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Drugs in NSW – myths and realities

I ONLY HAVE ENOUGH FOR PERSONAL USE – THAT’S OK, RIGHT?

Certain drugs and plants – including popular drugs like MDMA, ketamine, ice, marijuana and GHB – are prohibited in NSW by the *Drug Misuse and Trafficking Act 1985*. Unlike in some other jurisdictions, there is no hierarchy of prohibition such as Class A, Class B and Class C. All prohibited drugs are equally prohibited.

NSW law sets out ‘small quantity’ amounts for every prohibited drug and plant. If police find an amount at or below this threshold on you, it is likely you will be charged with possession of a prohibited drug or issued with (at police discretion) a criminal infringement notice. The maximum penalty for drug possession is two years’ imprisonment, a fine of \$2200, or both. There is no ‘safe’ amount. There is no risk-free way to possess prohibited drugs.

I WAS HOLDING THE DRUG FOR SOMEONE ELSE.

The elements of the offence of possessing a prohibited drug are:

- Was the substance a prohibited drug?
- Was it, to your knowledge, in your possession or control?
- Did you know it was a prohibited drug?

It doesn’t matter whether it ‘belonged’ to you.

WHAT ABOUT POT?

The Cannabis Cautioning Scheme permits police to give formal police cautions to adult offenders detected for minor cannabis offences. In appropriate cases, police can choose to issue a caution rather than a charge. However, you can only be cautioned twice and cannot receive a caution if you have any prior convictions for drugs, violence or sexual assault. There is also no automatic entitlement to a caution – it is up to police discretion. Possession of marijuana risks a possession charge.

POT IS LEGAL IN MY HOME STATE OR COUNTRY.

Marijuana is a prohibited drug under NSW law.

POLICE CAN ONLY SEARCH ME IF I CONSENT, OR IF I AM ARRESTED.

Police may, relevantly, search you or your car without arrest if they have reasonable grounds to suspect you have prohibited drugs. 'Reasonable grounds' can include the action of a police dog. Police can pat you down, ask you to remove your outer clothes and shoes, and look into your stuff and your clothes. They can also ask you to open your mouth. Police must provide the name and place of duty of the officer performing the search, and explain why they are searching you. Not consenting to complying with the search may be a criminal offence.

If police have reasonable grounds to suspect that it is necessary and the circumstances are serious and urgent, they may perform a strip search. They must provide you with as much privacy as possible for the search.

MY FRIENDS AND I POOLED OUR MONEY AND BOUGHT SOME PILLS. I'M NOT BREAKING THE LAW BY GIVING THEM THE PILLS, AM I?

Under NSW law, there is no requirement for money to change hands or for a person to profit for it to be 'supply' within the meaning of the law ('dealing'). The legal definition of supply is very broad. Supply includes selling or distribution, agreeing to sell or distribute, offering to sell or distribute, having in your possession for sale or distribution; or facilitating any of these things. For example, if police catch you passing the pills to one of your friends – there is a risk that you may be charged with actual supply of a prohibited drug.

If you have an amount greater than the small quantity amount on you, NSW law states that you are considered to have this amount for the purposes of supply or dealing (unless proved otherwise). You may be charged with drug supply accordingly.

IT'S NOT A CRIME TO BE UNDER THE INFLUENCE OF A PROHIBITED DRUG.

Self-administration of a prohibited drug is an offence.

Under NSW law, it is also a crime to use or attempt to use a motor vehicle while under the influence of alcohol or a prohibited drug. Penalties include substantial fines and imprisonment for up to 18 months.

It is also an offence to drive or attempt to drive a vehicle with a 'prescribed illicit drug' present in your oral fluid, blood or urine. 'Prescribed' means specified rather than prescribed by a doctor. The four specified illicit drugs are THC (cannabis), methylamphetamine (speed), cocaine and ecstasy. Similarly, it is an offence to drive or attempt to drive a vehicle with cocaine or morphine present in your blood or urine.

Penalties include fines, and disqualification. From May 2019, this offence can be dealt with by an infringement notice (which includes a fine and disqualification) or a charge/court attendance notice.

There is no requirement for the police to prove that the drug affected your ability to drive for successful prosecution of this offence.

IT'S A CRIME TO FILM POLICE WITHOUT CONSENT

Provided you don't interfere with or physically obstruct police in doing their duties, it is perfectly legal to film police when in a public place.

POLICE ONLY ISSUE FINES FOR DRUG POSSESSION NOW

Since January 2019, NSW Police have had the power to issue a criminal infringement notice rather than a court attendance notice for the offence of drug possession. This is a discretionary power – in other words, it is up to the police. It is also a power that Police are exercising in more limited circumstances than those set out in the legislation.

If you receive a criminal infringement notice and pay it, you will not have to go to court and you will not have a criminal history. If you are not sure whether you have received a criminal infringement notice or a court attendance notice, you should seek legal advice.

IF I GET CHARGED, I SHOULD JUST SEND IN THE FORM

It is possible to send in a 'written notice of pleading' (if you are not on bail) and ask that the court deal with the matter in your absence. Generally, this isn't a good idea. You need to be present in court to have the best chance of a non-conviction outcome, and being present in court gives you or your lawyer the chance to explain your circumstances more effectively than sending in a form.

It is extremely unlikely that you will receive a non-conviction outcome on a drug possession charge if you send in the written notice of pleading.

If you are charged with a drug-related offence, seek legal advice and do not rely on statements from police about likely outcomes. Sending in the written notice of pleading risks a conviction.

POLICE AUTOMATICALLY HAVE THE RIGHT TO ASK FOR MY PHONE PASSWORD

Generally speaking, police have the power to examine your phone during a properly conducted search. However, they do not have the power to demand your password or other unlock information without an order from a magistrate under s 3LA *Crimes Act 1914* (Cth).

This information is current to 4 February 2020 and reflects the law in New South Wales. It is general information and is no substitute for legal advice tailored to your particular circumstances. For assistance, contact the ICLC on 9332 1966.