

## **Part 15 Police discretion with possession/use of controlled drugs and/or possession of utensils offences**

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# Policy statement and principles

## What

Police may apply discretion in cases of possession and use of controlled drugs and/or possession of utensils under sections [7\(1\)\(a\)](#) and/or [13\(1\)\(a\)](#) of the [Misuse of Drugs Act 1975](#).

## Why

To ensure the delivery of a more effective Police service with a focus on whether or not a prosecution for sections [7\(1\)\(a\)](#) and/or [13\(1\)\(a\)](#) offences is required in the public interest and in addition giving consideration to whether a health-centred or therapeutic approach would be more beneficial.

## How

Police achieve this through:

- a focus on directing people found possessing/using controlled drugs and/or possessing utensils towards:
  - health-centred or therapeutic treatment
  - harm reduction
  - exercising safety, fairness and empathy for people procuring, possessing, consuming, smoking and using any controlled drug.
- appropriately applying [discretion for personal possession/use of controlled drug offences and possession of utensils](#) under section [7\(1\)\(a\)](#) and [13\(1\)\(a\)](#) of the Act.

# Overview

## Introduction

This part of the Drugs chapter provides guidance to frontline staff with understanding:

- offences of possession and use of controlled drugs and/or possession of utensils under sections 7(1)(a) or 13(1)(a) of the [Misuse of Drugs Act 1975](#)
- Police policy and practice with applying [Police discretion for personal possession/use of controlled drug offences for offences of possession and use of controlled drugs and/or possession of utensils](#) under sections 7(1)(a) and 13(1)(a).

## Table of definitions

The following table defines key terms used in the [Misuse of Drugs Act 1975](#), [Smoke-free Environments Act 1990](#) and these instructions.

Term	Description
<b>Act</b>	Act means the <a href="#">Misuse of Drugs Act 1975</a> .
<b>Class 'A' controlled drug</b>	Class A controlled drug means the controlled drugs specified or described in Schedule <a href="#">1</a> to this Act.  (s <a href="#">2</a> )
<b>Class 'B' controlled drug</b>	Class B controlled drug means the controlled drugs specified or described in Schedule <a href="#">2</a> to this Act.  (s <a href="#">2</a> )
<b>Class 'C' controlled drug</b>	Class C controlled drug means the controlled drugs specified or described in Schedule <a href="#">3</a> to this Act; and includes any temporary class drug and any controlled drug analogue.  (s <a href="#">2</a> )
<b>Controlled drug</b>	Controlled drug means any substance, preparation, mixture, or article specified or described in Schedule <a href="#">1</a> , Schedule <a href="#">2</a> , or Schedule <a href="#">3</a> to this Act; and includes any temporary class drug and any <a href="#">controlled drug analogue</a> .  (s <a href="#">2</a> )

<b>Controlled drug analogue</b>	<p>Controlled drug analogue means any substance, such as the substances specified or described in Part <a href="#">7</a> of Schedule 3 to this Act, that has a structure substantially similar to that of any controlled drug; but does not include:</p> <ul style="list-style-type: none"> <li>- any substance specified or described in Schedule <a href="#">1</a> or Schedule <a href="#">2</a> or Parts 1 to 6 of Schedule <a href="#">3</a> to this Act</li> <li>- any pharmacy-only medicine or prescription medicine or restricted medicine within the meaning of the <a href="#">Medicines Act 1981</a></li> <li>- an approved product within the meaning of the <a href="#">Psychoactive Substances Act 2013</a></li> <li>- a <a href="#">non-psychoactive THC analogue</a>.</li> </ul> <p>(<a href="#">s2</a>)</p>
<b>Medical practitioner</b>	<p>Medical practitioner means a health practitioner who is, or is deemed to be, registered with the Medical Council of New Zealand continued by section <a href="#">114(1)(a)</a> of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine.</p> <p>(<a href="#">s2</a>)</p>
<b>Pipe or other utensil (not being a needle or syringe)</b>	<p>“Pipe” does not mean only the sort of pipe which is commonly used to smoke tobacco, but includes, as a matter of ordinary usage in this context, any device which may be used to hold a controlled drug for the purpose of the inhalation of its smoke or fumes.</p> <p>“Utensil” must be read in the context of its application to “an offence against this Act”, so it would include utensils connected with diverse activities such as use and cultivation. An ordinary belt, used as a tourniquet, could therefore be within the meaning of utensil here: <i>Police v Lincoln (1978) 14 MCD 325</i>.</p> <p>See <a href="#">commentary</a> in Westlaw.</p>
<b>Requires palliation</b>	<p>A person <b>requires palliation</b> if, in the opinion of a medical practitioner or nurse practitioner, the person has an advanced progressive life-limiting condition and is nearing the end of their life. (<a href="#">s2(1B)</a>)</p> <p><b>Note:</b> Palliation is a kind of care that make patients with terminal illnesses feel better, even though the care cannot cure the patient.</p>
<b>Nurse practitioner</b>	<p>Nurse practitioner means a health practitioner who:</p> <ul style="list-style-type: none"> <li>- is, or is deemed to be, registered with the Nursing Council of New Zealand continued by section <a href="#">114(1)(a)</a> of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of nursing and whose scope of practice permits the performance of nurse practitioner functions; and</li> <li>- holds a current practising certificate. (<a href="#">s2</a>)</li> </ul>

<b>Police discretion</b>	See <a href="#">legislative reinforcement of Police discretion</a> in this chapter and sections <a href="#">7(5)</a> and <a href="#">(6)</a> of the Act.
<b>To smoke</b>	<p>To smoke means:</p> <ul style="list-style-type: none"><li>- to smoke, hold, or otherwise have control over an ignited tobacco product, weed, or plant; and</li><li>- includes to smoke, hold, or otherwise have control over an ignited product or thing whose customary use is or includes the inhalation from it of the smoke produced from its combustion or the combustion of any part of it; but</li><li>- does not include to hold or have control over an ignited product or thing customarily used as incense.</li></ul> <p>(s<a href="#">2(1)</a> of Smoke-free Environments Act 1990)</p>

## Related information

See these related documents:

- [Adult diversion scheme policy](#) chapter
- [Arrest and detention](#) chapter
- [Bail](#) chapter
- [Charging decisions](#) chapter
- [Part 8 - Drug prosecutions](#) of the 'Drugs' chapter
- [Part 13 - Psychoactive substances](#) of the 'Drugs' chapter
- [Part 14 - Medical cannabis](#) in the 'Drugs' chapter
- [People in Police detention](#) chapter
- [Formal warnings](#) chapter
- [Prevention First National Operating Model 2017](#)
- [Solicitor- General's Prosecution Guidelines](#).
- [Youth justice](#) chapter.

## Offences of possession/use of controlled drugs and possession of utensils

Offences of possession and use of controlled drugs and/or utensils are category 2 offences contained under section [7](#)(1)(a) and/or [13](#)(1)(a) of the Misuse of Drugs Act 1975 are explained in the table.

Offence	What must be proved	Penalty
<b>Procuring, possessing, consuming, smoking or otherwise using any controlled drug</b> ( <a href="#">s7</a> (1)(a))	The person: <ul style="list-style-type: none"> <li>- procured, or had in their possession, or consumed, or smoked, or otherwise used,</li> <li>- any controlled drug (includes class 'A', 'B' or 'C' controlled drug).</li> </ul>	<p>Liable on conviction to a term of:</p> <ul style="list-style-type: none"> <li>- 6 months imprisonment and/or \$1000 fine for class A controlled drug</li> <li>- 3 months imprisonment and/or \$500 fine for class B and C controlled drug.</li> </ul> <p><b>Note:</b> No custodial sentence unless previous conviction or exceptional circumstances (<a href="#">s7</a>(2)).</p>
<b>Possessing any pipe or other utensil (not being a needle or syringe)</b> ( <a href="#">s13</a> (1)(a))	The person: <ul style="list-style-type: none"> <li>- had in their possession,</li> <li>- any pipe or other utensil (not being a needle or syringe),</li> <li>- for the purpose of the commission of an offence against the Misuse of Drugs Act.</li> </ul>	Liable on conviction to a term of 1 year imprisonment and/or \$500 fine.

### Defences under section 7 (possessing/using controlled drug)

The standard of proof for the following defences under section [7](#)(1)(a) is on the balance of probabilities.

#### Possessing any controlled drug

Where, in any proceedings for an offence against section [7](#) in respect of the possession of a controlled drug, it is proved that the defendant had such a drug in their possession it is a defence to prove they, knowing or suspecting it to be a controlled drug, took possession of it to:

- prevent someone else committing, or continuing to commit, an offence with it; and as soon as possible after that, took all reasonable steps to destroy the drug or deliver it to someone lawfully entitled to have possession of it; or
- for the purpose of delivering it to a person lawfully entitled to have possession of it; and as soon as possible after taking possession, took all reasonable steps to carry this out.



s7(3)

## Possessing/using cannabis

Section [7\(3A\)](#) provides in any proceedings for possessing and using cannabis as follows:

*“In any proceedings for an offence against subsection [\(1\)\(a\)](#) in respect of possessing or using any plant or plant material of the genus Cannabis, or any cannabis preparation, the defendant has a defence if, at the **time** of the possession or use, the defendant had been diagnosed by a [medical practitioner](#) or [nurse practitioner](#) as [requiring palliation](#).*

See [Part 14 - Medical cannabis](#) in the ‘Drugs’ chapter for further information.

## Exemptions for possessing and using controlled drugs

See section [8](#) of the Act for the exemptions that exist for particular people who may possess and use controlled drugs.

## Defences under section 13 (possessing utensil)

In any proceedings for an offence against subsection [13\(1\)\(a\)](#) of possessing a pipe or other utensil (not being a needle or syringe) for the purpose of possessing or using any plant or plant material of the genus Cannabis or any cannabis preparation, the defendant has a defence if, at the time of possessing the pipe or other utensil, the defendant had been diagnosed by a medical practitioner or nurse practitioner as requiring palliation.

# Police discretion for personal possession/use of controlled drugs and/or possession of utensils

This section offers guidance to Police employees on the use of constabulary discretion regarding offences of procuring, possession, consuming, smoking, and using controlled drugs (s7(1)(a)) and/or possessing utensils (13(1)(a)).

## Overarching discretion approach

In line with the [Solicitor-General's Prosecution Guidelines](#), prosecution should not be brought **unless** it is required in the public interest. When considering whether a prosecution is required in line with the public interest test, also consider whether a health-centred or therapeutic approach would be more beneficial to the public interest.

## Constabulary discretion principles

The following constabulary discretion principles should be considered:

- The guidance for constabulary discretion emphasises that consideration should be given to whether a therapeutic approach would be more beneficial to the public interest before a decision is taken to prosecute for the possession or use of controlled drugs (as defined under section 7 in the [Misuse of Drugs Act 1975](#)).
- Where addiction or resultant harm to the user, their family or whanau is suspected, or when requested by the user, officers are encouraged to make a connection to an appropriate health service.
- Arrest and prosecution remain an available course of action to prevent or reduce the harm resulting from drug possession/use and utensil possession, where the public interest requires it.

## Legislative support of policing principles and discretion

Legislative support of policing principles generally and discretion for possession of controlled drugs are contained under:

- s8 and s16 of the Policing Act 2008 (principles of the Act and responsibilities and independence of the Commissioner)
- s7(5) of the Misuse of Drugs Act 1975:
- to avoid doubt, it is affirmed that there is a discretion to prosecute for an offence against section 7(1) (a) (possession and use of class 'A', 'B', 'C' and 'C1' controlled drugs), and a prosecution should not be brought unless it is required in the public interest
- when considering whether a prosecution is required in the public interest, in addition to any other relevant matters, consideration should be given to whether a health-centred or therapeutic approach would be more beneficial to the public interest.
- [Solicitor-General's Prosecution Guidelines](#).

## Aggravating considerations

Aggravating considerations may exist that weigh towards initiating a prosecution rather than a warning.

Examples of aggravating considerations include:

- When addiction has been identified as an issue, and the person refuses a health-based approach, then other approaches might need to be considered, particularly if the addiction is leading to other offending behaviour.
- Amount of drug. If the amount reaches the quantity for possession for supply under section 6 of the Act.
- Other serious drug offences suspected, or drink/drug driving offences associated/linked with the offence.
- Persistent drug-related offending that has not responded to previous health-led interventions.
- On bail, or subject to a sentence or Court order restricting the use of drugs.

**Note:**

- Discretion to warn a person does not restrict them from future warnings.
- Police employees using or found in possession of a controlled drug outside of their official duties are not eligible under the criteria.

## Mitigating considerations

Mitigating considerations may exist that weigh against prosecution and taking alternative resolution.

Examples of mitigating considerations include:

- The person is willing to undergo health-centred or therapeutic approach.
- Small quantity of drug.
- Minor harm resulted in possession/use.
- Person is elderly or a youth.
- Surrounding circumstances of possession/use is not of a serious nature.
- Person has minor or no previous drug convictions.

## Welfare and best interests of children and young persons are paramount

If the possession or use of a controlled drug is occurring in the presence of children or young persons, then their welfare and best interests are the first and paramount consideration. Whether or not to apply Police discretion to warn or arrest/prosecute becomes a lesser consideration.

See:

- [Child protection](#) in the Police Manual for Police policies and procedure with protection, investigations and meeting our obligations under the [Oranga Tamariki Act 1989](#) and the [Children's Act 2014](#).
- [Child Protection Protocol: Joint Operating Procedures](#) (between Police and Oranga Tamariki) for guidance on the roles and responsibilities of the parties to the protocol.
- [Joint Standard Operating Procedures for Children and Young Persons in Clandestine Laboratories](#) for guidance with protecting children and young persons in those circumstances.

## Good practice procedure with applying discretion

See this part of the [Drugs](#) chapter:

- [Annex 1](#) for good practice procedure with applying discretion
- [Annex 2](#) for Police discretion flow chart.

# People under the influence of, or in withdrawal from, controlled drugs

## Use and withdrawal symptoms

Detox generally has some form of withdrawal symptoms. For most substances, symptoms last 1-2 weeks. Withdrawal can cause symptoms that could last for several weeks or even months. Depending on the substance, many symptoms can be safely managed without the use of medication, or specialist medical/nursing input.

Common withdrawal symptoms	More extreme withdrawal symptoms
<ul style="list-style-type: none"> <li>- Restlessness</li> <li>- Irritability</li> <li>- Agitation</li> <li>- Sleep problems</li> <li>- Low mood</li> <li>- Heavy sweating</li> <li>- Anxiety</li> <li>- Headaches</li> <li>- Low energy</li> <li>- Poor concentration</li> <li>- Mood swings</li> <li>- Vomiting</li> <li>- Diarrhoea</li> <li>- Aches and pains</li> <li>- Nausea</li> <li>- Low appetite</li> <li>- Craving drugs</li> </ul>	<ul style="list-style-type: none"> <li>- Extreme panic and anxiety</li> <li>- Depression</li> <li>- Hallucinations</li> <li>- Paranoia</li> <li>- Racing heart</li> <li>- Anger</li> <li>- Suicidal thoughts</li> <li>- Ongoing diarrhoea and vomiting</li> <li>- Aggression and violence</li> <li>- Confusion and memory problems</li> </ul>

See '[People under the influence of, or in withdrawal from psychoactive substances](#)' in [Part 13 - Psychoactive substances](#) of the 'Drugs' chapter.

## Enforcement risk

The side effects of use and withdrawal pose a risk to Police employees and members of the community (e.g. vendors may be targeted for robbery/burglary by addicts who cannot afford products).

Police employees must consider the risks their enforcement tactics could present to themselves, public and the individuals with these symptoms.

The dissociative state sometimes experienced by controlled drug users may also mean they are unable to

recognise and therefore alert Police employees of symptoms indicating a serious medical issue that could pose a risk while they are kept in custody.

Users with pre-existing mental health conditions tend to be particularly susceptible to the side effects, compounding the risk to Police and others.

Awareness of the addiction, withdrawal symptoms, enforcement risk and applying the [TENR - Operational threat assessment](#) and [Tactical Options Framework](#) will assist with mitigating that risk.

## Where drug users go to obtain help

There are a number of services available to help people suffering addiction and withdrawal problems from taking controlled drugs or are concerned about someone who is suffering addiction and withdrawal. Services range from individual or group counselling; medication assisted treatment; peer support services; intensive out-patient programmes, or Court referral to a drink-drive intervention programme.

## No evidential sufficiency of section 7(1)(a) offence

Should a person seek help and no evidential sufficiency of an offence under section [7\(1\)\(a\)](#) and/or [13\(1\)\(a\)](#) of the Misuse of Drugs Act 1975 exists, then:

- the Police discretion and health connection process under [Annex 1](#) does not apply (must have evidential sufficiency of [s7\(1\)\(a\)](#) and/or [13\(1\)\(a\)](#) offence)
- instead supply details under sources of assistance for where the person can obtain help.

## Sources of assistance

Sufferers, addicts and people concerned about someone's addiction and withdrawal can be advised to contact:

- [Healthline](#) on 0800 611 116 for free health advice
- [Alcohol Drug Helpline](#):
  - General helpline: phone 0800 787 797, text 868
  - Māori Helpline - kaupapa Māori support services: phone 0800 787 798, text 8681
  - Pasifika Helpline - Pacific support services: phone 0800 787 799, text 8681
  - Youth Helpline - support for working through issues affecting young people: phone 0800 787 984, text 8681
- their local [District Health Board](#), Alcohol and Drug Services listed in the front of the telephone book under District Health Board services in the 'Hospitals and other health service providers' section.

Further [community treatment services](#) include:

- Peer group support is available for meeting with others to share experiences and strategies for managing their recovery. These services are provided by:
  - [Alcoholics Anonymous](#)
  - [Narcotics Anonymous](#).
- Group session

- Day programme
- Opioid substitution treatment
- Drink/drug driving intervention programme.

Further information is available to the public at:

- Ministry of Health (MoH) website <http://psychoactives.health.govt.nz/home>
- National Poisons Centre via [www.poisons.co.nz](http://www.poisons.co.nz) or 0800 POISON (0800 764 766).

## Annex 1 - Applying Police discretion

The following table sets out the steps for applying discretion when a person is procuring, possessing, consuming, smoking or otherwise using any [controlled drug](#) and/or [possessing any pipe or other utensil](#).

See [Annex 2 - Police discretion flow chart](#) for a concise and visual view of the discretion process.

Step	Action
1	Be satisfied there is evidential sufficiency for a section <a href="#">7(1)(a)</a> and/or <a href="#">13(1)(a)</a> offence under the Act.
2	Verify the quantity of controlled drug is less than the quantity for possession for supply under section <a href="#">6</a> (dealing with controlled drugs).  <b>Note:</b> If the controlled drug is of an amount, level, or quantity at or over which the controlled drug is presumed to be for supply, then the procedural steps in this table do not apply.
3	Apply empathy and respect throughout the discretion process.
4	In the event of medicinal cannabis follow the <a href="#">procedure for dealing with people claiming to be palliation patients who possess/use cannabis</a> in 'Part 14 - Medicinal cannabis' of the 'Drugs' chapter.
5	Seize controlled drugs as an exhibit.
6	Obtain person's particulars and confirm the identity of the person found committing section <a href="#">7(1)(a)</a> and/or <a href="#">13(1)(a)</a> offence.
7	Check NIA for previous history and current alerts.
8	If the person is: <ul style="list-style-type: none"> <li>- aged 17 years or younger: <ul style="list-style-type: none"> <li>- follow <a href="#">youth justice process</a></li> <li>- involved in family harm continue with considering the use of discretion in this table and follow-up with the <a href="#">family harm process</a> separately</li> </ul> </li> <li>- aged 18 years or over: <ul style="list-style-type: none"> <li>- give verbal or formal warning at scene if appropriate, or</li> <li>- arrest/detain that person for the purpose of a formal warning / supported resolution / prosecution <ul style="list-style-type: none"> <li>- deliver person to custody suite/watch house.</li> </ul> </li> </ul> </li> </ul>



9 **Consider** whether or not it is in the [public interest](#) to prosecute. When considering whether a prosecution is required, take into account relevant matters (e.g. [aggravating considerations](#) and [mitigating considerations](#)) including whether or not a **health-centred or therapeutic approach** would be more beneficial to the public interest than prosecution.

**Note:** If in doubt, seek guidance from a supervisor.

See:

- [www.health.govt.nz/publication/research-report-new-zealand-drug-harm-index-2016](http://www.health.govt.nz/publication/research-report-new-zealand-drug-harm-index-2016) for [Guidance](#) on assessing the average estimated harm from respective controlled drugs
- [People under the influence of, or in withdrawal from, controlled drugs](#) in this 'Part' for health considerations
- [Prevention First National Operating Model 2017](#) for maximising the use of Police discretion and alternative resolutions in appropriate circumstances.

10 At the custody suite/watch house **arresting/detaining constable and/or custodial supervisor decides** whether or not it is in the [public interest](#) to prosecute.

If:

- **not** in the [public interest](#) to prosecute:
  - [prepare formal warning](#) or [Te Pae Oranga: Iwi Community Panels](#) referral:
    - if [formal warning](#):
      - verify whether the person is willing to undergo **health-centred or therapeutic** assessment/treatment and consents to being referred to Alcohol Drug Helpline
      - use the 'OnDuty' application to answer 'Yes' or 'No' regarding a referral
      - prepare 'OnDuty' noting/referral (if 'Yes' the application provides a web form referral that is sent to Alcohol Drug Helpline, if 'No', then no referral is made and only the 'noting' is recorded)
    - if [Te Pae Oranga: Iwi Community Panels](#) referral, then the **health-centred or therapeutic** assessment/treatment will be considered by the panel (**note**, do not prepare an 'OnDuty' noting/referral)
  - enter occurrence and clear the offence. **Note:**
    - for [formal warnings](#) ensure the narrative in NIA includes whether a Homecare Medical referral is made.
  - go to step 11 for action to take regarding seized drugs/utensils
- **unsure** whether or not it is in the [public interest](#) to prosecute, then obtain advice from supervisor
- **in** the [public interest](#) to prosecute
  - [charge](#)
  - [bail](#)
  - advise Police Prosecution Service (PPS) to remind Court if appropriate, that charge relates to drug possession/use and a **health-centred or therapeutic approach** may be beneficial.
  - **Note:** Do not use the 'OnDuty' application to make the referral as this will be considered by the Court.
- consider:
  - [adult diversion scheme](#)
  - [Solicitor- General's Prosecution Guidelines](#).

11	<p>If the person is to receive <a href="#">formal warning</a> or referred to <a href="#">Te Pae Oranga: Iwi Community Panels</a>, then ask them whether or not they consent to the destruction of the drugs/utensils (disposal of unlawful items) and get them to sign/endorse your notebook/Drug Exhibit Form (POL 374)/Property Sheet (POL 268) to that effect.</p> <p>If they:</p> <ul style="list-style-type: none"><li>- <b>consent to destruction</b> of drugs/utensils, arrange subsequent destruction, or</li><li>- <b>decline consent</b> to destroy drugs/utensils, arrange for a 'Notice to person for disposal by destruction of seized or produced unlawful thing' (located in Police Forms &gt; Search and Surveillance &gt; Seizure) to be given to the person under section 160 of the Search and Surveillance Act 2012.</li></ul> <p>See the '<a href="#">Search</a>' chapter for search and seizure powers authorising lawful search and seizure, '<a href="#">Part - 12 Procedure applying to seized and produced things</a>' for the process of <a href="#">disposing of unlawful items</a> and '<a href="#">Exhibit and property management</a>' for handling, securing and disposal of exhibit(s).</p>
12	<p>Comply with the National Recording Standard when recording:</p> <ul style="list-style-type: none"><li>- possession and use of controlled drugs</li><li>- clearance of offences.</li></ul> <p>See the <a href="#">Drug offences coding guide</a> and the <a href="#">Recording clearances: quick reference guide</a> for accuracy with recording the event in NIA.</p>
13	<p>Remember these notifications:</p> <ul style="list-style-type: none"><li>- if exercising a warrantless search power, the warrantless search notification must be created by using 'OnDuty' (tap 'Take Action &gt; Create Warrantless Search' from the Today or Paperwork page or from a person, vehicle, location summary or from other paperwork items in 'OnDuty')</li><li>- if drugs seized complete the <a href="#">Drug Search and Seizure</a> notification.</li></ul>
14	<p>For further guidance, contact:</p> <ul style="list-style-type: none"><li>- Legal Services for legal advice</li><li>- National Criminal Investigations Group (NCIG) at PNHQ for policy and practice advice.</li></ul>

# Annex 2 - Police discretion flow chart



