

## Drugs: Possession – *Drugs Misuse Act 1986*

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### Legislation

#### *Drugs Misuse Act 1986*

#### Part 2 Drug offences

#### 9 Possessing dangerous drugs

- (1) A person who unlawfully has possession of a dangerous drug is guilty of a crime.

Maximum penalty—

- (a) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 4 in respect of that thing—25 years imprisonment; or
- (b) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the quantity of the thing is of or exceeds the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 3 but is less than the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 4 in respect of that thing and the person convicted—
- (i) satisfies the judge constituting the court before which the person is convicted that when the person committed the offence the person was a drug dependent person—20 years imprisonment; or
- (ii) does not so satisfy the judge constituting the court before which the person is convicted—25 years imprisonment; or
- (c) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2 and the quantity of the thing is of or exceeds the quantity specified in the *Drugs Misuse Regulation 1987*, schedule 3 in respect of that thing—20 years imprisonment; or
- (d) in any other case where the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 or 2—15 years imprisonment.
- (2) For a dangerous drug that is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1, part 2 (a part 2 drug), a reference in subsection (1) to the quantity of the thing is a reference to the whole weight of all the part 2 drugs (whether of the same or different types) that the person is convicted of unlawfully possessing.

#### Part 6 Miscellaneous

## 129 Evidentiary provisions

- (1) In respect of a charge against a person of having committed an offence defined in part 2—
  - (a) it is not necessary to particularise the dangerous drug in respect of which the offence is alleged to have been committed; and
  - (b) that person shall be liable to be convicted as charged notwithstanding that the identity of the dangerous drug to which the charge relates is not proved to the satisfaction of the court that hears the charge if the court is satisfied that the thing to which the charge relates was at the material time a dangerous drug; and
  - (c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place; and
  - (d) the operation of the Criminal Code, section 24 is excluded unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge; and
  - (e) the burden of proving any authorisation to do any act or make any omission lies on that person.

### Commentary

For a dangerous drug that is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1, part 2 (a *part 2 drug*), a reference in subsection (1) to the quantity of the thing is a reference to the whole weight of all the part 2 drugs (whether of the same or different types) that the person is convicted of unlawfully possessing: *Safe Night Out Legislation Amendment Act 2014* Part 6 amendment of *Drugs Misuse Regulation 1987*.

#### Knowledge

To satisfy the element of knowledge of possession, it is enough for the Crown to prove, directly or by inference, that the defendant knowingly possessed a thing or substance or object which was in fact a dangerous drug: *R v Tabe* (2003) 139 A Crim R 417 at [8]; upheld by the majority in *Tabe v The Queen* (2005) 225 CLR 418.

So far as knowledge is concerned, it is not necessary that the defendant knew that the property was a dangerous drug. It suffices that he or she possessed the substance which is in fact a dangerous drug: *Clare* [1994] 2 Qd R 619. And generally as to the operation of s 57(c) of the *Drugs Misuse Act 1986*, see E. Barnett, 'Presumption of Possession: s 57 ...', (1998) 18 QL 123; P. Franco, 'Share and Share Alike', (1999) 20 QL 21; *Jenvey v Cook* (1997) 94 A Crim R 392.

A person charged as an accessory will also be guilty of possession of dangerous drugs, if it is established that the accessory aided the principal offender to secure possession of something which is in fact a dangerous drug or dangerous drugs, whether or not the Crown can establish that the accessory believed it contained a dangerous drug or dangerous drugs. See *R v Tabe* [\[2003\] QCA 356](#) at [17], in the judgment of the Chief Justice with whom Davies JA agreed.

It is a defence if the defendant can prove proved that he or she believed, honestly and reasonably, that the relevance containers did not contain a dangerous drug. See s 129(1)(d) *Drugs Misuse Act*; and *R v Myles* [\[1997\] 1 Qd R 199](#) at 200, 210.

*Meaning of ‘concerned in the management or control of a place’*

Being ‘concerned in the management or control of a place’ requires more than bare ownership. Some interest in or personal involvement in the control or management of a place must be shown: *R v Smythe* [\[1997\] 2 Qd R 223](#) at 226.

### Suggested Direction

**It is a crime to unlawfully have possession of a dangerous drug. [Insert name of drug] is a dangerous drug. If the defendant had possession of that drug, that possession was not lawful. The central issue in the case therefore concerns possession.**

In cases where s 129(1)(c) *Drugs Misuse Act 1986* does not apply:

**Possession denotes a physical control or custody of a thing with knowledge that you have it in your control or custody. You do not possess a thing unless you know you have it or else can actually exercise dominion over it.**

**It is for the prosecution to prove, beyond reasonable doubt, the defendant’s knowledge of [here insert fact, e.g. presence of the things containing the drugs]. However, it is not necessary for the prosecution to establish that the defendant knew that the substance was [describe drug]. In other words, the prosecution does not bear the burden of showing that the defendant knew the nature of the substance in his/her control or custody. It is enough for the crown to prove, directly or by inference, that the defendant knowingly possessed a thing or substance or object which was in fact a dangerous drug.**

**If you are satisfied beyond reasonable doubt that the defendant had the requisite degree of control or custody to constitute possession, the defendant is guilty unless the defendant has proved that he/she then believed, honestly and reasonably, that the [containers] did not contain a dangerous drug. If you are persuaded of that, the defendant is not guilty. The standard of proof concerning this issue is not proof beyond reasonable doubt. The defendant need only prove that it is more probable than not that he believed, honestly and reasonably, that the [containers] did not contain**

**[insert name of drug]. If you are so persuaded, you must return a verdict of not guilty [in respect of the charge of possession of the dangerous drugs].**

In cases where s 129(1)(c) *Drugs Misuse Act 1986* is relevant:

**A provision [of the *Drugs Misuse Act* s 129] arises here for your consideration. It provides:**

**‘proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person’s possession, unless the person shows that he or she then neither knew or had reason to suspect that the drug was in or on that place’**

**The effect of this provision is that if the prosecution satisfies you beyond reasonable doubt that the defendant was an occupier of, or a person concerned in the control and management of, the place where the drugs were found, he/she is fixed with possession of those goods in law and will be guilty of the offence of possession unless he/she satisfies you that he/she did not know of, or have reason to suspect, the presence of those drugs. The burden of proof in this respect lies on the defendant, although it is sufficient if he/she satisfies you that it is more probable than not that he/she neither knew of, nor had reason to suspect, the presence of the drugs.**

**The occupier of a place is someone who is in occupation of it. This is a question of fact for you. A person who occupies a place will usually do so under some legal right but a squatter may also be an occupier. To be in occupation involves exercising some degree of control over, or management of, the relevant place. An occupier will be able to exclude others. He or she will usually be physically present at the place, either constantly or from time to time but he or she may exercise occupation through another or others as his or her agent or agents. A person may jointly occupy a place with another or others.**

**Similar considerations apply when you are considering whether the person is concerned in the management or control of a place. Consideration will primarily focus upon the power of such person to exercise control over the place and the extent to which he/she does so and his/her power to make decisions concerning the place and carry them out or have them carried out.**

**It is for you to say if you are satisfied beyond reasonable doubt by the evidence of the defendant’s alleged relationship with the place, where the drugs were found, his/her alleged activities on or in relation to it, and the extent of the control alleged to have been exercised by him/her over it, whether he/she is someone to whom the section applies. If so, you will convict him/her unless you are persuaded that it is more probable than not that he/she neither knew of, nor suspected, the presence of the drugs in or at that place. And if so persuaded, you will find the defendant not guilty.**