offence to cover the administration of a drug provided by the person to whom it is administered, since this risks harm to that person. In the absence of such an offence, the generic offence of injury by an unlawful act and culpable homicide would not be available, if injury or death materialised.

10.116 Such an offence is qualitatively different from supply or other dealing offences and should not be lumped together with them. In our view, it should be a separate offence with its own maximum penalty. Administering a drug is a form of endangerment and this should be reflected in the penalty level. The Law Commission's report on Part 8 of the Crimes Act recommended a maximum term of imprisonment for two years for endangerment offences where injury or death does not result.[773] We suggest this would be an appropriate maximum penalty for administering drugs, whatever their class.

769 Controlled Drugs and Substances Act SC 1996 c 19 (Canada), s 7.

770 Misuse of Drugs Act 1971 (UK), s 6(2) and Schedule 4.

771 *R v Harris* [1968] 2 All ER 49.

772 Don Mathias *Brookers Misuse of Drugs* (Loose leaf, Brookers, Wellington, 1998) para 1702 (last updated 30 November 2007) para 406; Bruce Robertson (ed) *Adams on Criminal Law* (Loose leaf, Brookers, Wellington, 1992) para CP 3.02 (last updated 19 January 2010) para MD6.17.

773 New Zealand Law Commission, above n 734.

Q39 Do you agree that "administering" should be made a separate offence rather than continuing to be grouped with supply?

Q40 If the former, do you agree that the maximum penalty should be two years imprisonment? If not, what should it be?