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Cannabis, The Law and Implications in the Workplace

Dr Greg Kew
Occupational Medicine Specialist

16 August 2024

2024 OHS CONFERENCE PROGRAMME

16 AUGUST 2024 - CENTURY CITY CONFERENCE CENTRE - CAPE TOWN

Saiosh


STOP

Overview

Part 1: Refresher – Substance abuse testing in the workplace

1. General principles of workplace testing for substance abuse
2. Drug testing equipment, cut-off levels
3. Cannabis and its metabolism

Part 2: Workplace challenges specific to cannabis & the law

1. Constitutional Court ruling
2. Consequences on other laws
3. Consequences on testing for the presence of cannabis
4. Case Law

Part 3: Way Forward

1. Take home messages

PART 1

Refresher – Substance abuse testing in the workplace

Founding principle for a workplace substance abuse programme

Safe-guarding workplace safety (incorporates legal compliance, good governance)

Safety Imperative

Reduce the burden of dysfunction / ease suffering (troubled employee assistance; incorporates corporate values)

Moral Imperative

Protect employee productivity / work performance

Sustainability Imperative

INCREASING SAFETY IMPERATIVE

INCREASING MORAL IMPERATIVE

Safety risk is a key issue – rigorous testing standards with **zero tolerance** for non-compliance;
Culture of "misconduct"

Work performance and productivity are the issues – soft testing standards as safety is not a concern;
Culture of "incapacity"

Steps to implementing a Workplace Substance Abuse Programme

(ILO Recommendations)

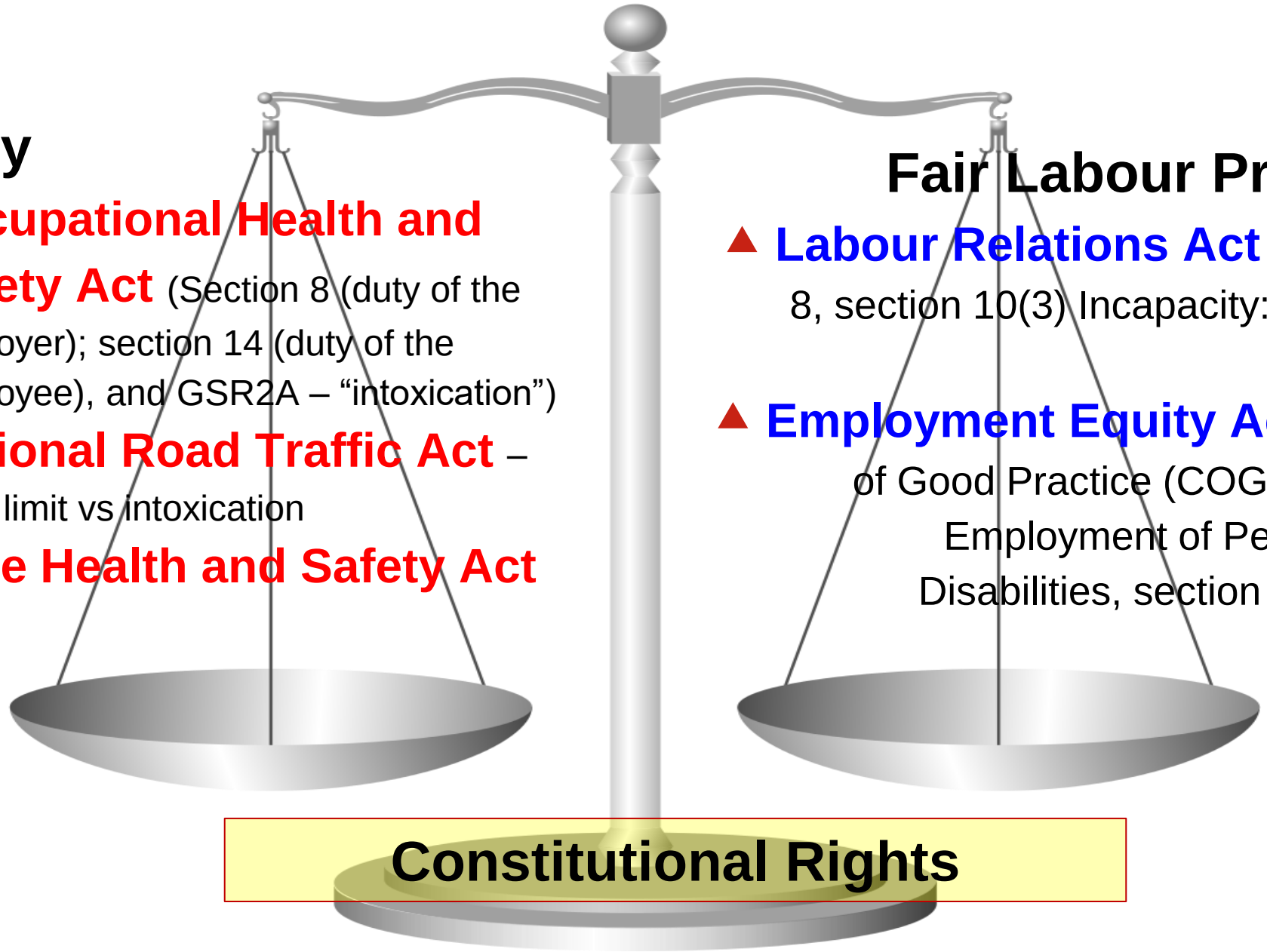
- ✓ **Step 1**: Investigate the need for a programme (Safety? Moral? Productivity?)
- ✓ **Step 2**: Formulate a policy & procedure (the rules, including whether or not there will be drug testing)
- ✓ **Step 3**: Participation & Communication
- ✓ **Step 4**: Establish a support structure
- ✓ **Step 5**: Implementation

5 elements of a fair sanction for misconduct

On what grounds can an employer discipline an employee for breaking a rule?
(e.g. a rule about substance use / abuse)

1. There is a **rule** (ie a policy)
2. The rule is **fair** (ie supported by correct facts)
3. The employee was **aware** of the rule (ie it was communicated)
4. The employee knowingly **broke** the rule
5. The employee **failed to take corrective action** despite being the opportunity to do so (ie a fair process was followed)

Safety & compliance (legal) Imperative



Safety

- **Occupational Health and Safety Act** (Section 8 (duty of the employer); section 14 (duty of the employee), and GSR2A – “intoxication”)
- **National Road Traffic Act** – legal limit vs intoxication
- **Mine Health and Safety Act**

Fair Labour Practice

- **Labour Relations Act** (Chapter 8, section 10(3) Incapacity: Ill health or injury)
- **Employment Equity Act** (Code of Good Practice (COGP) on the Employment of People with Disabilities, section 5.1.3(iv))

Constitutional Rights

2A. Intoxication

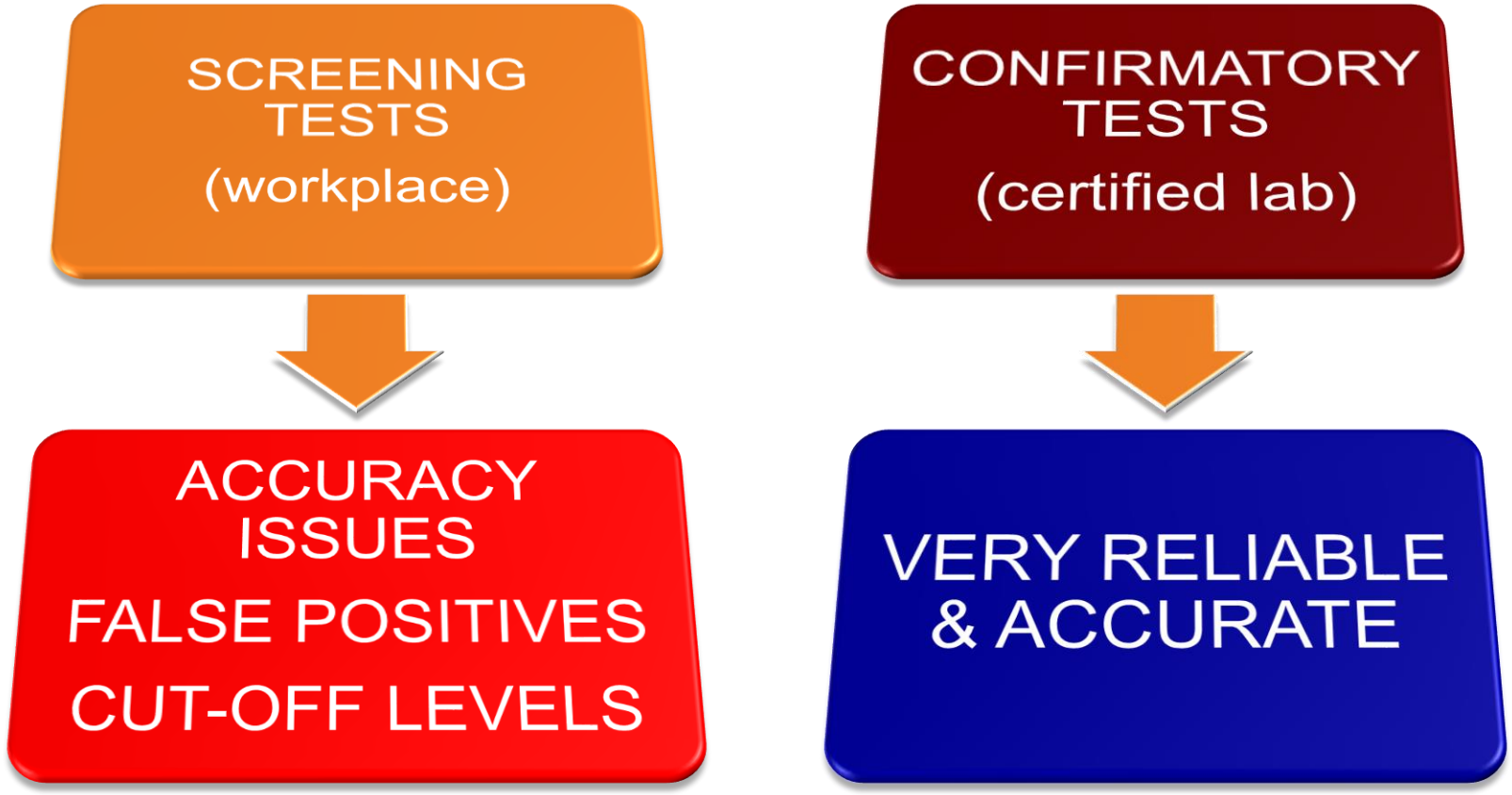
(1) … an employer or a user, as the case may be, **shall not permit** any person who is or who appears to be under the influence of intoxicating liquor or drugs, **to enter or remain at a workplace**.

(2) … no person at a workplace shall be under the influence of or have in his or her possession or partake of or offer any other person intoxicating liquor or drugs.

(3) An employer or a user, as the case may be, shall, in the case where a person is taking medicines, only allow such person to perform duties at the workplace if the side effects of such medicine do not constitute a threat to the health or safety of the person concerned or other persons at such workplace.

TESTING FOR SUBSTANCES OF ABUSE

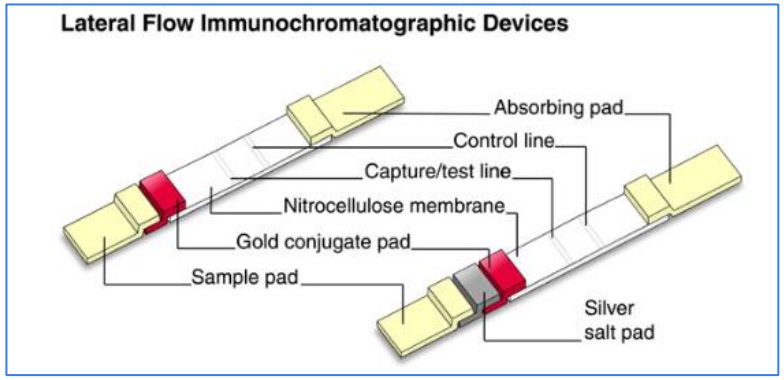
How reliable are the tests?

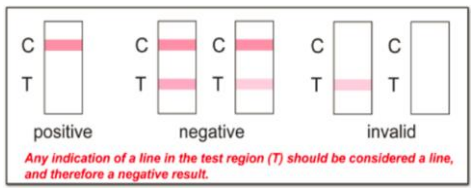


Testing Equipment

Screening Tests

- At Point of Contact (workplace)
- Designed for ease of use and low cost
- Lateral flow, immunochromatography
- **E**nzyme-**L**inked **I**mmuno**s**orbent **A**ssay technology
- Can have false positives and false negatives (cross-reactivity, accuracy)
- Cannot tell what the actual drugs are (detect the general drug groups only)



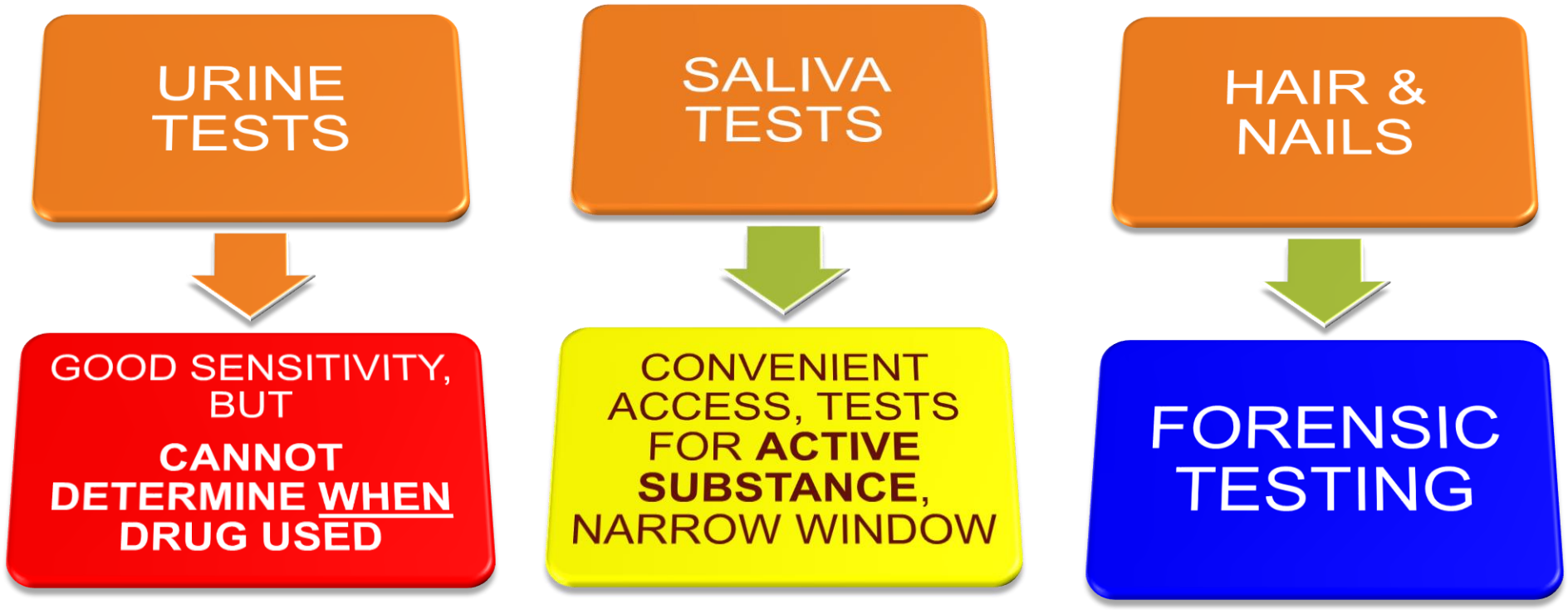


Confirmatory Tests

- Accredited toxicology laboratory
- High levels of accuracy (no false positives / negatives)
- Gas chromatography or liquid chromatography and Mass Spectrometry ("GC-MS" or "LC-MS")
- Are able to determine the exact compound (no cross-reactivity, and not just the drug group identified)

What body fluids should we test?

(screening or confirmatory)

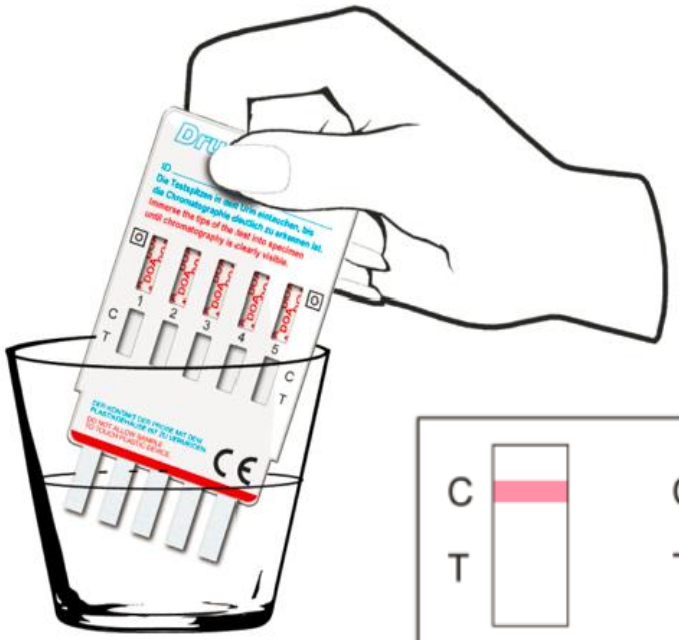


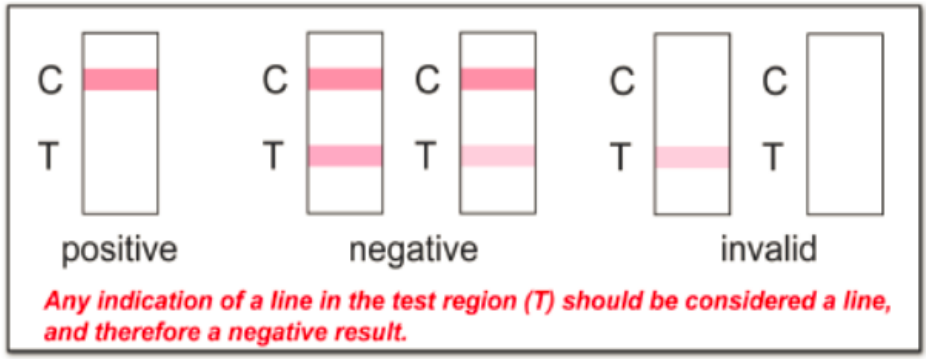
Urine = **U**ser of a substance

Saliva = **Ps**ychoactive **s**ubstance is in your **s**ystem

What urine test devices? (1)

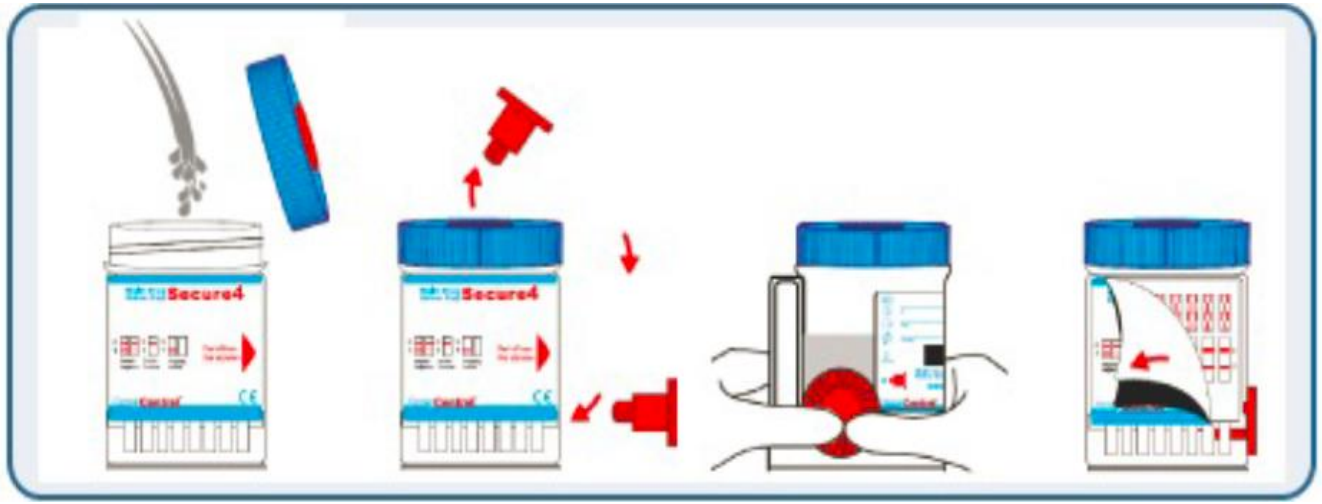
- Simple “dipstick”
- Multi test card





What urine test devices? (2)

Single chamber versus twin (split) chamber testing cup



What urine cut-off levels should I use? (1)

The **cut-offs** vary, for the selected substances in the test kit.
Preferably use cut-offs recommended by reputable agencies

Substance of Misuse	Cut-off levels (ng/ml)*	
	Screening	Confirmatory
CORE PANEL		
Cannabis metabolites (**THCA**)	50	10 [15] (TCH-COOH)
Natural **opiates**	300 [2000]	
Codeine	-	300 [2000]
Morphine	-	300 [2000]
Heroine	- [10] (as 6-MAM)	10 (as 6-MAM)
Cocaine	150	150 [100](as benzoylecgonine)
Amphetamine/Methamphetamine**	500	200 [250]
MDMA / MDA / MDEA	500 (MDMA/ MDA/MDEA)	200 [250]
OPTIONAL PANEL		
Methaqualone ("mandrax")+	300+	
Phencyclidine	25	25
Barbiturates	250	200
Benzodiazepines	200	100
Buprenorphine or metabolites	5	2
Methadone (or EDDP)	300 (100)	250(75)
LSD or metabolites	1	1
Propoxyphene or metabolites	300	300

European Workplace Drug Testing Society

* As issued by the **European Workplace Drug Testing Society (EWDTS) Guidelines** (2015-05-29 Version02)
[ ] Values used by SAMHSA and US Dept. of Transport that deviate from the ones used by EWDTS guidelines.

Substance **A**buse and **M**ental **H**ealth **S**ervices **A**dministration

What urine cut-off levels should I use? (EWDTS, 2022)

European Guidelines for Workplace Drug Testing in Urine

2022-10 Version 3.0 FINAL

13 Appendix D
Recommended Substances and Maximum Cut-Off Concentrations for Screening Tests in Urine

Laboratory Screen Test Cut-Off Concentration in urine (ng/mL)

In the list below, where the value is given, this is the maximum recommended cut-off.

Primary Substances	ng/mL
Amphetamines group	500
Benzodiazepines group	200
Cannabis metabolites	50
Cocaine metabolites	150
Methadone (or EDDP)	300 (100)
Opiates (total)	300
6-MAM	10

European Workplace Drug Testing Society

Confirmation Test Cut-Off Concentration in urine (ng/mL)

In the list below, where the value is given, this is the maximum recommended cut-off.

Primary Substances	ng/mL
Amphetamines	
Amphetamine (d+ l)	200
Methamphetamine	200
MDA	200
MDMA	200
Other members of the amphetamine group	200
Benzodiazepines or their metabolites	
Individual benzodiazepines*	100
Opiates	
Morphine	300
Codeine	300
6-Monoacetylmorphine	10
Dihydrocodeine	300
Cannabis	
Cannabis metabolite (THC-COOH)	15
Cocaine	
Cocaine metabolite (Benzoylecgonine)	100
Methadone	
Methadone (d+l)	250

Oral fluid test kits (1)

Oral fluid test kits (2)

What oral fluid cut-offs should I use?

Substance **A**buse and **M**ental **H**ealth **S**ervices **A**dministration

Table 10: SAMHSA (United States) Cut offs for Oral Fluid (2015-05-15)

Federal Register / Vol. 80, No. 94 / Friday, May 15, 2015

Initial test analyte	Initial test cutoff (ng/mL)	Confirmatory test analyte	Confirmatory test cutoff concentration (ng/mL)
Marijuana (THC) [1]	4	THC	2
Cocaine/Benzoylecgonine	[2] 15	Cocaine	8
		Benzoylecgonine	8
Codeine/Morphine	[2] 30	Codeine	15
		Morphine	15
Hydrocodone/Hydromorphone	[2] 30	Hydrocodone	15
		Hydromorphone	15
Oxycodone/Oxymorphone	[2] 30	Oxycodone	15
		Oxymorphone	15
6-Acetylmorphine	3	6-Acetylmorphine	2
Phencyclidine	3	Phencyclidine	2
Amphetamine/Methamphetamine	[2] 25	Amphetamine	15
		Methamphetamine	15
MDMA [4]/MDA [5]/MDEA [6]	[2] 25	[3] MDMA	15
		[4] MDA	15
		[5] MDEA	15

[1] Δ-9-Tetrahydrocannabinol (THC).
[2] *Immunoassay:* The test must be calibrated with one analyte from the group identified as the target analyte. The cross reactivity of the immunoassay to the other analyte(s) within the group must be 80 percent or greater; if not, separate immunoassays must be used for the analytes within the group.
Alternate technology: Either one analyte or all analytes from the group must be used for calibration, depending on the technology. At least one analyte within the group must have a concentration equal to or greater than the initial test cutoff or, alternatively, the sum of the analytes present (i.e., equal to or greater than the laboratory's validated limit of quantification) must be equal to or greater than the initial test cutoff.
[3] Methylenedioxymethamphetamine (MDMA).
[4] Methylenedioxyamphetamine (MDA).
[5] Methylenedioxyethylamphetamine (MDEA).

European Workplace Drug Testing Society

Laboratory Screen Test Cut-Off Concentration in neat oral fluid (ng/mL)

In the list below, where the value is given, this is the maximum recommended cut-off.

Primary Substances	ng/mL
Amphetamines group	40
Benzodiazepines group	10
Cannabis metabolites	10
Cocaine and metabolites	30
Methadone	50
Opiates	40
6-MAM	4

Confirmation Test Cut-Off Concentration in neat oral fluid (ng/mL)

In the list below, where the value is given, this is the maximum recommended cut-off.

Primary Substances	ng/mL
Amphetamines	
Amphetamine (d+ l)	15
Methamphetamine	15
MDA	15
MDMA	15
Other members of the amphetamine group	15
Benzodiazepines	
Individual benzodiazepines*	3
Opiates	
Morphine	15
Codeine	15
6-Monoacetylmorphine	2
Dihydrocodeine	15
Cannabis (THC)	2
Cocaine	
Cocaine metabolite (Benzoylecgonine)	8
Cocaine	8
Methadone	

Cannabis and its challenges for workplace substance abuse policies

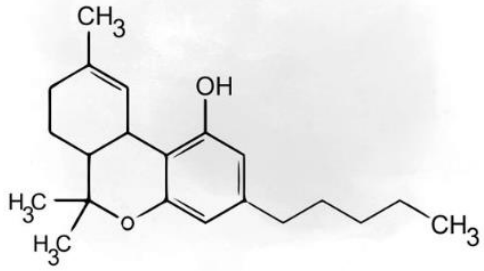
Cannabinoids

- The cannabis plant (“cannabis sativa”) produces over 113 substances called “cannabinoids” which have various roles in the plant’s life;
- The two cannabinoids most important for us are
  - Δ9-tetrahydrocannabinol (**THC, or Δ9 THC**)
  - Cannabidiol (**CBD**)

Δ9-tetrahydrocannabinol (THC)

- The psychoactive cannabinoid
- Known as marijuana, weed, ganga, insangu
- occurs most abundantly in the flowering parts (floral calyxes and bracts) of the female plants

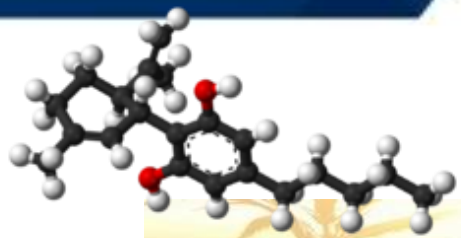
It is initially in the plant as inactive **tetrahydrocannabinolic acid** which is naturally converted to psychoactive **THC** over time.
This conversion is *accelerated* when the plant is heated (cookie) or combusted (cigarette)

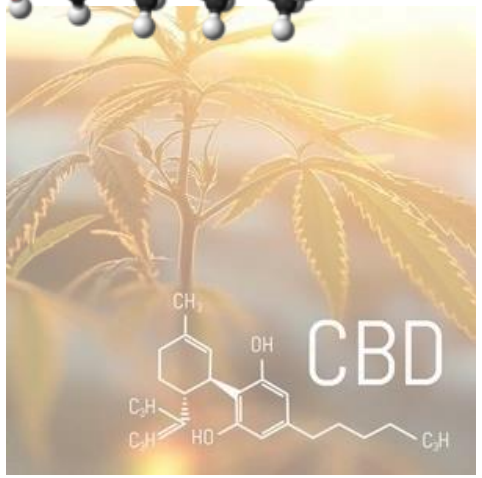


THC binds to naturally occurring **cannabinoid receptors**

- in the brain (**CB1**) (psychotropic effects, boosts dopamine) and
- various tissues (immune system) (**CB2**) (regulates cytokine release).

Cannabidiol (CBD)

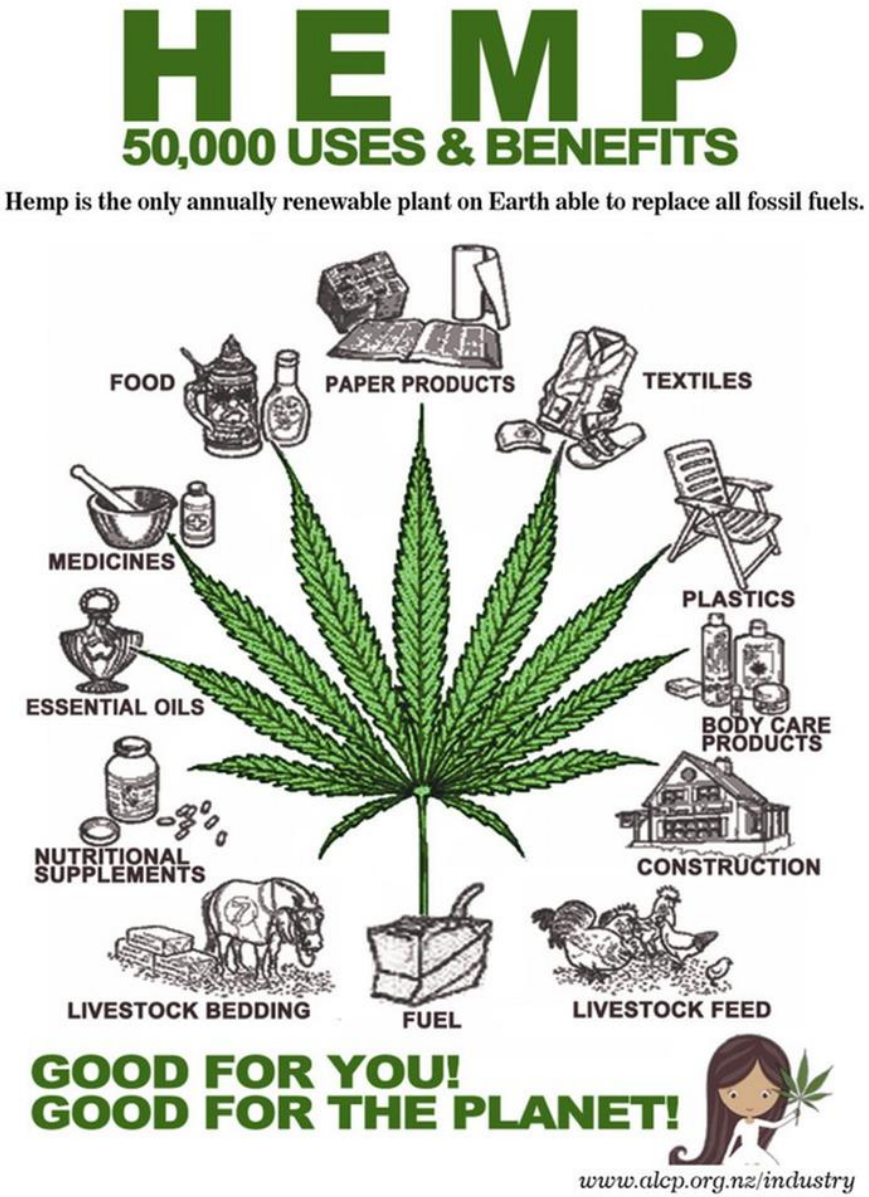


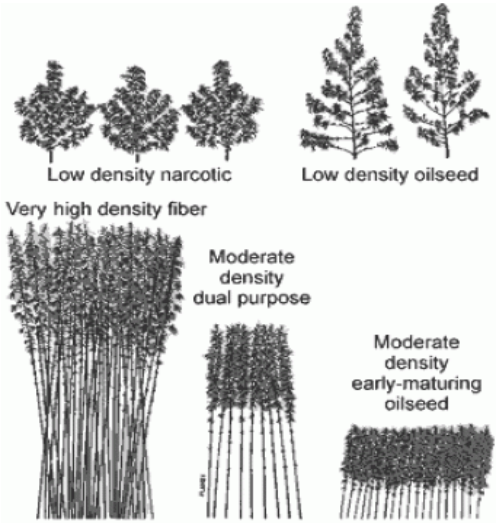


- Not psycho-active
- CBD also **binds with CB1 & CB2 receptors**, but binds only *weakly to CB1* receptors in the brain, and interferes with THC binding thereby **dampening the THC effects**
- Supplied as an oil, capsules or liquid solution; BUT note that unless rigorous manufacturing techniques are used, these all contain some THC.
- A purified version of CBD was approved by the FDA (Epidiolex) in 2019 for intractable epilepsy
- CBD is now being manufactured & sold by large pharma companies in South Africa as a sched 0 medication

Hemp fibre

- The hemp plant is a sub-species of cannabis, developed for its fibre & seed oil
- Hemp **fibre** is durable and soft, it is derived from the cannabis plant stem (stalk).
- It has been used for centuries in the manufacture of cloth and ropes
- Genetic manipulation produces “industrial” varieties of cannabis plants, with high fibre content, which are called “hemp”
- Hemp (including its oil), has very low levels of THC and CBD.





Metabolism & excretion of cannabis

Plant tetrahydrocannabinolic acid (inactive)

Plant cannabidiolic acid (inactive)

Time

Time

Δ9 THC

Cannabidiol (CBD)

Combustion/heat

Heat

Recreational, (medicinal)

Medicinal

Note: This is what is measured in oral fluid tests! (is psychoactive) Window of detection: hours

Psychoactive

Not psychoactive

Absorbed through lungs (& GIT, skin)

Metabolised in liver hydroxylation (& conjugation)

Eliminated through kidneys (urine)

Urine

Slightly psychoactive

11-OH-THC (hydroxyTHC, THCA)

7-OH-CBD
6-OH-CBD

Note: This is what is measured in urine tests! (not psychoactive) Window of detection: days to weeks

11-COOH-THC
(**carboxyTHC**)

Not psychoactive

COURT RULINGS AND CONSEQUENTIAL LEGAL FRAMEWORK

Cannabis in the news – in 2016 already

Cape Argus

AM EDITION

Black Friday: subscribe for half the price tomorrow – Page 30

Dagga in line for legal status

Health department pushes for herb to be a prescribed drug

TRAGIC: Zanele Mkhize, with red blanket, at the memorial service last night for her son, Ntsikozo, 16, who was stabbed more than 20 times in Langa.

24 November 2016

https://www.youtube.com/watch?v=2PLC_cBJwk4

Cannabis in the Western Cape High Court (24/03/2017)

Dagga can be used in the home, Western Cape High Court rules

2017-03-31 10:12

Jenni Evans, News24

news24

Cape Town – The Western Cape High Court has made a landmark ruling, declaring that it is an infringement to ban the use of dagga by adults in private homes.

In making the ruling on Friday, it has allowed for the possession, cultivation and use dagga at home, for private use.

It has also ruled that Parliament must change sections of the Drug Trafficking Act, as well as the Medicines Control Act.

It has 24 months to do so.

The successful application to decriminalise dagga was driven by Dagga Party leader Jeremy Acton and Rastafarian Garreth Prince who argued on December 13 and 14 last year for the decriminalisation of the herb.

The Western Cape High Court in Cape Town. (Paul Herman, News24)

=> Decriminalising the possession or cultivation of cannabis in a private dwelling for personal consumption by an adult – a matter of privacy and protected by the Constitution

Cannabis in the Constitutional Court (**18/09/2018**)

Ruled that two acts have sections that are unconstitutional:

- **Drugs and Drug Trafficking Act** (140 of 1992) ("**Drugs Act**") - section 4(b) and 5(b)
- **Medicines and Related Substances Control Act** (101 of 1965) ("**Medicines Act**") - section 22A(9)(a)(i)

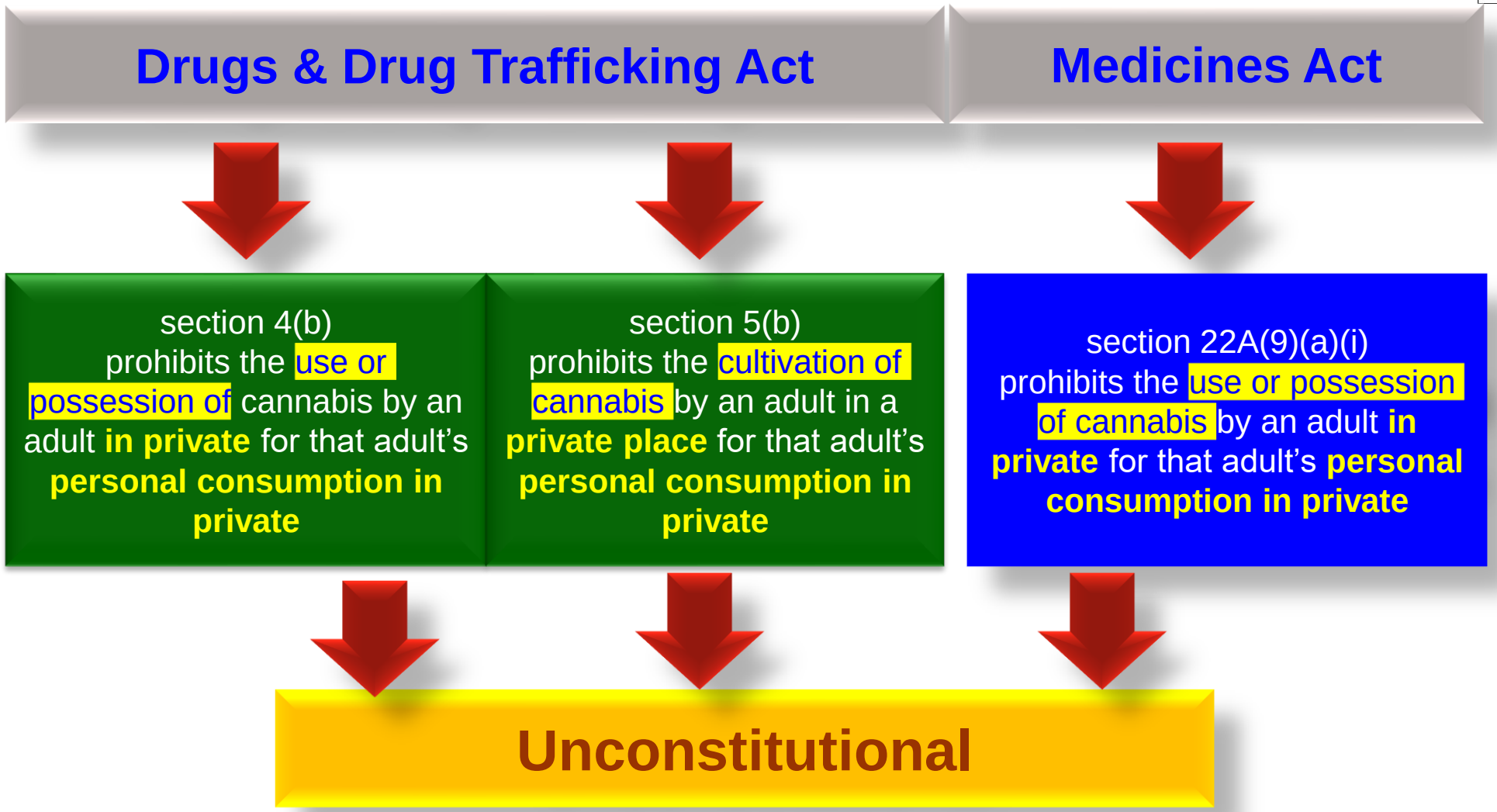
*they infringe the **right to privacy** entrenched in section 14 of the Constitution*

CONCOURT UPHOLDS RULING THAT PRIVATE USE OF DAGGA IS LEGAL

The Constitutional Court has upheld the Western Cape High Court ruling that the private use of dagga is legal.

Rastafarians smoke cannabis outside the South African Constitutional Court on 18 September 2018 before the ruling on the private use of marijuana is delivered. Picture: Thomas Holder/EWN

Cannabis in the Constitutional Court (18/09/2018)



“**Interim relief**” for cannabis users

- The Constitutional Court **suspended its order of invalidity for a period of 24 months** to give Parliament an opportunity to correct the constitutional defects in the two Acts.

- However, in order to ensure that people who fall into the same category as Mr Prince and his co-applicants receive effective relief,

  the Constitutional Court granted **interim relief** by way of a **reading-in of the two Acts** to ensure that, during the period of suspension of invalidity, it would not be a criminal offence for an adult person to be in breach of the aforementioned sections of the Drugs & Medicines Acts.

“Reading in” of the two Acts to give interim relief

Extract from the judgement:

13. During the period of the suspension of the operation of the order of invalidity:

(a) section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 ***shall be read as if*** *it has sub-paragraph (vii) which reads as follows: "(vii), in the case of an adult, the substance is cannabis and he or she uses it or is in possession thereof in private for his or her personal consumption in private."*

(b) the definition of the phrase "deal in" in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 ***shall be read as if*** *the words "other than the cultivation of cannabis by an adult in a private place for his or her personal consumption in private" appear after the word "cultivation" but before the comma.*

(c) the following words and commas ***are to be read into*** *the provisions of section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1965 after the word "unless":*

", in the case of cannabis, he or she, being an adult, uses it or is in possession thereof in private for his or her personal consumption in private or, in any other case,".

...

15. Should Parliament fail to cure the constitutional defects within 24 months from the date of the handing down of this judgment or within an extended period of suspension, the reading-in in this order will become final.

Cannabis regulation following the Constitutional Court ruling

Drugs & Drug Trafficking Act

section 4(b)
prohibits the use or possession of cannabis by an adult **in private** for that adult's **personal consumption in private**

section 5(b)
prohibits the cultivation of **cannabis** by an adult in a **private place** for that adult's **personal consumption in private**

Removal of the following from Schedule 2 of the Act: cannabis (the whole plant or any portion or product thereof), tetrahydrocannabinol, Dronabinol, trans delta 9 THC.

Cannabis for Private Purposes Act (07 of 2024)

Medicines Act

section 22A(9)(a)(i)
prohibits the use or possession **of cannabis** by an adult **in private** for that adult's **personal consumption in private**

Regulation of cultivation, manufacture, distribution and sale of cannabis (THC & CBD)

South African Health Products Regulatory Authority (SAHPRA)

Regulation of cultivation, manufacture, distribution and sale of cannabis

Personal use, private place

Cultivation, possession of & use within the limits of the Con Court ruling (**personal use, private place**)

- Recreational
- Home Remedy
- Medicinal

Beyond personal use; for others, public

Subject to regulation under sections **22A** (Permit) & **22C** (Licence) of the Medicines Act

SAHPRA South African Health Products Regulatory Authority

South African Health Products Regulatory Authority
Building A
Loftus Park
Arcadia
Pretoria

10 November 2022

GUIDELINE FOR CULTIVATION OF CANNABIS AND MANUFACTURE OF CANNABIS-RELATED PHARMACEUTICAL PRODUCTS FOR MEDICINAL AND RESEARCH PURPOSES

Cultivation	✓
Manufacture	±
Distribution	✗
Sale	✗

Cultivation	✓
Manufacture	✓
Distribution	✓
Sale	✓

*"**Cultivation** for any other purpose than allowed for through the **licence** and **permit** system under the Medicines Act is a criminal offence."*

*The **sale, supply and use** of a medicine or scheduled substance is subject to Section 22A of the Medicines Act.*
All medicines are subject to a scheduling process based on their active pharmaceutical ingredients (APIs).

Schedule 7 substances are deemed to have no legitimate medicinal use and can only be accessed by means of a permit issued by the Director-General of the National Department of Health

Cannabis in the Medicines Act schedules:

- **Sched 7**: cannabis plant*; synthetic cannabinoids (cannabicyclohexanol).
- **Sched 6**: Δ9THC for therapeutic use
- **Sched 4**: CBD for therapeutic use
- **Sched 0**: THC & CBD withing prescribed limits

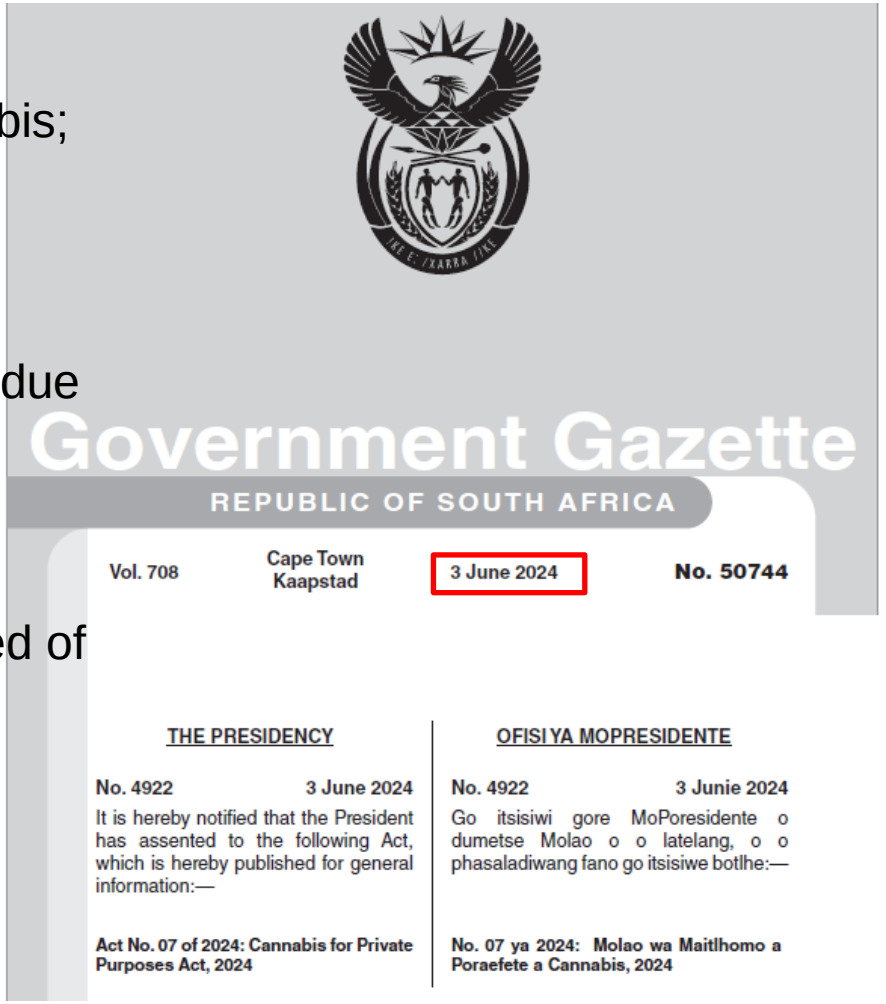
* **Cannabis plant** = the whole plant or any part or product of it, with certain **exceptions**, eg:

- otherwise scheduled (S6)
- processed hemp fibre & products manufactured from such fibre, contain no more than 0.1% THC

The Cannabis for Private Purposes Act 7 of 2024 (**07 of 2024**)(1)

This Act intends to:

- respect the right to privacy of an adult person to use or possess cannabis;
- regulate the use or possession of cannabis by an adult person;
- provide for an alternative manner by which to address the issue of the prohibited use, possession of, or dealing in, cannabis by children, with due regard to the best interest of the child;
- prohibit the dealing in cannabis;
- provide for the **expungement of criminal records** of persons convicted of possession or use of cannabis or dealing in cannabis on the basis of a presumption;
- amend provisions of certain laws; and
- provide for matters connected therewith.



Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 708 | Cape Town Kaapstad | 3 June 2024 | No. 50744

THE PRESIDENCY

No. 4922 3 June 2024

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

Act No. 07 of 2024: Cannabis for Private Purposes Act, 2024

OFISI YA MOPRESIDENTE

No. 4922 3 Junie 2024

Go itsisiwi gore MoPoresidente o dumetse Molao o o latelang, o o phasaladiwang fano go itsisiwe botlhe:—

No. 07 ya 2024: Molao wa Maitlhomo a Poraefete a Cannabis, 2024

8. (1) This Act is called the Cannabis for Private Purposes Act, 2024, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

(2) For purposes of subsection (1) different dates may be proclaimed in respect of different provisions of the Act and the different items of the Schedule to the Act.

The Cannabis for Private Purposes Act 7 of 2024 (7 of 2024)(2)

Deletion of the following from Schedule 2 of the Drugs & Drug Trafficking Act:

- **Cannabis** (the whole plant or any portion or product thereof)
- **Dronabinol**, **trans delta 9 THC** (meds)

Schedule

(Section 7)

LAWS AMENDED

Item No.	Number and year of law	Short title	Extent of repeal or amendment
1.	Act No. 140 of 1992	Drugs and Drug Trafficking Act, 1992	*(a)* Part II of Schedule 2 is amended by the deletion of the item: "Dronabinol [(-)-transdelta-9-tetrahydrocannabinol]." *(b)* Part III of Schedule 2 is amended by the deletion of the items: (i) "Cannabis (dagga), the whole plant or any portion or product thereof, except dronabinol [(-)-transdelta-9-tetrahydrocannabinol]"; and (ii) "Tetrahydrocannabinol".

The Cannabis for Private Purposes Act 7 of 2024 (7 of 2024)(3)

Amendment of the threshold limits for substances with narcotic effects in the **National Road Traffic Act**:

- **Alcohol**
- **Δ9 THC** (the psychologically active substance)
- **Combinations** of these

(10) (a) Where a person is a **professional driver** referred to in section 32—
(i) a concentration of less than a concentration of a drug having a narcotic effect, as may be prescribed, per 100ml of blood;
(ii) a concentration of less than—
(aa) 0,02 gram **alcohol** per 100 millilitres of blood;
(bb) 200 nanograms **THC** per 100 millilitres of blood [2ng/ml]; or
(cc) 0,01 gram alcohol **and** 100 nanograms THC per 100 millilitres of blood [1ng/ml blood],
... (more details)

(b) Where a person is **not a professional driver**—
(i) a concentration of less than a concentration of a drug having a narcotic effect, as may be prescribed, per 100 ml of blood;
(ii) a concentration of less than—
(aa) 0,05 gram **alcohol** per 100 millilitres of blood;
(bb) 500 nanograms **THC** per 100 millilitres of blood [5ng/ml]; or
(cc) 0,025 gram alcohol **and** 250 nanograms THC per 100 millilitres of blood [5ng/ml]; ,
... (more details)

Implications of decriminalising cannabis use on workplace risks

Increase in use = increase in accident risk.

and

Use is increasingly “legitimate” (prescribed medication) = changes in drug testing policy required.

Take home message: Cannabis as a medication & company policy

It follows that the employer should **regulate cannabis** in the **same manner as alcohol (recreational use or as a home remedy)** or a **scheduled medication (medicinal use)**, including:

- There should be clear rules in place (in a **policy**) that prohibit employees from using or being in possession of intoxicating liquor or drugs (including cannabis) **in the workplace**.
- Employees found to be in in breach of the policy should be formally dealt with in terms of the employer's disciplinary code.

Concluding suggestions - cannabis use

For the **THC-containing** substances / meds, consider the following approach:

- **"recreational use":** must not test positive for Δ9THC whilst on duty (**similar to alcohol**), or
- **"home remedy"** (grown at home for personal use or sched 0 med) must not test positive for Δ9THC whilst on duty (**similar to alcohol**) (THC @ sched 0 has *very low* THC levels (0.001%));
- **"medicinal use" (sched 6):** must not test positive for Δ9THC whilst on duty and must be prescribed by a medical practitioner and all the formulations should be regarded as having the potential to **cause drowsiness** (thereby **affecting safety sensitive work**). (**note 1**: sched 6 requires prescription; **note 3**: no sched 6 THC registered with SAHPRA yet)

IMPLICATIONS FOR WORKPLACE TESTING FOR CANNABIS

Duty of the employer is unaffected

In terms of the laws that **protect the safety of employees & the public**

Occupational Health and Safety Act

Mines Health and Safety Act

*the employer is still required to **prevent an incident from taking place** as a consequence of **someone** **being under the influence of an intoxicating substance**, **regardless of whether the intoxicating substance is legal or illegal**.*

2A. Intoxication

(1) …. an employer …, shall not permit any person **who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace**.

(2) …, **no person at a workplace shall be under the influence of or have in his or her possession or partake of or offer any other person intoxicating liquor or drugs**.

(3) An employer …, shall, in the case **where a person is taking medicines**, only allow such person to perform duties at the workplace if the **side effects of such medicine** do **not constitute a threat to the health or safety of the person concerned or other persons at such workplace**.

- 4.7.1 **No person** in a **state of intoxication** or ….., **shall be allowed to enter** the workings of a mine or be in the proximity of any working place or near any machinery on the surface of a mine or at a works,

- and any person who may have entered the workings of a mine or who is found in the proximity of any workings or near any machinery on the surface of a mine or at any works in a state of intoxication **may be arrested immediately by the manager or some person duly appointed by him and immediately handed over to the police**, and shall be deemed to be guilty of an offence under these regulations.

Important considerations

- How do we define “under the influence of”, or “intoxication”?
- When is an employee intoxicated enough to endanger themselves and others by their unsafe acts?
- If we wait for visible signals of intoxication, is that not already too late?
- The levels of intoxicant in the blood, urine and oral fluid do not always reliably corelate with behaviour. Different people metabolise or react to intoxicants in various ways.
- So ... what do we do?

Use a dual approach

Clinical Chemistry Techniques

AND / OR

Observational Detection

Screening & Confirmatory testing for substances with impairment potential

Table 10: SAMHSA (United States) Cut offs for Oral Fluid (2015-05-15)

Federal Register / Vol. 80, No. 94 / Friday, May 15, 2015

Initial test analyte	Initial test cutoff (ng/mL)	Confirmatory test analyte	Confirmatory test cutoff concentration (ng/mL)
Marijuana (THC) [1]	4	THC	2
Cocaine/Benzoylecgonine	[2] 15	Cocaine	8
		Benzoylecgonine	8
Codeine/Morphine	[2] 30	Codeine	15
		Morphine	15
Hydrocodone/Hydromorphone	[2] 30	Hydrocodone	15
		Hydromorphone	15
Oxycodone/Oxymorphone	[2] 30	Oxycodone	15
		Oxymorphone	15
6-Acetylmorphine	3	6-Acetylmorphine	2
Phencyclidine	3	Phencyclidine	2
Amphetamine/Methamphetamine	[2] 25	Amphetamine	15
		Methamphetamine	15
MDMA [4]/MDA [5]/MDEA [6]	[2] 25	[3] MDMA	15
		[4] MDA	15
		[5] MDEA	15

[1] Δ-9-Tetrahydrocannabinol (THC).
[2] *Immunoassay:* The test must be calibrated with one analyte from the group identified as the target analyte. The cross reactivity of the immunoassay to the other analyte(s) within the group must be 80 percent or greater; if not, separate immunoassays must be used for the analytes within the group.
Alternate technology: Either one analyte or all analytes from the group must be used for calibration, depending on the technology. At least one analyte within the group must have a concentration equal to or greater than the initial test cutoff or, alternatively, the sum of the analytes present (i.e., equal to or greater than the laboratory's validated limit of quantification) must be equal to or greater than the initial test cutoff.
[3] Methylenedioxymethamphetamine (MDMA).
[4] Methylenedioxyamphetamine (MDA).
[5] Methylenedioxyethylamphetamine (MDEA).

"Field Sobriety Tests"

- Appearance (red eyes, dishevelled look,
- Behaviour (slurred speech, unsteady gait)
- Other (smell of an alcoholic beverage)

The amended National Road Traffic Act

The amendments to this Act by the Cannabis for Private Purposes Act 7 of 2024 (7 of 2024) provide good grounds for setting thresholds for acceptable levels for cannabis.

(10) (a) Where a person is a **professional driver** referred to in section 32—
(i) a concentration of less than a concentration of a drug having a narcotic effect, as may be prescribed, per 100ml of blood;
(ii) a concentration of less than—
(aa) 0,02 gram **alcohol** per 100 millilitres of blood;
(bb) 200 nanograms **THC** per 100 millilitres of blood [2ng/ml]; or
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(aa) 0,05 gram **alcohol** per 100 millilitres of blood;
(bb) 500 nanograms **THC** per 100 millilitres of blood [5ng/ml]; or
(cc) 0,025 gram alcohol **and** 250 nanograms THC per 100 millilitres of blood [5ng/ml]; ,
... (more details)

Additional considerations

Occupational Health and Safety Act

GSR 2A. Intoxication

(1) …. an employer …, shall not permit **any person** who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace

... etc.

Safety is an inherent part of the job

The main aim of the OHSA is health and safety; it is not concerned with protecting an organisation's interests, such as property, liabilities, finances, reputation, or public image.

Common Law of Contract

Employment Contract

- Employees are required to perform their duties diligently and effectively, and failure to do so constitutes a breach
- If an employee is found to be impaired or intoxicated, they breach the contract, which justifies disciplinary action for failing to meet performance expectations, such as arriving fit for duty
- In addition, employers have a common law duty to ensure workplace safety
- The employment contract must refer to rules indicating that there are thresholds or cut-off concentrations for substances with impairment potential in an employee's body. These are determined rationally for each specific substance.
- Ideally individuals should be informed of the testing programme before formal employment

Recognition: Dr Tim Laurens, PhD (Med law & Ethics), PhD (Chem). Expert Laboratory Services

ILLUSTRATIVE CASE LAW

Case Law (1): Rankeng (applicant) vs Signature Cosmetics & Fragrance Pty (Ltd) (16/11/2020)

- Applicant worked as a picker
- Two witnesses testified that the applicant reported late and had red & watery eyes.
- The applicant agreed to a drug test which was positive.
- Charged with being under the influence of cannabis while at work – dismissed for misconduct
- The commissioner held that:
  - the difficulty with a charge of this nature is that there is no scientific method of determining whether a person is under the influence of the drug such that there is an impairment in their performance.
  - the company's evidence did not point to any evidence of impairment of faculties, apart from red and watery eyes, which would suggest an inability to perform tasks allocated.
  - On this basis, although the applicant's conduct was irresponsible since it was in contravention of the company policy, **dismissal was not an appropriate sanction, and a final warning would have sufficed**.
- The commissioner ordered that the employee be reinstated and issued with a final written warning.

Case Law (2): Marasi (Applicant) and PetroSA (27/06/2023) (Labour Court) (1)

- All employees at the refinery are subjected to an annual medical assessment and ad hoc inspections, as well as random individual and group drug testing, accordance to PetroSA's Alcohol and Drug Abuse Workplace Policy
- The purpose and scope of the Policy: to ensure the maintenance of a safe working environment, the health of its employees and compliance with the (MHSA, 1996).
- Policy provides for cut-off levels relating to the use of intoxicating substances, including alcohol and 16 other substances. The cut-off levels are in line with the European Workplace Drug Testing Society (EWDTS) Guidelines, as well as section 11 of the MHSA.
- The term "testing positive" or "intoxication" in this context refers to the presence of alcohol or other substances, including cannabis, above the relevant cut off limits.

Case Law (2): Marasi (Applicant) and PetroSA (27/06/2023) (Labour Court) (2)

- Applicant worked as a Telelcommunications Technician for 14yrs, with a clean disciplinary record.
- He decided to embark on a traditional healer training programme for 18 months. (whilst remaining employed). PetroSA agreed.
- It was further agreed that he had to attend a medical surveillance assessment to determine his fitness to work at the refinery. This included a drug screening(a panel test).
- When he went for his medical, he tested positive for cannabis. A second test was done some weeks later - tested positive for cannabis. A confirmatory test was done - positive.
- PetroSA informed Mr Marasi that he had tested above the cut off level and that he would therefore not be permitted access to the refinery as he was deemed unfit for duty.
- Several weeks later, Mr Marasi took a further test and tested below the cut off limit (26ng/ml) for cannabis. He accordingly returned to work and continues to work for PetroSA to date in compliance with the Policy.

- Mr Marasi argued that this suspension from work was unfair labour practice.
- Mr Marasi disputes whether urine testing in relation to cannabis can determine whether a person is inhibited from performing their functions.

Judge's Ruling:

- The barring of Mr Marasi from the plant at Mossel Bay did not constitute a 'suspension' in terms of the LRA or an unfair labour practice.
- Mr Marasi's submissions contain extensive and interesting data relating to the issue of what medical tests are best for the determination of intoxication by cannabis. However, he did not bring any expert witnesses to the trial to assist the Court in this respect. The Court is unable to make findings in this respect.
- The concept that an employee should not be immediately barred from entry into a Petro chemical plant when an impermissible amount of an intoxicating substance is found in their system, is **absurd in the Court's view**.
- The applicant's claims are dismissed.

Case Law (3): Enever (Appellant) vs Barloworld Equipment (23/04/2024) (Labour Appeal Court) (1)

- Appellant worked in an admin position. She had been promoted several times until her position as category analyst.
- The employer has an "Employee Policy Handbook" which details the employer's zero tolerance for anyone under the influence of alcohol and/or drugs. (incorporates an Alcohol and Substance Abuse Policy)
- On 29 January 2020, the employee was subjected to a medical test, which included a urine test - which tested positive for cannabis.
- Subsequent urine cannabis tests were done, and all remained positive. The appellant refused to stop using cannabis, citing religious reasons, and subsequently health reasons.
- The employer acknowledged that: (1). The employee was not impaired nor was impairment part of the reason for the sanction. (2). The employee's job did not include safety-sensitive work.
- The outcome of her disciplinary enquiry on 20 April 2020 was she was summarily dismissed.
- In 2022 the **Labour Court** found **against the Appellant**, saying as cannabis is an intoxicating substance employers may implement their own rules or policies to ensure occupational health and safety.
- In April 2024 the **Labour Appeal Court** (LAC) set aside the order of the Labour Court and found in the appellant's favour, saying she had been unfairly dismissed.

Case Law (3): Enever (Appellant) vs Barloworld Equipment (23/04/2024) (Labour Appeal Court) (2)

Judge's Ruling: dismissal was automatically unfair, because

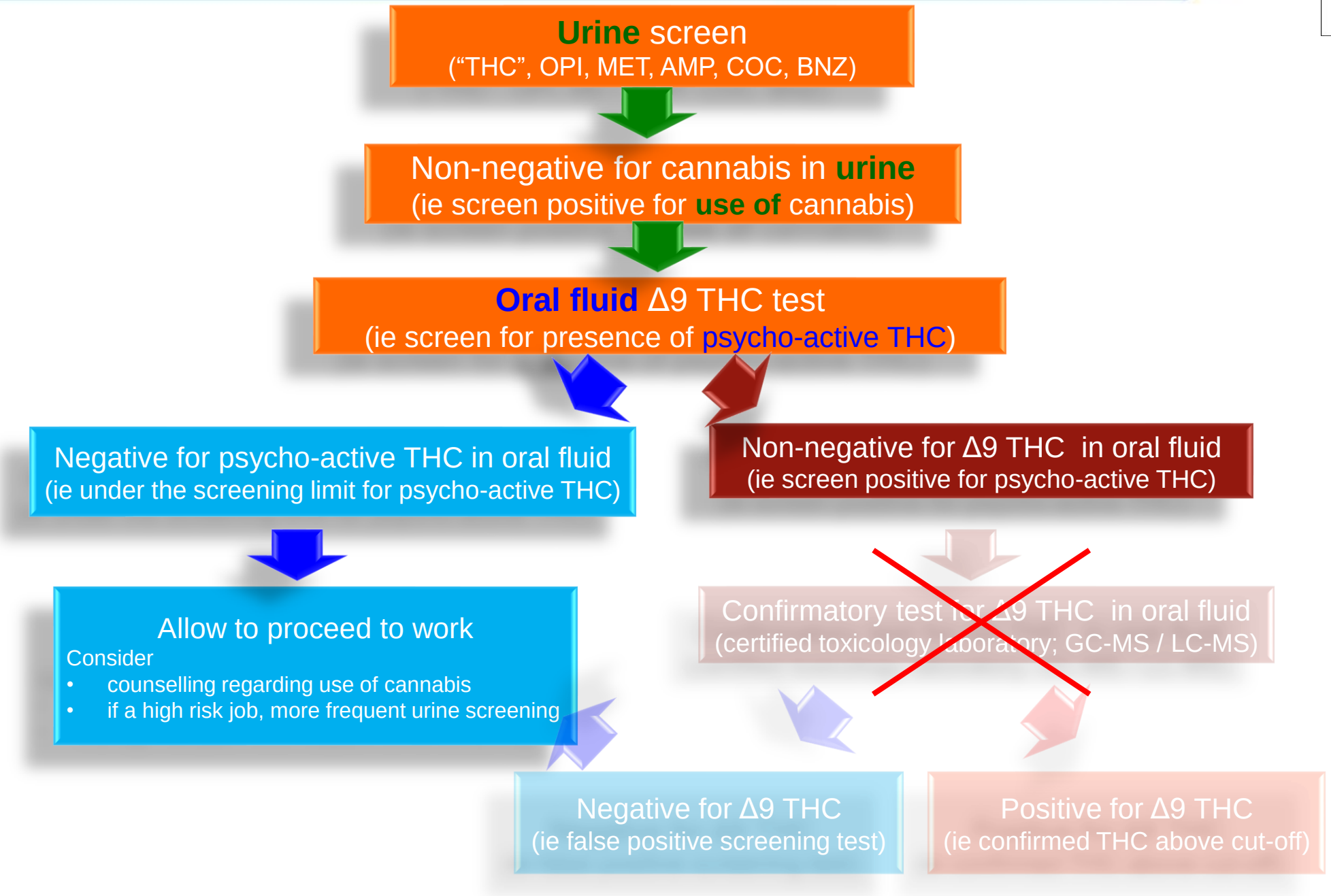
- Barloworld's Alcohol and Substance Abuse Policy is irrational and violates the right to privacy in Section 14 of the Constitution, to the extent that it prohibits office-based employees that **do not work** with or within an environment that has heavy, dangerous and similar equipment, from consuming cannabis in the privacy of their home.
- Whilst the Respondent did operate in an environment with heavy machinery, the Policy was unjustifiably overbroad, and the same standards could not be applied to an employee who works in an office outside of the dangerous environment. That the employer had a zero-tolerance approach was irrelevant in this regard and there was no justifiable reason to limit the Appellant's rights.
- This is because cannabis stays in the body much longer than alcohol, the only way the Appellant could comply with the Policy is by not smoking cannabis at all. This meant that she had to choose between her job and her right to smoke cannabis in private.
- Importantly, however, the LAC stressed that this finding may not be true for other employees of the Respondent whose circumstances and work environment may have greater safety sensitivity.
- Enever was awarded compensation equivalent to 24 months' salary.

Point to Ponder: Had Barloworld's policy required that a positive urine test for cannabis be followed by an oral fluid test, this case would not have reached the CCMA or the courts.

PART 3

Take Home Messages / Way Forward

Recommended process flow - cannabis



Key take-home messages

- Substance Abuse Policies must set out **rules that are fair**:
  - Do not over-reach into the private lives of employees (be cautious of “zero tolerance”)
  - Do not unfairly discriminate between users of alcohol & cannabis
  - Thresholds of acceptable levels (cannabis and other substances) should be specified and based on reasonable evidence.
- When invoking the OHSA, remember the inherent requirements of the job relate to employee safety (therefore blanket testing may not be acceptable).
- If a wider reach than just safety is being considered (“blanket testing”), ensure the above rules are enshrined in employment contracts (common law of contract).

Thank you for your attention!