

# Drugs and NSW Police Powers

## Minor Drug Possession

### ***What is a prohibited drug?***

A prohibited drug has been declared forbidden under the law. These laws are found in the *Drug Misuse and Trafficking Act 1985* (NSW) and the *Commonwealth Criminal Code*. The *Drug Misuse and Trafficking Act 1985* (NSW) contains a list of all prohibited drugs at Schedule 1. There are over 300 drugs on that list. Some examples of prohibited drugs include:

- Cannabis
- Cocaine
- MDMA
- Amphetamines
- Ketamine
- Heroin
- LSD
- GHB

The weight of the prohibited drug is relevant in determining what kind of offence a person can be charged with, how serious the offence might be, and which court it will be heard in. The list of prohibited drugs in Schedule 1 of the *Drug Misuse and Trafficking Act 1985* (NSW) contains five quantity categories for each drug:

1. Small quantity
2. Traffickable quantity
3. Indictable quantity
4. Commercial quantity
5. Large commercial quantity

The quantities in each category vary depending on the drug. For example, a small quantity of cocaine is 1g, whereas a small quantity of MDMA is 0.25g. Laws restricting the possession and supply of prescription medication are also in place under the *Poisons and Therapeutic Goods Act 1966* (NSW).

### ***What is possession?***

A person has a prohibited drug if:

- (a) the drug is in their physical custody or under their control, and
- (b) they knew of the existence of the prohibited drug in their custody or control

Possession can be control over a drug alone or jointly with some other person. What is required is proof that the person, alone or jointly, can exclude other people from it.

To be in possession of a drug, you must intend to have control. That means if something has been slipped into your clothes or belongings without your knowledge, you legally do not possess that thing.

### ***Is it illegal to possess drug equipment?***

It is illegal to possess any item of equipment used in the administration of a prohibited drug, such as a water or ice pipe. It is not illegal to possess a hypodermic syringe or hypodermic needle.

Certain professionals, such as doctors, dentists, pharmacists, registered nurses, and vets, are exempt from this law when acting in their profession.

## Searches

### ***When can police search you for drugs?***

Under s 21 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, police have the power to 'stop, search and detain' anyone who they 'reasonably suspect' could be in possession of drugs.

To 'reasonably suspect' a person is in possession of prohibited drugs, the police officer must:

- (a) demonstrate some rational, factual basis for the suspicion
- (b) be satisfied there is more than a possibility a person is in possession of a prohibited drug but does not need to have a belief that the person is, in fact, in possession

If you consent to the search, police do not have to demonstrate reasonable suspicion.

## Drug Dogs

### ***Is a drug dog indication a reason to search?***

Police may use drug dogs without a warrant on persons leaving or entering certain places such as public transport, licensed premises, sporting events, dance parties and other entertainment events. Police can obtain a warrant to use drug dogs in different public locations, but a warrant does not allow police to place a drug dog inside a private vehicle.

The police officer handling the drug dog must take all reasonable steps to ensure the dog does not touch anyone and remains under control.

A drug dog can make an indication that it has detected the presence of prohibited drugs, usually by sitting down next to a person. On its own, an indication from a drug dog does not amount to 'suspicion' on 'reasonable grounds' that a person is in possession of a prohibited drug.

### ***What should you say to the police?***

Failing to comply with police orders is an offence. You can tell the police you do not consent to the search but should still cooperate and comply with police directions.

You may ask the police to turn on their body-worn video so the interaction is recorded. However, it is still up to the police to turn on BWV.

If the interaction is in a public place and you have a friend, you can ask the friend to stand back and film the interaction.

If police locate prohibited drugs on you, the police officer can confiscate the prohibited drug(s) and charge you with an offence. You are only required to provide police with your name and address. You are not required to answer any other questions from the police or to give an interview to the police.

### ***What are your legal rights when being searched?***

When exercising their power to 'stop, search and detain' a person, the police officer must:

- (a) provide evidence that they are a police officer and provide their name and station

- (b) explain the reason for the search
- (c) ask for your cooperation
- (d) inform you if they need them to remove an item of clothing and explain why

A police officer can require you to open your mouth or shake out your hair. Police must take all reasonable steps to search away from public view.

***Police turn up for noise complaints. Can they also search for drugs?***

If police attend your property in response to a noise complaint, they can only enter and search the property if they have a warrant or your consent.

Police can enter a property without a warrant or consent if they have a reasonable belief that:

- (a) there has been or will be a breach of the peace (which can include a range of actions and threatened actions which interfere with the ordinary operation of civil society)
- (b) someone has been or will be seriously injured
- (c) there is a person on the premises who needs to be arrested

If police lawfully enter your property and locate prohibited drugs, they must be able to attribute the prohibited drug to a particular person. This can be difficult if there are multiple occupants on the premises and the prohibited drugs are in common areas.

***What about an overdose situation?***

NSW Police have a policy which encourages police officers to exercise their discretion not to charge people present at drug overdoses for minor drug matters. This is designed to remove any reluctance that people may have to call an ambulance due to fear of police prosecution.

**Driving and Drugs**

***What about driving and use of medicinal cannabis?***

It is an offence to drive or sit in the driver's seat and attempt to drive a vehicle with a prohibited drug (including cannabis) in your oral fluid, blood or urine. Even if you have a cannabis prescription, it is still an offence to drive with cannabis in your system.

***Mobile drug testing. How does it work?***

Police have the power to stop a motor vehicle and require a person to submit to one or more oral fluid drug tests if the person is or was:

- (a) driving a motor vehicle on a road
- (b) sitting in the driver's seat of a motor vehicle and attempting to drive
- (c) in the passenger seat of a motor vehicle while a learner driver is or was driving

If police stop you for an oral fluid drug test, you are required to provide police with your licence on request.

If you are required to do an oral fluid drug test, the police officer will take a sample of your saliva by placing an absorbent collector on your tongue for a few seconds. It takes a few minutes for the result to appear. If the test returns a positive outcome or you refuse to provide a sample, you may be arrested to give a further oral fluid or blood sample. If you are arrested, you are not required to answer police questions or interview the police.

A recent court decision has confirmed that drug driving is an absolute liability offence, meaning that it is not a defence to say that you didn't know there was a prohibited drug in your system or that you believed that the prohibited drug was out of your system at the time of driving.

### ***When can the police search your vehicle?***

Police can search your vehicle if they reasonably suspect your vehicle or a person in the vehicle:

- (a) has been involved in a crime, or your vehicle will be involved in a crime in the future
- (b) contains stolen goods or prohibited drugs
- (c) has a prohibited drug in its possession or under its control
- (d) is in a public place with something dangerous inside

Police can also search your vehicle if you consent to it being searched.

### ***What about the dual offence of alcohol and drugs?***

New laws create harsher penalties for people found to be driving (or sitting in the driver's seat and attempting to drive a vehicle) with a combination of a prohibited drug in their system and a middle or high-range alcohol reading. The penalties for this combined drink/drug driving offence are harsher than those for stand-alone drink driving and drug driving offences.

### ***How is driving with illicit drugs in the system different from being under the influence?***

You can be charged with a drug driving offence even if you are not under the influence of prohibited drugs. All that is required is that there be a prescribed illicit drug present in your system. This includes cannabis, methylamphetamine (speed), ecstasy, or cocaine. Roadside oral fluid tests detect the presence of prohibited drugs in your system, and that can be enough to be charged. Police do not have to test or prove you are impaired or under the influence.

Most prohibited drugs stay in your system for days or even weeks after the effects of the drug have worn off.

Police can send blood or saliva tests off for further testing. If the results show that the amount of drug in your system was enough that you were under the influence of the drug, you could be charged with a more serious offence of driving under the influence of a drug. This is a more serious offence with a maximum imprisonment penalty and extended disqualification periods.

## Supply and Deemed Supply

### ***What is supply?***

Supplying a prohibited drug is a serious criminal offence carrying a maximum penalty of 15 years imprisonment.

Supply has a broad meaning under the law. It includes selling and distributing, as well as agreeing to supply, offering to supply, keeping or having in possession for supply, sending, forwarding, delivering or receiving for supply, or authorising, directing, causing, suffering, permitting or attempting any of those acts or things.

A person can be charged with supply even if there is no exchange of money (e.g. sharing).

A person can be charged with “knowingly taking part” in a supply, including intentionally participating in any step in the supply process. An example might be arranging for the finances of any step in the process or providing premises for a step in the supply process.

### ***What is deemed supply?***

Suppose a person is found in possession of more than a trafficable quantity of any prohibited drug. In that case, that person can be charged with the offence of drug supply regardless of whether there is any evidence of actual supply. The onus is then on the accused person to prove that they had possession of the prohibited drugs for a purpose other than supply (such as personal use).

### ***Can you explain the defence of “holding” or Carey’s defence?***

A person who is found in possession of more than a trafficable quantity of a prohibited drug and charged with supply may be able to defend the charge if they can demonstrate that they were given the prohibited drug by the owner to temporarily hold with the intention of returning the prohibited drug to the owner. This is known as the Carey defence.

### ***What should you do if you are being charged for the supply?***

If you are arrested and charged with drug supply, you should seek legal advice as soon as possible. It is best to cooperate with police to avoid any additional charges, such as resisting arrest.

However, you have the right to silence, and you do not need to answer any questions from police about the allegations or participate in an interview with police. If in doubt, wait to take part in an interview and ask to speak with a lawyer as soon as possible. The law says that refusing to participate in an interview cannot be used against you.

## Mobile Phones

### ***Can the police ask you to open your mobile phone and search it?***

Unless you provide consent, police may only search through the contents of your phone if they have legally confiscated it first. Police can only confiscate a mobile phone if the police have:

- (a) a warrant; or
- (b) reasonable grounds to suspect the phone is stolen or contains evidence of a serious offence that has taken place

If you are stopped and searched by police, the officer can examine anything in your possession, but police cannot demand that you unlock your phone.

### ***What are digital access orders?***

In 2023, new laws were introduced that allowed police to apply to a court for a digital access order, which is like a warrant. A digital access order is an order that requires a person to provide police with a password, passcode, or other information to gain access to their digital devices such as phones, computers, and tablets.

If the police have obtained a digital access order against you, you are only required to comply with it if the police can show you a copy of it.

The penalty for non-compliance with a digital access order or providing false information in response to a digital access order is a fine of up to \$11,000 or imprisonment of up to 5 years.

### ***If your phone gets confiscated, what can you do?***

If police confiscate your phone, they can hold on to your phone until they decide that:

- (a) the property is no longer needed as evidence
- (b) it is lawful for you to have the property in your possession.

You can request the return of your phone by contacting the officer in charge of the matter. Police must notify you when your property is ready to be collected, and you have 28 days to claim your property.

### ***What about resetting a phone remotely?***

When police confiscate a mobile phone, they use the internet or set the phone, usually disconnect it from the internet or set it to aeroplane mode. If the phone is remotely reset, it may not update the device that has been confiscated and disconnected from the internet.

However, you should not reset a phone in police custody or do anything that might alter its contents. This might constitute tampering with evidence, a very serious offence punishable by 10 years imprisonment.

Police use special software called Cellebrite to access, download, and analyse mobile phone content. Depending on the nature of the encryption, Cellebrite can access some encrypted and deleted data from the phone.

## **Going to Court v Fines or Caution**

### ***What is the Cannabis Cautioning Scheme?***

The Cannabis Caution Scheme (**CCS**) is a NSW Police Force policy that gives police officers discretion to formally caution rather than charge adults in possession of less than 30g of dried cannabis leaf, stalks, or heads. A person can only benefit from the CCS if they have no prior convictions for serious drug offences (unless the convictions are spent, meaning more than 10 years old).

The CCS is a warning; it is not a criminal charge and does not result in a criminal record. A record of the caution is kept on the NSW Police internal database. A person is only entitled to a maximum of 2 cautions with further cannabis offences resulting in a criminal charge for drug possession.

***When can the police issue a penalty notice rather than a CAN?***

Since 2019, police have had the discretion to issue a penalty notice (a fine) of \$400 to people found possessing less than a small quantity of any prohibited drug. For example, 1g or less of cocaine or 2.5g or less of Ketamine. In the case of MDMA, police can issue a fine to a person in possession of 0.25g if the MDMA is in capsule form or up to 2.5g if it is in any other form (e.g. pills).

If police choose to issue a fine, the recipient will not be charged with a criminal offence and is not required to go to court. That means there is no risk of a criminal conviction. However, the notice will appear in your Criminal Infringement Notice History. This is not a criminal conviction or criminal record.

***What is the new Early Drug Diversion Initiative?***

NSW Police can issue Criminal Infringement Notice (CIN) and \$400 fines to adults for small-quantity drug possession offences.

If you are issued a CIN, you can use the EDDI to choose to pay the fine or speak with a health professional. If you speak with a health professional, the fine will be treated as paid.

The EDDI is limited to 2 minor drug offences. It is not for small drug-related marijuana offences (see the Cannabis Cautioning Scheme), possession of more than one type of drug, or when police issue you with a Court Attendance Notice.

***What are the risks of taking your matter to court?***

A person who has been issued a drug possession fine can still dispute the fine in court.

However, there is a risk that the Local Court Magistrate will find you guilty. If you are found guilty of possessing a prohibited drug, you may be convicted and get a criminal record.

You will also have to pay court costs, which takes time and energy.

The best option is to get some legal advice before electing to have the matter heard in court.

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