Part 8 Drug prosecutions

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Introduction

When you arrest someone for a drug offence, you face the following set of requirements:

- be aware of the jurisdictions and range of charging options available for the offence (including obstruction) and you must choose the most suitable for that offence.
- ensure that in collecting material for the prosecution's case, you follow procedure and preserve the chain of evidence so that the evidence can be admitted in Court.
- given that many drug investigations involve undercover work, you must take every care to protect your undercover officers, using the legislative provisions available to you.

This part of the 'Drugs' chapter provides some guidance in terms of prosecuting drug offences. See also 'Expert evidence - drugs and gangs' for information on the professional conduct of expert witnesses.

Minor offences

In less serious offences (as opposed to trafficking offences), the primary aim of the judicial process is to rehabilitate the suspect. When deciding whether to arrest or prosecute, use the same criteria that you would use for other minor offences. Take account of whether the suspect has sought treatment and is no longer offending.

See Part 15 - Police discretion with possession/use of controlled drugs and/or possession of utensils offences for specific guidance with applying Police discretion, whether it would be more beneficial to:

- prosecute, or
- take a health-centred or therapeutic approach with a health referral and warning.

Jurisdiction and manner of proceeding

Jurisdiction depended on what class of drug involved

Jurisdiction for offences against the Misuse of Drugs Act 1975 varies depending on whether the offence is a category 2 or category 3 offence under section 6 of the Criminal Procedure Act 2011.

Dealing vs. possession/use

The Misuse of Drugs Act 1975 and the Criminal Procedure Act 2011 provide clear divisions of offences and their treatment. The broad divisions are:

- **offences against section 6 of the Act (dealing - category 3)**:
  - involving class A or B controlled drugs
  - involving class C controlled drugs
  -
  See 'dealing offences' below for breakdown of these offences.

- **offences against section 7 of the Act (possession/use - category 2)**
- **other offences (punishable by less than 2 years imprisonment - category 2, or if punishable by 2 years imprisonment or more - category 3)**.

There is a clear division between dealing and possession/use.

Dealing offences

Offences against section 6 of the Misuse of Drugs Act 1975 include:

- importing or exporting
- producing or manufacturing
- supplying or administering, or offering to supply or administer
- selling or offering to sell (Class C only)
- possessing for any of the above purposes any controlled drug.

These are collectively known as 'dealing offences'.

Be aware that there is a specific definition for drug dealing offences relating to class A and B controlled drugs under section 3 of the Bail Act 2000. The definition of drug dealing offences under the Bail Act 2000 extends to an attempt to commit an offence against section 6 or 12C of the Misuse of Drugs Act 1975 in relation to a Class A controlled drug or a Class B controlled drug (s 12C relates to those offences under s 6 committed outside New Zealand). Do not get this legal definition confused with the common usage of the word 'dealing' which also includes class C controlled drugs.

Class A, B or C controlled drugs

Dealing offences involving class A, Class B or Class C controlled drugs are category 3 offences. Prosecutions are commenced in the District Court, but may transfer to the High Court,

Possession/use offences

Section 7 concerns the offences of possessing and using controlled drugs. Offences against this section are category 2 offences and all prosecutions are commenced in the District Court.

Other offences

Other offences under the Misuse of Drugs Act 1975 are either category 2 (punishable by less than 2 years) or category 3 offences (punishable by 2 years or more) and all prosecutions are commenced in the District Court.

Filing charges

A person in possession of two or more different kinds of drug, whether or not they are of the same class, must face a separate charge for each. Follow these steps to file charges.

Step	Action
1	When charging under section 6(1)(b) of the Misuse of Drugs Act, it is important to use the correct wording. See 'Part 1 - Drug related definitions'.
2	Remember that in the case of class C drugs, the age of the person supplied determines which charge to file.
3	Cannabis seed is a controlled drug. Its possession is therefore covered by section 7(1)(a) of the Misuse of Drugs Act, not by section 13.
4	If a drug cannot be seized for analysis you may still be able to charge the suspect. A drug's identity in a possession case can be proved by: - the suspect's statements or admissions - a witness' knowledge of methodology, drug smells or user behaviour. The case will depend on the experience of the witness.

Time limits on charges

For offences against sections 6, 9 and 10 of the Misuse of Drugs Act 1975, there is no time limit for filing the charging document.

For other offences against the Act or regulations made under it, charges must be filed within four years from the time that the matter arose. (s28)

For offences against the Medicines Act 1981, charges must be filed within 12 months. (s77)

Using discretion whether to charge

See 'Part 15 - Police discretion with possession/use of controlled drugs and/or possession of utensils offences' for specific guidance with using Police discretion whether or not to charge in these circumstances.

Evidence

Evidence of analysis

Section 31 of the Misuse of Drugs Act 1975, provides a procedure whereby evidence of the weight and nature of a controlled drug or prohibited plant may be given by certificate without having to call the analyst to give such evidence.

You must use this procedure in every case involving controlled drugs unless there are good reasons to the contrary.

Institute of Environmental Science and Research (ESR) analysts will request good reasons as to why the procedure has not been used if they are requested to give evidence in drug cases. You must ensure the valuable time of ESR analysts is not wasted by unnecessary court appearances.

Procedure

Evidence on the nature of the substance seized can be given by any person:

- designated by the Minister as the analyst in charge of an approved laboratory, or
- working in an approved laboratory and authorised by the analyst in charge of it to act as an analyst for the purposes of the Misuse of Drugs Act 1975.

The analyst need not appear in court. The evidence can be presented in the form of a certificate, provided that the defendant:

- receives a copy of the certificate at least seven clear days before the hearing and is informed in writing that the analyst will not be called; and
- does not notify the prosecutor in writing, at least three clear days before the hearing, that they require the analyst to be called.

Methods of delivery of exhibit

Section 31(2) provides two methods of delivering a drug exhibit to the ESR so that certificate evidence can be used. You can deliver the exhibit:

- in person to the analyst who is to issue the certificate, or to a person authorised by the analyst to receive it
- by registered post or by courier post with signature required in a sealed package to an employee who has been authorised by the analyst in charge at the laboratory.

Chain of evidence must be preserved

If you are in charge of the case, it is your responsibility to ensure that the chain of evidence is complete. Always use a POL 120 standard drugs envelope (SDE) or attach a SDE to the article. You will need to be able to:

- describe the packaging to prove the chain of evidence, by sealing and labelling it with the file reference name
- quote the registered article number and other details of the registered mail
- produce the receipt of its delivery to the ESR.

Note: Section 31 allows any Police employee to deliver exhibits to the ESR.

Delivery to analyst

If you are delivering the exhibit to the analyst in person, you must cross-reference the:

- name of the person who signed the certificate 'upon receipt of the exhibit'
- receipt signature on the Exhibits for Laboratory Examination, Police 143 form (to locate form, go to Police Forms > Forensic)
- evidence of the Police employee who delivered the drug to the ESR.

Important: All of the names must be the same.

Delivery to authorised employee

You will need to ensure and prove:

- the name of the person to whom the drug was delivered

- the person who received the package was a person who works in an approved laboratory and who is authorised, by the analyst in charge at that laboratory, to receive it
- the package was sealed.

Section 31(2A) concerns the delivery of exhibits to the ESR. The analyst may give evidence that that employee received the package whose contents the analyst subsequently analysed. Unless evidence is then presented to the contrary, the analyst's evidence will be admitted as sufficient proof that the exhibit was properly received by the ESR. In most cases, this will make it unnecessary to call further ESR witnesses to prove continuity.

Once it is certified that the authorised officer of the ESR has received a substance for analysis from a named Police employee, the presumption is that the goods so received are the goods analysed. Having regard to the fact that a certificate is admissible only if the defendant raises no objection and subject to the court's overriding discretion to put the prosecution to the proof, there is no need for the Crown to show the chain of physical control passing from the employee of the ESR to the authorised analyst. *Kemp v Yates* (1988) 3 CRNZ 150 refers.

Admissibility of certificate of analysis

Under section 31(3)(a) of the Misuse of Drugs Act 1975, the certificate is admissible evidence only if:

- the defendant is served at least seven days (7 clear days) of the hearing, and provided with a copy of the analyst's certificate
- the defendant does not, at least three days before the hearing, give written notice that the analyst be called
- the Court does not request the oral evidence of the analyst.

The purpose of section 31(3)(a) is to warn the accused that a certificate will be proffered as evidence, rather than calling the person who actually made the analysis. No evidence of the identity of the person making the analysis is required by the provision, or can be properly required by the Court as a condition of the admissibility of the certificate. *Police v Green* (1986) 2 CRNZ 292 refers.

Service of the analyst certificate and written notice that the analyst will not be called

The copy of the certificate and the written notice that the analyst will not be called:

- can be delivered to a member of the defendant's family or to their solicitor (in accordance with sections 24-29 of the Summary Proceedings Act 1957)
- must be dated at least seven clear days before the hearing at which the certificate is to be tendered
- must be proved to have been served either by oral evidence or a constable's endorsement which complies with section 29 of the Summary Proceedings Act 1957.

Lack of response

Do not assume that there will be no argument about the exhibit, chain of evidence or identity of the drug just because the defence has not served a notice requiring the analyst to give evidence. The defence accepts nothing and admits nothing by failing to serve notice: the only effect is to make the certificate technically admissible.

Errors relating to service, form and content.

Service	If you do not serve the documents correctly, you jeopardise the certificate's admissibility as evidence. The certificate of analysis was inadmissible as evidence because the statutory procedures were not complied with. For that reason, any evidence in regard to the cannabis became hearsay, and therefore inadmissible. *Free v Police* (1986) 2 CRNZ 298 refers.
Form	However, if your statement saying that the certificate and notice have been served is incorrect in form but not in substance, you can make a submission under section 204 of the Summary Proceedings Act 1957 that the statement not be invalidated.
Content	The fact that there is an incorrect statement of fact in the certificate does not render it inadmissible. The law contemplates the possibility of error 'until contrary is proved'. Where the wording of the certificate was contradicted by oral evidence as to whom the Police employee gave the sealed package to, a reasonable doubt was created as to whether the articles were the same as had been found in the possession of the accused, or as to whether they had been interfered with "somewhere along the line of the chain". *Bell v Police* 6/11/79, Holland J, SC Auckland MIS54/79 refers.

Related information

See the following additional resources:

- Adams on Criminal Law for commentary about:
  - strict compliance
  - facts stated in the certificate
  - relationship to schedule
  - procedural conditions for admissibility
  - court may disregard certificate
  - definitions of ‘member of police’ and ‘served’
  - proof without certificate
- Police Manual chapters for good practice guidance:
- ‘Part 10 - Drug investigations’ for steps dealing with drug exhibits and evidence
- ‘Part - Packaging, handling, and storage of exhibits’ in the ‘Exhibit and property management’ chapter for submission of exhibits to ESR.

Bail

Bail for drug-dealing offences

The issue of bail for drug dealing offences is covered by sections 16 and 17A of the Bail Act 2000.

A defendant who is charged with or convicted of a drug dealing offence may be granted bail by order of a High Court Judge or a District Court Judge.

If a defendant of or over the age of 17 years is charged with a serious Class A drug offence, then they may not be granted bail or allowed to go at large, unless they satisfy the Judge that bail or remand at large should be granted.

Note: The defendant must satisfy the Judge on the balance of probabilities that they will not while on bail or at large commit any drug dealing offence. This requirement does not limit any other matters that the defendant may be required to satisfy the Judge that bail or remand at large should be granted.

Definition of serious Class A drug offence

Serious Class A drug offence under section 17Ameans:

- an offence under section 6 or 12C(1)(a) of the Misuse of Drugs Act 1975 for contravention of section 6(1)(a), (b), (c), or (f) in relation to a Class A controlled drug; or
- an attempt to commit an offence in the bullet point above.

See also the 'Bail' chapter for information about a person's release from court or police custody on conditions including that a person comes to court when next required and addressing other risks they may pose if released pending the hearing of their case.

Bail conditions

Section 30 of the Bail Act 2000 sets out the types of special conditions that a Judge can impose on the defendant including:

- a condition that the defendant has to report to Police at specified places and/or times
- an electronic monitoring condition (note, may only do so by agreement with the prosecution)
- any other condition that the Judge considers will make it likely that the defendant will appear as required in court on subsequent occasions (such as confiscate their passport, confine them within a specified geographical area)
- any conditions that the Judge considers necessary (such as direct them not to mix with certain people).

Bail application process

This table details the bail application process for drug dealing offences.

Stage	Description
1	Application for bail must be made before a Judge of the District Court or High Court by the defendant's counsel.
2	O/C Case should have forwarded instructions regarding bail to the prosecutor (regardless of whether bail is opposed or not, the O/C Case should always outline the conditions of bail to be sought). This provides the Crown Prosecutor with a 'fall-back' position in the event that bail is granted, in spite of the Crown's opposition.
3	If bail is to be opposed, full and detailed reasons for opposing bail should be given. You should also consider providing the prosecutor with affidavits in support of the grounds for opposing bail.
4	The Judge will then remand the defendant for a case review hearing date or whatever is considered appropriate.

Related information

See the 'Bail' chapter for making appropriate decisions around bail and providing accurate information to the court to ensure public safety.

Forfeiture

Things liable to forfeiture

These three categories of things are specified in section 32 of the Misuse of Drugs Act 1975 as being liable to forfeiture in particular circumstances:

- all articles in respect of which the offence was committed
- money received by the defendant in the course of or consequent upon the commission of an offence against section 6
- any motor vehicle, aircraft, ship, boat or other vessel used by the defendant in the commission of an offence against section 6.

Note: Applications under section 32 are brought on or after conviction. Commissioner of *Police v Jones* (1990) 6 CRNZ 608 refers.

Automatic forfeiture

Section 32(1) of the Misuse of Drugs Act 1975, provides for automatic forfeiture, upon conviction, of any article in respect of which any drug offence was committed. The court has no jurisdiction to order the return of any such article to the convicted person.

Under section 32(2) the Minister of Health may direct the sale, destruction or other disposal of any forfeited articles, and has issued these directions:

- Drugs must be disposed of as per Police Instructions (see Part 11 - Custody, storage and disposal of controlled drugs).
- Drug users' paraphernalia must be destroyed by Police following prosecution.
- Valuable goods, not being paraphernalia, must be sold by auction and the proceeds paid into the Crown consolidated account.

Where articles must be 'otherwise disposed of' the authority of the Minister of Health must be obtained by way of a report to NDIB. The report must contain this information:

- a complete description of the article
- value (if known)
- purpose or use of article
- time, date and place of seizure
- details of persons charged
- details of the charges
- details of the result of the prosecution
- any relevant court orders
- details of owner or other persons with any property or interest in the article
- details of the intended method of disposal.

ESR must automatically destroy exhibits after a two year period unless a specific request is made for them to be held for a longer period.

Money found in the possession of the suspect

On the conviction of any person for an offence against section 6 of the Misuse of Drugs Act, the District Court Judge is satisfied that money found in the possession of that person was received by that person in the course of or consequent upon the commission of that offence, or was in the possession of that person for the purpose of facilitating the commission of an offence against the section the District Court Judge may in addition to any other penalty imposed order that money to be forfeited to the Crown.
(s32(3))

Vehicles, aircraft, ship or any other vessels

The court may also order forfeiture of any vehicles, aircraft, ship or any other vessels used in committing the offence if owned by the convicted person, or in which they had an interest unless the court considers this unjust.

If an order for forfeiture is made provisions of the Sentencing Act will apply so far as they are applicable.

(s32(4), (5) and (6))

Forfeiture under the Criminal Proceeds (Recovery) Act 2009

There are two types of forfeiture under the Criminal Proceeds (Recovery) Act 2009.

- instrument forfeiture (subpart 4 of part 2)
- civil forfeiture (subpart 3 of part 2).

Instruments used to commit an offence

The first applies to instruments, i.e., property used to commit the relevant offence. This sort of forfeiture requires a conviction for an offence which has a maximum penalty of at least five years imprisonment (s6).

Application for an instrument forfeiture is made by a Prosecutor, either Police or Crown.

Proceeds of significant criminal activity

The second type of forfeiture applies to proceeds of significant criminal activity(s7). This forfeiture is sought by way of civil proceedings, where the standard of proof is the balance of probabilities. A conviction for the relevant criminal activity is not required, and neither is it a bar to the proceedings that there has been an acquittal or the quashing of a conviction.

Note: This type of forfeiture can apply to assets and profits.

An application for a civil forfeiture order is made by the Commissioner of Police to the High Court under sections43 and 44 Criminal Proceeds (Recovery) Act 2009.

Only staff with the authority delegated by the Commissioner of Police (Asset Recovery Unit staff) can make applications for civil forfeiture orders.

Assets forfeiture

An order may be made in respect of assets acquired by, or profits of, significant criminal activity, defined in section6. An assets forfeiture order may be made if the Court is satisfied on the balance of probabilities that specific property, as defined in section 5, is tainted property under section 50. That means the property has, wholly or in part, been acquired as a result of significant criminal activity, or directly or indirectly derived from significant criminal activity.

It is not necessary that an owner of the property be identifiable, but a respondent or interested person must be specified if known. Property may be excluded from the order if the respondent can persuade the Court that undue hardship is reasonably likely to be caused to the respondent. In addition, a third party may apply for relief under section 61.

Profit forfeiture

It is necessary that an application for a profit forfeiture order specifies the respondent and describes the relevant significant criminal activity. While the Court must be satisfied on the balance of probabilities that the respondent has interests in property, a profit forfeiture order may be made without any connection between that property and the relevant offending. A profit forfeiture order must specify what property is to be disposed of to satisfy the order. Section 55 requires the Court to be satisfied that the respondent has unlawfully benefited from significant criminal activity (defined in section 7) within the relevant period of criminal activity.

The relevant period of criminal activity is defined in section 5, as the seven years before the application for the restraining order (if relevant), or for the forfeiture order.

There is a presumption, rebuttable on the balance of probabilities, that the value of the respondent's benefit is that which is stated in the application. This presumption arises once the Commissioner proves on the balance of probabilities that the respondent has unlawfully benefited from significant criminal activity in the relevant period. The Court must determine the amount of such benefit in accordance with section 54. This includes a requirement that the value of any property forfeited in respect of the same criminal activity be deducted. Property may also be excluded from the order if undue hardship is likely to be caused to the respondent (section 56 refers).

Related information

See the following additional resources:

- Adams on Criminal Law for commentary about:
- standard of proof
- scope of forfeiture
- not the same as confiscation
- what may be forfeited
- money
- vehicles
- destruction of forfeited vehicles.