

[59.01] Enactment history

Subsection (1) was replaced pursuant to s 3 of the Computer Crimes Ordinance 1993 (23 of 1993), commencing 23 April 1993; subs (1A) was added pursuant to s 3 of the Computer Crimes Ordinance 1993 (23 of 1993), commencing 23 April 1993 and subs (2) pursuant to s 3 of the Crimes (Amendment) Ordinance 1972 (48 of 1972), commencing 1 November 1972.

[59.02] England

Subsections (1), (2), (3) and (4) are to similar effect as s 10 of the Criminal Damage Act 1971 c 48. There is no equivalent provision to subs (1A).

[59.03] This Part

ie Part VIII, ss 59–67 of the present Ordinance.

[59.04] Any person

As to the meaning, see note [5.03] above.

[59.05] Equitable interest

An equitable interest in land in a case where the vendor has not completed the sale and purchase of premises but is legally bound to do so, is not property in this context. Thus where the vendor enters the premises and damages then he is not guilty of damaging the property of another: see *R v Lee Sing Wai* [1991] 1 HKLR 221, [1990] 2 HKC 462.

60. Destroying or damaging property

- (1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.
- (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—
 - (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
 - (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered,
 shall be guilty of an offence.
- (3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

(Added 48 of 1972 s. 3)

[cf. 1971 c. 48 s. 1 U.K.]

[60.01] Enactment history

This section was added pursuant to s 3 of the Crimes (Amendment) Ordinance 1972 (48 of 1972), commencing 1 November 1972.

[60.02] England

This section is to similar effect as s 1 of the Criminal Damage Act 1971 c 48.

[60.03] General note

See as to the nature of the offences contemplated by the equivalent English section, the remarks of Melford Stevenson J in *R v Aylesbury Crown Court, ex p Simms* [1972] 3 All ER 574 at 575.

[60.04] Subs (1): Without lawful excuse

This phrase qualifies the doing of the act that causes the destruction or damage, and may or may not be related to the mental element with which the act is done. The absence of lawful excuse is made an element of the offence and the burden of proving such absence, as under the previous law, is upon the prosecution. It is a good defence that the accused honestly (but unjustifiably) believed he owned the property: see *R v D R Smith* [1974] QB 354, [1974] 1 All ER 632, CA. See also *R v Denton* [1982] 1 All ER 65, [1981] 1 WLR 1446, CA, where it was held that no offence was committed by a person who set fire to premises on the instructions of the owner notwithstanding that it was preparatory to the commission of fraud.

As to the meaning of 'lawful excuse' in the case of offences under subs (1), see s 64 below.

[60.05] Belonging to another

The simple offence is limited to destroying or damaging *another's* property. Thus an owner who damages his flat between signing the contract to sell and completion is not guilty of an offence under subs (1): *R v Lee Sing-wai* [1991] 1 HKLR 221. As to when property is regarded as property belonging to a person, see s 59(2)–(4) above.

[60.06] Subsection (2): Intention

The prosecution is required to prove that the danger to life results from the destruction of or damage to the property and it is insufficient for the prosecution to prove that it resulted from the act of the defendant which caused the destruction or damage: see *R v Steer* [1988] AC 111, [1987] 2 All ER 833, HL.

In order to maintain a charge of attempted arson in the aggravated form contemplated by subs (2) it is sufficient to prove that the defendant was reckless as to whether life would be endangered by his actions, in addition to establishing specific intent to cause damage by fire; there is no need for the prosecution to prove a graver mental state than is required for the completed

offence: see *A-G's Reference (No 3 of 1992)* [1994] 1 WLR 409, (1994) 98 Cr App R 383, CA.

The danger to life must result from the destruction of or damage to property; it is not sufficient to prove that it resulted from the act of the defendant which caused the damage or destruction: see *R v Webster* [1995] 2 All ER 168 (CA) (applying *R v Steer*, (above).)

The words "destruction or damage" refer to the destruction or damage which the defendant intended to cause or to the risk of which he was reckless, and not to the destruction or damage which in fact occurred: see *R v Webster*, (above).

[60.07] Reckless as to whether any property would be ... damaged; reckless as to whether the life of another would be thereby endangered

The House of Lords in *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341, a case concerned with charges of arson under the Criminal Damage Act, decided that the test on recklessness should be an objective one, based on the standard of an ordinary prudent individual.

Caldwell was subsequently overruled in another arson case, *R v G & Another* [2004] 1 AC 1034, where the House of Lords decided, in relation to s 1 of the Criminal Damage Act 1971, that the defendant's state of mind must be shown to be culpable in that "he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, a defendant could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions." The judges decided that it was a salutary principle that conviction of serious crime should depend upon proof not simply that the defendant had caused (by act or omission) an injurious result to another, but that his state of mind when so doing was culpable.

The subjective test of recklessness was followed by the Court of Final Appeal in *Sin Kam Wah & Another v HKSAR* (2005) 8 HKCFAR 192, which effectively overruled previous decisions by Hong Kong courts that adopted the *Caldwell* approach. The CFA held that juries should be directed in terms of the subjective interpretation of recklessness upheld in *R v G & Another* (above).

Also, in relation to subsection 2(b), it is necessary for the court to decide whether the defendant "genuinely did not appreciate or foresee the risk" that the life of others would thereby be endangered: see *Sin Kam Wah Lam Chuen Ip and Another v HKSAR* (above).

[60.08] Subs (3): Destroying or damaging ... by fire

See *R v Denton* [1982] 1 All ER 65, [1981] 1 WLR 1446, CA.

[60.09] Arson

The common law offence of arson is abolished by s 67 below.

[60.10] Evidence

As to evidence in connection with offences under this Ordinance, see s 66 below.

[60.11] Penalties

See s 63 below and the notes thereto.

[60.12] Definition

For "property", see s 59 above.

61. Threats to destroy or damage property

A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out,-

- (a) to destroy or damage any property belonging to that other or a third person; or
- (b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person,

shall be guilty of an offence.

(Added 48 of 1972 s. 3)

[cf. 1971 c. 48 s. 2 U.K.]

[61.01] Enactment history

This section was added pursuant to s 3 of the Crimes (Amendment) Ordinance 1972 (48 of 1972), commencing 1 November 1972.

[61.02] England

This section is to similar effect as s 2 of the Criminal Damage Act 1971 c 48.

[61.03] Without lawful excuse

For the meaning of "lawful excuse" in the case of certain offences under this section see s 64 below. See also note [60.04] above.

[61.04] Belonging to that ... person

As to when property is treated as belonging to a person, see ss 59(2)-(4) above.

[61.05] Evidence

As to evidence in connection with offences under this Ordinance, see s 66 below.

[61.06] Penalties

See s 63(2) below, and the notes to that section. In contrast to s 60 above, no distinction is made as to penalty between threats to commit the simple offence and threats to commit the aggravated offence.

[61.07] Definition

For "property", see s 59 above.

62. Possessing anything with intent to destroy or damage property

A person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it-

- (a) to destroy or damage any property belonging to some other person; or
- (b) to destroy or damage his own or the user's property in a way which he knows is likely to endanger the life of some other person,

shall be guilty of an offence.

(Added 48 of 1972 s. 3)

[cf. 1971 c. 48 s. 3 U.K.]

[62.01] Enactment history

This section was added pursuant to s 3 of the Crimes (Amendment) Ordinance 1972 (48 of 1972), commencing 1 November 1972.

[62.02] England

This section is the same as s 3 of the Criminal Damage Act 1971 c 48.

[62.03] Without lawful excuse

For the meaning of "lawful excuse" in the case of certain offences under this section, see s 64 below. Cf also note [60.04] above.

[62.04] Belonging to some other person

As to when property is treated as belonging to some other person, see s 59 (2)-(4) above.

[62.05] Evidence

As to evidence in connection with offences under this Ordinance, see s 66 below.

[62.06] Penalties

See s 63(2) below, and the notes to that section.

[62.07] Definition

For "property", see s 59 above.

63. Punishment of offences

- (1) A person guilty of arson under section 60 or of an offence under section 60(2) (whether arson or not) shall be liable on conviction upon indictment to imprisonment for life.
- (2) A person guilty of any other offence under this Part shall be liable on conviction upon indictment to imprisonment for 10 years.

(Added 48 of 1972 s. 3)

[cf. 1971 c. 48 s. 4 U.K.]

[63.01] Enactment history

This section was added by s 3 of the Crimes (Amendment) Ordinance 1972 (48 of 1972), commencing 1 November 1972.

[63.02] England

This section is to the same effect as s 4 of the Criminal Damage Act 1971 c 48.

[63.03] This Part

ie Part VIII, ss 59-67 of the present Ordinance.

64. "Without lawful excuse"

- (1) This section applies to any offence under section 60(1) and any offence under section 61 or 62 other than one involving a threat by the person charged to destroy or damage property in a way which he knows is likely to endanger the life of another or involving an intent by the person charged to use or cause or permit the use of something in his custody or under his control so to destroy or damage property.
- (2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this

Region and (b) a person for the time being assuming the duties of the Chief Executive according to the provisions of Article 53 of the Basic Law.

[153G.06] Chief Executive in Council

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as the Chief Executive acting after consultation with the Executive Council.

[153G.07] Definition

For "owner", see s 117(1) above.

153H. Effect of appeals and applications on closure orders, and forfeiture orders and declarations

- (1) A closure order or forfeiture order shall be enforced and a declaration under section 153D(2) shall remain in effect even if an appeal is pending in respect of a conviction upon which it is based.
- (2) A closure order shall be enforced even if an application has been made under section 153C for the order to be rescinded or under section 153I for the order to be suspended.
- (3) Where a person successfully appeals against a conviction upon which a closure order, a declaration under section 153D(2) or a forfeiture order is based, the appellate court shall rescind the order or declaration unless-
 - (a) that or any other person was convicted in the same proceedings of an offence of which he remains convicted and, as a result, the closure order, declaration or forfeiture order could have been made without reference to the first-mentioned conviction; or
 - (b) the appellate court substitutes a verdict of guilty of another offence upon which the closure order, declaration or forfeiture order could, if the person had originally been convicted of that offence, have been based.
- (4) Where a court rescinds a closure order under subsection (3), it shall as soon as reasonably practicable send a notice in writing, sealed with the seal of the court, to the Land Registrar stating that fact. (Amended 8 of 1993 s. 3)
- (5) Where a court rescinds a declaration under subsection (3), it shall as soon as reasonably practicable send a notice in writing, sealed with the seal of the court, to the Director of Marine stating that fact.

(Added 69 of 1990 s. 7)

[153H.01] Enactment history

This section was added pursuant to s 7 of the Crimes (Amendment) Ordinance 1990 (69 of 1990), commencing 1 October 1990 and was subsequently amended pursuant to s 3 of the Registrar General (Establishment) Transfer of Functions and Repeal Ordinance 1993 (8 of 1993), (now Cap 439), commencing 1 March 1993.

[153H.02] England

There is no equivalent to this section.

[153H.03] Court

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as a court of the Hong Kong Special Administrative Region of competent jurisdiction.

[153H.04] Writing

This word is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as including writing, printing, lithography, photography, typewriting and any other mode of representing words in a visible form.

[153H.05] Land Registrar

Is the Registrar of the District Court: see s 2 of the Lands Tribunal Ordinance (Cap 17).

[153H.06] Definitions

For "closure order" and "forfeiture order", see s 117(1) above.

153I. Suspension order

- (1) Where a closure order has been made in respect of any premises, any person who is a mortgagee or chargee of the premises or who would, if the premises were not closed,-
 - (a) be entitled or permitted to occupy or possess the premises; or
 - (b) be the immediate landlord of the occupier of the premises, may, in accordance with section 153L, apply in writing for the closure order to be suspended.
- (2) An application under this section shall state-
 - (a) the name, address and business or occupation of the person who is proposed to be the occupier of the premises; and
 - (b) the purpose for which it is proposed the premises be used, during the suspension of the closure order and, where the proposed occupier is an individual, be accompanied by a copy of

a document which is proof of his identity for the purposes of Part IVA of the Immigration Ordinance (Cap 115).

- (3) Upon receipt of an application under this section the court or magistrate shall-
- (a) appoint a date for the hearing of the application; and
 - (b) send a copy of the application and of the accompanying document of identity to the Commissioner of Police and inform him of the date of the hearing.
- (4) A court or magistrate may-
- (a) after hearing an application under this section and after hearing any representations made by or on behalf of the Commissioner of Police; and
 - (b) if satisfied that the proposed user of the premises by the proposed occupier would not be likely to cause a nuisance or annoyance to any person residing nearby, make an order suspending the closure order for 2 years (but not for a shorter period).
- (5) A court or magistrate making a suspension order-
- (a) shall attach a condition to the order to the effect that the premises are, during the suspension, to be used only for the purpose proposed and, when occupied, to be occupied by the person proposed; and
 - (b) may attach any other conditions to the order as it or he thinks fit, including the following conditions-
 - (i) that if there is a breach of the condition referred to in paragraph (a), a person will forfeit a specified sum of money;
 - (ii) that a person gives security, in such a manner and such amount as may be specified, in respect of any sum that he may forfeit as a result of a breach of the condition referred to in paragraph (a).
- (6) A court may enforce payment of any sum of money that is forfeited as a result of a breach of any condition attached to a suspension order in the same manner as if it were a judgment debt and any money recovered shall be paid into the general revenue.
- (7) Where a closure order is suspended and is not revived under section 153K, the order shall cease to have effect at the end of the 2-year period for which it was suspended.
- (8) A court or magistrate making a suspension order shall, as soon as reasonably practicable, send to the Land Registrar and to the Commissioner of Police a copy of the order, sealed with the seal of the court or signed by the magistrate. (Amended 8 of 1993 s. 3)

(Added 69 of 1990 s. 7)

[153I.01] Enactment history

This section was added pursuant to s 7 of the Crimes (Amendment) Ordinance 1990 (69 of 1990), commencing 1 October 1990 and was subsequently amended pursuant to s 3 of the Registrar General (Establishment) Transfer of Functions and Repeal) Ordinance 1993 (8 of 1993), (now Cap 439), commencing 1 March 1993.

[153I.02] England

There is no equivalent to this section.

[153I.03] Part IVA of the Immigration Ordinance

ie, ss 17A-17E of Cap 115.

[153I.04] Court

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as a court of the Hong Kong Special Administrative Region of competent jurisdiction.

[153I.05] Magistrate

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as any person appointed to be a permanent or special magistrate under the Magistrates Ordinance (Cap 227).

[153I.06] Commissioner of Police

This is defined in s 3 of the Police Force Ordinance (Cap 232) as the Commissioner of Police of Hong Kong or a Deputy Commissioner.

[153I.07] Land Registrar

ie the Registrar of the District Court: see s 2 of the Lands Tribunal Ordinance (Cap 17).

[153I.08] Definitions

For "closure order" and "suspension order", see s 117(1) above. For "premises", see s 153A(6) above.

153J. Variation of conditions attached to suspension order

- (1) Any person specified in subsection (2) may, in accordance with section 153L, apply in writing for a variation of any condition attached to a suspension order and section 153I shall apply, with the necessary modifications, to such an application.
- (2) An application under subsection (1) may be made by-
 - (a) a person liable to be penalised in the event of a breach of a condition attached to the suspension order;

CHAPTER 134

DANGEROUS DRUGS ORDINANCE

To amend and consolidate the law relating to dangerous drugs.

[17 January 1969]

L.N. 6 of 1969

(Originally 41 of 1968) ARRANGEMENT OF SECTIONS

PART I

Short Title and Interpretation

- 1 Short title
- 2 Interpretation
- 3 Calculation of percentages for purposes of First Schedule, and extended meaning of "substance" (物質)

PART II

Control of Import, Export, Procuring, Supply, Dealing in or with, Manufacture and Possession of Dangerous Drugs

- 4 Trafficking in dangerous drug
- 4A Trafficking in purported dangerous drug

PART II

Control of Import, Export, Procuring, Supply, Dealing in or with, Manufacture and Possession of Dangerous Drugs

- 5 Dangerous drug not to be supplied except to person authorized or licensed to be in possession thereof
- 6 Manufacture of dangerous drug
- 7 (Repealed)
- 8 Possession of dangerous drug otherwise than for trafficking, and consumption of dangerous drug
- 9 Cultivation of and dealing in cannabis plant and opium poppy

PART III

Issue of Licences and Certificates, Requirements in Connection with Lawful Import and Export of Dangerous Drugs, and Dangerous Drugs in Transit

- 10 Licence to import dangerous drug
- 11 Requirements to be complied with in relation to import of dangerous drug

- 12 Licence to export dangerous drug
- 13 Requirements to be complied with on export of dangerous drug
- 14 Dangerous drug in transit
- 15 Licence to remove dangerous drug in transit
- 16 Licence to divert dangerous drug in transit
- 17 Requirement to be complied with where diversion licence issued
- 18 General power of Director to issue licences
- 19 Issue of licence, etc to be in discretion of Director and power to impose conditions
- 20 Cancellation of licences, etc
- 21 Form of licence and certificate

PART IV

Statutory Authority to Procure, Supply and Possess Dangerous Drugs

- 22 Statutory authority for certain persons to possess, supply or manufacture dangerous drugs
- 23 Restrictions on authority conferred by section 22, etc
- 24 Statutory authority for authorized sellers of poisons to manufacture preparations and retail drugs and preparations, and for listed sellers of poisons to retail certain preparations
- 25 Statutory authority to possess dangerous drug supplied by registered medical practitioner, etc, or on prescription or by authorized seller of poisons
- 26 Statutory authority to ingest or inject dangerous drug
- 27 Statutory authority to possess equipment and apparatus for injection of dangerous drugs
- 28 Statutory authority of masters of ships to possess, supply and procure dangerous drugs
- 29 Further statutory authorization of persons authorized or licensed to manufacture of supply dangerous drug
- 30 Supply of dangerous drugs to hospitals, etc
- 31 Supply of dangerous drug on prescription
- 32 Supply of dangerous drugs to persons on behalf of another, otherwise than on prescription
- 33 Withdrawal of authority conferred by section 22
- 34 Power to prohibit prescribing of dangerous drug
- 34A Amendment of Sixth Schedule

PART V

Divans, Equipment for Smoking, Injecting, etc, Dangerous Drug, and Premises Used for Unlawful Trafficking in or Manufacture of Dangerous Drug

- 35 Divan keeping
- 36 Possession of pipes, equipment, etc
- 37 Responsibility of owners, tenants, etc

[4.07] Whether or not the dangerous drug is in Hong Kong

Subsection (1) is not clothed with extraterritorial effect by subs (2) thereof, and is limited to activity of an accused within the territory of Hong Kong; otherwise the legislation would lead to absurd results: see *Somchai Laingsiriprasert v The Government of the United States of America & Anor* [1990] 2 HKLR 612; [1990] HKCU 415.

[4.08] Ascertained, appropriated or in existence

The word "ascertained" has two meanings: (1) "known"; and (2) "made certain" (*Sidebottom v Sidebottom*, L.R. 2 P. & D. 365). "Ascertained goods", for the purpose of Sale of Goods Act 1893 (c 71) s 52, means goods the individuality of which has by some means or other been found out by the time the contract is made (*Thames Sack Co. v Knowles*, 88 L.J.K.B. 585; distinguished *Re Wait* [1927] 1 Ch 606).

The word "appropriation" means making a thing the property of a person: see *Jowitt's Dictionary of English Law* (2nd Ed).

The term "in existence" means the state or fact of existing. The word "exist" means "emerge; present oneself; come into being": *The New Shorter Oxford English Dictionary*, Thumb Index Edition.

[4.09] Fine

"Fine" is a sum of money ordered to be paid to the (Government) by an offender, as a punishment for his offence: *Jowitt's Dictionary of English Law* (2nd Ed).

[4.10] Imprisonment for life

The maximum sentence for trafficking in dangerous drugs conferred by s 4(1)(a) of the Dangerous Drugs Ordinance is life imprisonment.

[4.11] Imprisonment

There is no statutory definition of "imprisonment". It is a sentence of imprisonment imposed by a court in respect of an offence. Section 67A of the Criminal Procedure Ordinance (Cap 221) provides for the computation of sentences of imprisonment to take into account, for example, any period during which the prisoner was in custody by reason only of having been committed to custody by an order of a court made in connection with the proceedings relating to the sentence or the offence for which it was passed, or with any proceedings from which those proceedings arose. The Prisons Ordinance (Cap 234) provides for the appointment of a Commissioner of Correctional Services and other officers (s 3) and for the setting apart of places as prisons (s 4). See further, *The Annotated Ordinances of Hong Kong*, Criminal Procedure Ordinance (Cap 221).

The respective sentencing tariffs laid down by the Court regarding trafficking offence are as follows:

(a) **Heroin:** *R v Lau Tak Ming* [1990] 2 HKLR 370; [1990] HKCU 399

Up to 10g	2 – 5 years
10 – 50g	5 – 8 years
50 – 200g	8 – 12 years
200 – 400g	12 – 15 years
400 – 600g	15 – 20 years
Over 600g	20 years upwards

(b) **Cocaine:** *R v Rojas Pedro* [1994] 2 HKCLR 69:

cocaine could be equated with heroin for sentencing purpose

(c) **Methamphetamine hydrochloride** (commonly known as "Ice"): *R v Ching Kwok Hung* [1991] 2 HKLR 125; [1991] HKCU 433

Up to 12g	3 – 7 years
10 – 70g	7 – 10 years
70 – 300g	10 – 14 years
300 – 600g	14 – 18 years
Over 600g	18 years upwards

(d) **Opium:** *R v Lau Yiu Nam* [1986] 5 HKLR 964; [1986] HKCU 291

Under 500g	As the court thinks fit
Over 500g	6 – 12 months
Over 1,000g	12 – 24 months
Over 2,000g	2 – 3 years
Over 3,000g	3 years upwards

(e) **Cannabis resin:** *R v Tuen Shui Ming* [1995] 2 HKCLR 129; [1995] 2 HKC 798; [1995] HKCU 416

Under 2,000g	Up to 16 months
Over 2,000g	16 – 24 months
Over 3,000g	24 – 36 months
Over 6,000g	36 – 48 months
Over 9,000g	4 years upwards

(f) **Herbal Cannabis:** *R v Tuen Shui Ming* (above):

A discount of up to one year in respect of similar amount of cannabis resin. Be that as it may, the sentence is still governed by the weight of herbal cannabis: *R v Chong Chak-on* [1996] 1 HKC 152

(g) **Ecstasy (MDMA):** *Secretary for Justice v Hii Siew Cheng* [2008] HKC 323

Up to 1g	At the discretion of the court
Over 1 – 10g	2 – 4 years
10 – 50g	4 – 6 years
50 – 300g	6 – 9 years
300 – 600g	9 – 12 years
600 – 1000g	12 – 14 years
Over 1000g	14 years upwards

(h) **Ketamine:** *Secretary for Justice v. Hii Sew Cheng* (above)

(i) **Methaqualone:** *AG v Chan Chi Man* [1987] 2 HKLR 221; [1987] HKCU 174

Under 500g/up to 2,000 tablets	As the court thinks fit
Over 500g/over 2,000 tablets	6 – 12 months
Over 1,000g/over 4,000 tablets	12 – 24 months
Over 2,000g/over 8,000 tablets	2 – 3 years
Over 3,000g/over 12,000 tablets	3 – 4½ years
Over 6,000g/over 24,000 tablets	4½ – 6 years
Over 9,000g/over 36,000 tablets	6 years upwards

(j) **Midazolam:** *HKSAR v Yiu Wai Chu* (HCMA 624/1997, unreported):

Midazolam could be equated with methaqualone for sentencing purpose

The sentencing tariffs also apply in cases involving dangerous drugs of very low narcotic contents: *AG v To Ka Yin* AR 3/1996; [1996] HKCU 35. Some of the “social” or “non-commercial” trafficking cases, involving small quantities of drugs, could properly fall into the lower end of the applicable sentencing scale: *HKSAR v Wong Suet Hau & Anor* [2002] 1 HKLRD 69; [2002] HKCU 108.

There is no difference in sentencing between possessing the drugs for trafficking or actual trafficking: *HKSAR v Ng Hon Man* (CACC 381/1999, unreported); [1999] HKCU 1437.

When separate parcels of dangerous drugs being found by the authorities, the normal practice is to sentence the defendant on the total quantity of dangerous drugs rather than on the individual smaller quantities. In cases involving different types of drugs, the total quantity rather than individual quantities should be taken for sentencing purposes: *HKSAR v Yip Pik Kwai* [1999] 3 HKLRD 42; [1999] HKCU 1729; [1999] HKCU 629; *HKSAR v Wong Kam Wo* [2001] 2 HKLRD 290; [2001] 2 HKC 647; *HKSAR v Cheung Kwok Leung* [2003] 3 HKLRD 542; [2003] HKCU 426; *HKSAR v. Yip Wai Yin and Anor* [2004] 3 HKC 367. Where two or more offences are committed on the same day on closely linked facts, it would be proper for the court to adopt an overall starting point by combining the weights of all the drugs in each charge to arrive at a total weight: *HKSAR v Chow Yu Chi* (CACC 359/2000, unreported); [2000] HKCU 978.

Where, after a plea of guilty to trafficking in dangerous drugs, the defendant advances in mitigation that a significant proportion of the drugs is intended for self-consumption, the court has to determine what the factual basis is for sentence. In doing so, factors like quantity and values of drugs, the number of packets found, the presence of paraphernalia, the place where the drugs are found, whether the defendant is an addict, the explanation given by the defendant after arrest, his general means and his criminal record should be considered. If the court accepts that a significant proportion of the drugs are intended for the defendant’s consumption, it is not necessary to specify the proportions. In sentencing, the court should keep in mind: (a) simple

possession itself carries a term of imprisonment and (b) the requirement to enhance sentence for simple possession to reflect the latent risk that some of the drugs may find their way into the hands of others: *HKSAR v Wong Suet Hau & Anor* [2002] 1 HKLRD 69; [2002] HKCU 108.

See also [39.01] below for the sentencing approach in respect of conspiracy to traffic in dangerous drugs.

[4.12] Dangerous drug in the course of transit

According to s 2, “in transit” means “imported into Hong Kong for the sole purpose of being exported from Hong Kong to another country”.

On a true construction, s 4(1)(a) covers dangerous drugs in transit which do not fall within the exceptions in s 4(4)(b)(i) or (ii). The terms of s 4 are clear and specific and the legislative changes in 1984 have plainly and unequivocally intended this: *Secretary for Justice v Lau Suk Han & Anor* [1998] 2 HKLRD 14 at pp 23J–24A; [1998] 2 HKC 263; [1998] HKCU 2657.

4A. Trafficking in purported dangerous drug

- (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Hong Kong-
 - (a) traffic in any substance represented or held out by him to be a dangerous drug but which is not in fact a dangerous drug;
 - (b) offer to traffic in any substance represented or held out by him to be a dangerous drug but which is not in fact a dangerous drug; or
 - (c) do or offer to do an act preparatory to or for the purpose of trafficking in any substance represented or held out by him to be a dangerous drug but which is not in fact a dangerous drug.
- (2) Subsection (1) shall apply whether or not the substance represented or held out to be a dangerous drug is in Hong Kong or is to be imported into Hong Kong or is ascertained, appropriated or in existence.
- (3) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence and shall be liable-
 - (a) on conviction on indictment, to a fine of \$500000 and to imprisonment for 7 years; and
 - (b) on summary conviction, to a fine of \$100000 and to imprisonment for 1 year.
- (4) No prosecution for an offence under this section shall be instituted without the consent in writing of the Secretary for Justice, but this subsection shall not prevent the arrest, or the issue of a warrant for the arrest, of a person for any such offence,

or the remand in custody or on bail of a person charged with such an offence. (Amended L.N. 362 of 1997)

(Added 37 of 1980 s. 3)

[4A.01] Enactment history

This section was added pursuant to s 3 of the Dangerous Drugs (Amendment) Ordinance 1980 (37 of 1980), commencing on 11 July 1980.

In subs (4), the title of "Attorney General" was amended to that of "Secretary for Justice", pursuant to s 3 of the Declaration of Change of Titles (General Adaptation) Notice 1997 (LN 362 of 1997), coming into operation on 1 July 1997.

[4A.02] Traffic in any substance represented or held out to be a dangerous drug but which is not in fact a dangerous drug

It is an offence for a person, either on his own behalf or on behalf of any other person, to traffic in a purported dangerous drug. See *Halsbury's Laws of Hong Kong* Vol 9, 2002 Reissue, Butterworths at [130.536]. For the meaning of "trafficking", see [4.04] above.

It was held in *R v Fang Yee Kwok* [1996] 2 HKCLR 116; [1996] 3 HKC 303, that if the evidence which the prosecution intended to lead would establish an unqualified offer then the offender should be charged under s 4 and that if it would establish a bogus offer then the offender should properly be charged under s 4A.

[4A.03] Offer to traffic in any substance represented or held out to be a dangerous drug but which is not in fact a dangerous drug

It is an offence for a person, either on his own behalf or on behalf of any other person, to offer to traffic in a purported dangerous drug. See *Halsbury's Laws of Hong Kong* Vol 9, 2002 Reissue, Butterworths at [130.526]. For the meaning of "offering to traffic", see [4.05] above.

[4A.04] Do or offer to do an act preparatory to or for the purpose of trafficking in any substance represented or held out to be a dangerous drug but which is not in fact a dangerous drug

It is an offence for a person, either on his own behalf or on behalf of any other person, to do or offer to do an act preparatory to or for trafficking in a purported dangerous drug. See *Halsbury's Laws of Hong Kong* Vol 9 Reissue 2002, Butterworths at [130.536]. For the meaning of "doing or offering to do a preparatory act to trafficking", see [4.06] above.

[4A.05] Ascertained, appropriated or in existence

See [4.08] above.

[4A.06] Imprisonment

See [4.11] above.

[4A.07] Without the consent in writing of the Secretary for Justice

No prosecution shall be instituted under subs (4) unless with the consent of the Secretary for Justice.

[4A.08] Remand in custody

To "remand" a defendant or prisoner in a proceeding before a magistrate or justices of the peace is to adjourn the hearing to a future date, and to order that the defendant, unless admitted to bail, be kept in custody in the meantime: *Jowitt's Dictionary of English Law* (2nd Ed).

[4A.09] Bail

An accused person is said at common law to be admitted to "bail" when he is released from the custody of officers of the law and is entrusted to the custody of persons known as his sureties, who are bound to produce him to answer, at a specified time and place, the charge against him and who, in default of so doing, are liable to forfeit such sum as is specified when bail is granted: *Jowitt's Dictionary of English Law* (2nd Ed). Under s 9D(1) of the Criminal Procedure Ordinance (Cap 221), a court shall order an accused person to be admitted to "bail", whether he has been committed for trial or not, when: (a) he appears or is brought before a court in the course of or in connection with proceedings for the offence for which he is accused; or (b) he applies to the court before which he is accused to be admitted to bail; or (c) he applies to a judge under s 9J to be admitted to bail. See further, *The Annotated Ordinances of Hong Kong*, Criminal Procedure Ordinance (Cap 221).

5. Dangerous drug not to be supplied except to person authorized or licensed to be in possession thereof

- (1) No person shall supply or procure, or offer to supply or procure, a dangerous drug to or for any person in Hong Kong unless-
 - (a) the latter person is authorized by or licensed under this Ordinance to be in possession of that dangerous drug;
 - (b) the dangerous drug is to be supplied or procured in accordance with this Ordinance; and
 - (c) in the case of a person licensed under this Ordinance to be in possession of the dangerous drug, the dangerous drug is to be supplied or procured in accordance with the conditions of his licence.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable-

the sentencing judge in sentencing the defendant on the offence of conspiracy to traffic in a dangerous drug. In that case, the defendant did not disclose the actual amounts of heroin he traded during the period covered in the conspiracy charge but he admitted that he supplied at least 10 packets of heroin every day to others. The sentencing judge calculated the total quantity of heroin the defendant traded during the period concerned by making reference to the narcotic contents of the drug found on him at the time of arrest, and then sentenced him with regard to that total quantity.

40. False statements, and aiding, abetting, etc. offence under corresponding law

- (1) Any person who-
 - (a) for the purpose of obtaining, whether for himself or for any other person, the issue or renewal of a licence or certificate under this Ordinance, makes any declaration or statement which is false in a material particular;
 - (b) knowingly utters, produces or makes use of any such declaration or statement or a document containing any such declaration or statement; or
 - (c) aids, abets, counsels or procures the commission in a place outside Hong Kong of an offence punishable under a corresponding law in force in that place, or does an act preparatory to, or in furtherance of, an act which if committed in Hong Kong would constitute an offence under section 4 or 6,
 shall be guilty of an offence.
- (2) Any person who is guilty of an offence under subsection (1)(a) or (b) shall be liable on conviction to a fine of \$10000 and to imprisonment for 3 years.
- (3) Any person who is guilty of an offence under subsection (1)(c) shall be liable-
 - (a) on conviction on indictment, to a fine of \$100000 and to imprisonment for 15 years; and
 - (b) on summary conviction, to a fine of \$10000 and to imprisonment for 3 years.

[cf. 1965 c. 15 s. 13 U.K.]

[40.01] Any person

See [4.02] above.

[40.02] False in a material particular

See [25.08] and [25.09] above. "False" in this context means deceptive, misleading: *The New Shorter Oxford English Dictionary*, Thumb Index

Edition. "A material particular" refers to a particular which is important, serious, pertinent, essential or relevant: *The New Shorter Oxford English Dictionary*, Thumb Index Edition. The falsity of a material particular must be proved in an objective manner.

[40.03] Knowingly utters, produces or makes use of any such declaration or statement or a document

For "knowing", see [37.06] above. In criminal law, to "utter" a forged document, die or seal, etc, or counterfeit coin, is to pass or attempt to pass it off as genuine when it is known to be forged. See *Jowitt's Dictionary of English Law* (2nd Ed).

[40.04] Aids, abets, counsels or procures the commission

Section 89 of the Criminal Procedure Ordinance, (Cap 221) states "Any person who aids, abets, counsels, or procures the commission by another person of any offence shall be guilty of the like offence." See further, *The Annotated Ordinances of Hong Kong*, Criminal Procedure Ordinance (Cap 221).

The courts have tended to construe the words "aid, abet, counsel or procure" so as to coincide with the common law in relation to felonies; thus aiders and abettors have been equated with principals in the second degree, and counsellors and procurers with accessories before the fact. This is unsatisfactory because it produces results which do not reflect the natural meaning of the words. It is submitted that the better approach is to give the words their natural meaning; thus an aider and abettor may be present giving active assistance to the principal; he may be some distance away (as in the case of a look-out who watches the householder whilst the principal, with whom he is in contact via a mobile telephone burgles the house) or his act of assistance could be far removed in time and place (as in the case of the supplier of a gun who knows that it is required for the purpose of committing murder). Counselling and procuring inevitably takes place before the offence itself, but it need not be long before and there is no reason why the counsellor or procurer should not be present (although this is unlikely). (See Paragraphs 18-19 in *Archbold 2002*).

The ordinary meaning of the word "counsel" is "advise" or "solicit". There is no implication in the word itself that there should be any causal connection between the counselling and the offence. However, one who counsels or commands (as well as procures) is liable and, by implication liable only, for an offence which is committed in consequence of such counselling (or commandment or procurement), but it is not necessary to prove that the counselling was a substantial cause of the commission of the offence. (See Paragraphs 18-21 in *Archbold 2002*).

An offence cannot, however, be said to have been procured unless there is a causal link between what the alleged procurer and the commission of the offence. The procurement may be personal, or through the intervention of a third person. It may also be direct, by hire, counsel, command, or conspiracy; or indirect, by evincing an express linking, approbation, or assent to another's

criminal design of committing an offence; but the bare concealment of an offence contemplated by another will not make the party concealing it liable; nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute an offence. (See Paragraphs 18–22 and 18–23 in *Archbold 2002*).

[40.05] Hong Kong

See [11.03] above.

[40.06] Imprisonment

See [4.11] above.

41. Joint trial of offences in certain cases

Notwithstanding anything in the Magistrates Ordinance (Cap 227) or any other law, where it is alleged that 2 or more persons have committed distinct offences under section 4, 8, 35 or 36 in the same place and at about the same time, the charges for such offence against such persons may be tried together.

[41.01] Magistrates Ordinance (Cap 227)

This is an ordinance to provide for the jurisdiction of magistrates and the procedure and practice before magistrates in relation to offences punishable on summary conviction, the transfer of charges to the District Court and the committal of persons charged with indictable offences and for other purposes.

42. Conviction of offence other than that charged

- (1) If on the trial of a charge for an offence specified in the second column of the Third Schedule the defendant is acquitted, but it is proved that the defendant is guilty of any offence specified opposite thereto in the third column of that Schedule or of being a party to any such offence, he shall be convicted of such offence or of being a party to any such offence and shall be liable to be punished accordingly.
- (2) The references in the Third Schedule to numbered sections and subsections shall be construed to include every offence under the section or subsection so numbered in this Ordinance.
- (3) Nothing in this section shall exclude the application to any offence of any other law authorizing a person to be found guilty of an offence other than that with which he is charged.

[42.01] Any other law

See [38.04] above.

PART VII

EVIDENCE

43. Certificate of corresponding law

A document purporting to be issued by or on behalf of the government of a country and purporting to state the terms of a corresponding law in force in that country shall be admitted in evidence, in proceedings for an offence under this Ordinance before any court, on its production by the prosecution without further proof, and such document shall be conclusive evidence—

- (a) that it is issued by or on behalf of the government of that country;
- (b) that the terms of such law are as stated in the document; and
- (c) that any facts stated in the document to constitute an offence under such law do constitute such offence.

[43.01] General Note

Since the criminal conduct of drug trafficking and all other offences related thereto often invoke the jurisdiction of two or more countries, s 43 saves the inconvenience of having to call the evidence of law experts or government officials of a particular foreign country in court proceedings in Hong Kong.

44. (Repealed 31 of 1969 s. 7)

[44.01] Enactment history

This section was repealed pursuant to s 7 of the Evidence (Amendment) (No 2) Ordinance 1969 (31 of 1969), commencing 4 July 1969.

45. Presumption concerning manufacture of dangerous drug

Any person who is proved to have been manufacturing or doing an act preparatory to the manufacture of a dangerous drug shall,