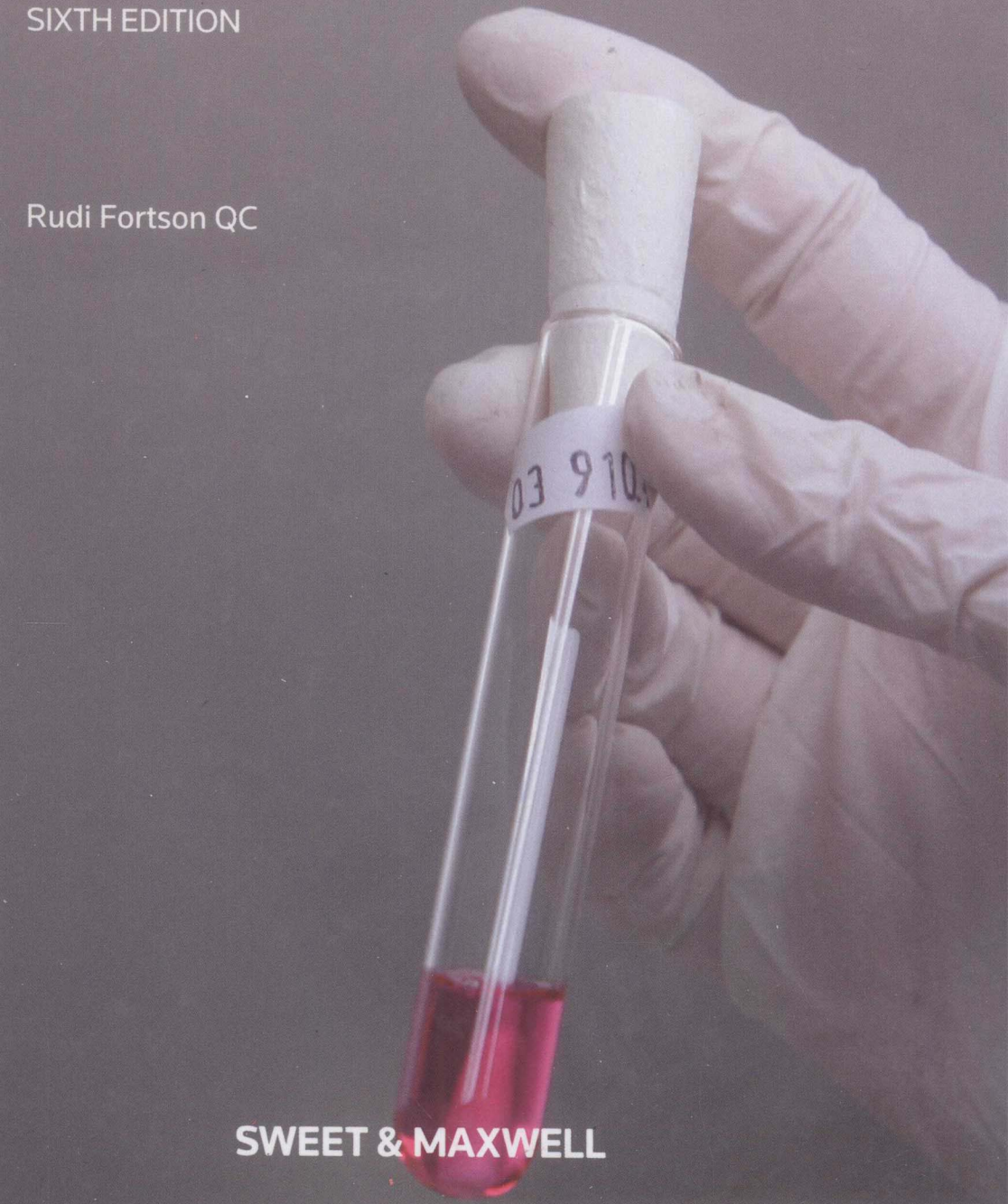
MISUSE OF DRUGS AND DRUG TRAFFICKING OFFENCES

SIXTH EDITION

Rudi Fortson QC



SWEET & MAXWELL

MISUSE OF DRUGS AND DRUG TRAFFICKING OFFENCES

6th edition

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FOREWORD TO THE 6th EDITION

This is a very wide ranging book which should be an indispensable guide to the many organisations and individuals concerned with the misuse of drugs: Government departments, the Crown Prosecution Service, Her Majesty's Revenue and Customs, lawyers, judges, police officers, prison officers and those concerned with the physical and mental health of those who suffer from addiction.

Politicians and journalists wishing to speak or write about tackling drug misuse would be advised to read Chapter 1 before doing so. Although Chapter 1 is entitled "An Historical Sketch of Drug Misuse", it is far more than a sketch. It contains a detailed history of what some would call the "War on Drugs" with numerous valuable statistics.

For those concerned with the enforcement of the laws relating to misuse of drugs, this comprehensive and scholarly book provides a detailed exposition of the substance of those laws and the approach of the courts to them. In areas such as confiscation the author cannot and does not limit himself to confiscation in drugs cases but provides a detailed analysis of this very complex branch of the law. Anyone involved with confiscation proceedings will find Chapter 13 a great help.

Such is the volume of change in the areas covered by the book that the 6th Edition is particularly welcome. I have no hesitation in recommending it.

The Right Honourable Lord Justice Hooper

PREFACE TO THE 6th EDITION

The 6th edition of this work has been a considerable undertaking. There is not a chapter that has escaped substantial revision or, indeed, rewriting. This is because in the six years since the last edition was published, there has been considerable legislative and judicial activity in the area of 'drugs and the law', all of which is intended to give effect to evolving policies. The policies are not confined to UK strategies for controlling the production, distribution and use of drug products and drug substances, but they also reflect international treaty obligations at an EU and UN level. Nowhere is this more apparent than in relation to so-called 'legal highs' – i.e. psychoactive substances – that are emerging at a very rapid rate, but which are also coming to the attention of interested public bodies in the UK and elsewhere. Such bodies have invested in 'early warning' systems that are continually being improved to increase their effectiveness in detecting and analysing unlicensed drug substances. In 2010, 41 psychoactive substances were officially notified to the European Commission and European Parliament for the first time by way of the information exchange mechanism and the Early-Warning System, which was set up by Council Decision 2005/387/JHA (see EMCDDA–Europol 2010 Annual Report on the implementation of Council Decision 2005/387/JHA). That number is considerably higher now. The results enable legislative bodies to take such steps as they consider appropriate to control particular substances. Needless to say, the questions of whether to control such substances, the methods of control and the intensity of control, are contentious issues.

The UK legislature has sought to control emerging psychoactive drugs in various ways. The traditional method is by adding substances to Sch.2 to the Misuse of Drugs Act 1971 (for example, piperazines such as *benzylpiperazine* (BZP), as well as synthetic cannabinoid receptor agonists and cathinones, for example, mephedrone). On November 10, 2011, the Advisory Council on the Misuse of Drugs (ACMD) recommended that two anabolic steroids, namely, 7-hydroxy DHEA (*7-hydroxy-dehydroepiandrosterone*) and 7-keto DHEA (*7-keto-dehydroepiandrosterone*) should be controlled under the MDA 1971 in Class C and, as Sch.4 substances under the Misuse of Drugs Regulations 2001, "so as not to preclude legitimate use on prescription". The relationship between the government and the ACMD has been the subject of much discussion in recent years (especially following the dismissal by the Home Secretary of the Council's then chairman, Professor David Nutt, in October 2009). Interestingly, a *'Working Protocol between the Home Secretary and the Advisory Council on the Misuse of Drugs'* was agreed on November 14, 2011. But the government has also used its powers under the Import, Export and Customs (Defence) Act 1939 together with the Import of Goods (Control) Order 1954, to

prohibit the importation of some substances (e.g. *phenazepam*) by adding them to the schedule to the Open General Import Licence (OGIL). The practical effect is to remove those substances from the licence (perhaps pending control under the MDA 1971). On November 15, 2011, the Government announced that it had imposed a ban on the importation of *Diphenylprolinol* (D2PM) and *diphenylmethyl-pyrrolidine* (substances *linked* to what is popularly known as "Ivory Wave" (see para.1-075). On the same day, s.151 and Sch.17 of the Police Reform and Social Responsibility Act 2011, came into force (see S.I. 2011 No. 2515). Those provisions graft a Temporary Class Drug regime onto the framework of the MDA so that drugs that are made the subject of a Temporary Class Drug Order are treated as Class B drugs (but there is a saving for simple possession of a TCD): see Chapter 1. Where psychoactive substances have been deemed to be "medicinal products" for the purposes of the Medicines Act 1968, there have been prosecutions brought under that Act, for contravening the importation and retail sale of unlicensed/unauthorised "medicinal products" (see Chapter 17).

One consequence of recent UK initiatives to control some psychoactive drug substances and drug products, is that attention has again focussed on words and phrases that appear in the MDA 1971, but which have proved problematic in the past (e.g. "preparation", "product", "other product", "production" and "medicinal product"). Those expressions were the subject of judicial attention in the 1980s and early 1990s, in relation to 'magic mushrooms' (in which *psilocin* – a Class A substance – naturally subsists). A number of prosecutions in respect of species of cacti in which *mescaline* naturally subsists, collapsed at trial (e.g. *R. v Sette*, unreported, Kingston Crown Court; 20 March, 2007). However, the points of law and statutory construction pertaining to each unsuccessful prosecution did not reach the Court of Appeal (Criminal Division) for its determination of those points. Persons who owned or who controlled 'head shops' (that sell, among other things, legal highs) may have believed that they were on safe (or reasonably solid) ground: they were not, and the words of caution expressed in earlier editions of this work went either unnoticed or unheeded. However, this does not mean that the law is satisfactory: on the contrary, there are weakness, grey areas and loose ends. It is respectfully submitted that the tendency of the courts to give key expressions such as "preparation", "product" and "other product", their ordinary meaning may prove to have been an oversimplification (at best). Thus, in *R. v Williams and another* [2011] EWCA Crim 232, the Court of Appeal held that the act of blending paracetamol and caffeine (non-controlled) with cocaine and heroin (Class A drugs) was sufficient to constitute the "production" of a controlled drug for the purposes of s.4 of the MDA 1971. It is submitted that what had manifestly not been produced was cocaine or heroin. But, had a controlled "product" been "produced"? This depends on whether the words "substance" and "product" (as those words appear in the MDA) are to be given their ordinary meaning or – as this work suggests – their scientific meanings, having regard to the definition of a "controlled drug" in s.2 of the 1971 Act (see Chapters 6 and 17).

The last six years have seen significant changes to rules relating to evidence (Chapter 11), confiscation of the proceeds of criminal conduct (Chapter 13) and

investigatory powers (Chapter 12). Investigating agencies and prosecuting agencies have undergone major reorganisation since 2005. This edition has reflected those changes.

This edition, in common with the 4th and 5th editions, continues to voice the plea that those who debate policy regarding drugs and the law, and who use the words "decriminalisation", "legalise", "depenalisation" and "diverting offenders", should explain what *they* mean by those terms. Much confusion and misunderstanding has been caused by not doing so (see para.1–042a, where suggested definitions/conventions appear and are explained).

In the writing of this book I am particularly grateful to Professor David Ormerod (Queen Mary, University of London) and, indeed, to Dr Leslie King, Mr Michael Evans-Brown (Liverpool John Moores University) and Professor David Nutt (Imperial College, London), for their helpful correspondence with me. I am also extremely grateful to my chambers at 25 Bedford Row, London, and to the Law School, Queen Mary, University of London, for their kind support. Many others deserve to be mentioned for their invaluable correspondence with me in the years since the last edition appeared, not least, Mr Robert Banks (barrister); Mr Andrew Bird (barrister); Dr Simon Brandt (Liverpool John Moores University); colleagues at 25 Bedford Row (including Mr Paul Mendelle QC, Mr Daniel Chadwick, Mr Richard Furlong, Mr Sebastian Gardiner, Mr Dermot Keating, Ms Beth O'Reilly, Mr Nathaniel Rudolf, Ms Natalie Sherborn and Mr Colin Wells); Professor Valerie Curran (University College, London); Mrs Genevieve Harris (International Drug Policy Consortium); Geoffrey Monaghan (UNODC); Mr Ivan Pearce (barrister); 'Release'; Dr Carol Weir (Northern Ireland); and to Mr Graham Isslinger whose idea it was to write the 1st edition of this work.

Thanks are also due to Ms Katherine Brewer, Ms Lisa Bruce, Mr Simon Harris and other members of staff at Sweet and Maxwell Ltd., who worked phenomenally hard in the preparation of this edition for publication. Needless to say, that the responsibility for any errors is entirely mine.

Finally, I would like to extend my sincere thanks to Lord Justice Hooper for kindly agreeing to write the Foreword to this edition notwithstanding his very busy schedule and onerous workload.

Insofar as this work expresses opinions, they are to be taken as being mine alone and they are not to be taken as being shared by any of the aforementioned persons.

I have endeavoured to state the law as at November 14, 2011. It will not go unnoticed (see SI 1971/2120, art. 2) that it is almost 40 years since the MDA 1971 came into force!

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November 2011

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