

The Shopfront

YOUTH LEGAL CENTRE

Drug Offences

1 Prohibited Drugs

Most drug offences in New South Wales are set out in the *Drug Misuse and Trafficking Act*. There are also some drug offences created by other acts such as the *Summary Offences Act* (NSW), the *Poisons and Therapeutic Goods Act* (NSW) and the *Customs Act* (Commonwealth).

Please note that the penalties listed here are all *maximum* penalties, which are rarely imposed. The court may also impose other penalties such as a good behaviour bond, community service order, suspended sentence, etc.

For some drug offences (mainly possession and self-administration) there are diversionary schemes which allow the matters to be dealt with without going to court. See section 4 of this document for more details.

1.1 Possession

Possession of a prohibited drug (*Drug Misuse and Trafficking Act s10*)

To be in possession of a drug, it has to be in your custody or control, and you must know about it. You can be guilty of possession if you share ownership or control of the drug with others, or if you are minding the drug for someone else.

Max penalty: \$2,200 fine and/or 2 years imprisonment

1.2 Use

Self-administration of a prohibited drug (*Drug Misuse and Trafficking Act s12*)

You will not be prosecuted for self-administration if you use in a medically-supervised injecting centre (*Drug Misuse and Trafficking Act s36N*) (currently there is only one in NSW, at Kings Cross). If you are using anywhere else, you may be prosecuted if the police see you. However, police have guidelines about overdoses and usually don't prosecute people who overdose and have to be treated by paramedics.

Max penalty: \$2,200 fine and/or 2 years imprisonment

1.3 Equipment

Possession of **equipment for self-administration** of a prohibited drug (*Drug Misuse and Trafficking Act s11*).

Note: it is not an offence to possess a syringe.

Max penalty: \$2,200 fine and/or 2 years imprisonment

1.4 Supply

Supplying a prohibited drug (*Drug Misuse and Trafficking Act s25*)

Supply has a very broad definition and **includes offering or agreeing to supply, whether or not any drugs or money actually change hands**. If you sell aspirin and pass it off as heroin, you are guilty of supply!

If you introduce someone to a dealer, you could be guilty of being knowingly concerned in supply. Supply also includes having drugs in your possession for the purpose of supply. If you have more than a certain amount (e.g. 3 grams heroin or 300 grams cannabis leaf) you will be charged with **deemed supply** (*Drug Misuse and Trafficking Act s29*) and it will be up to you to prove that you didn't intend to supply it to anyone else.

There is also the offence of **ongoing supply** (*Drug Misuse and Trafficking Act s25A*), which involves supplying drugs on 3 or more separate occasions within one month. It doesn't have to be the same drug each time. The quantities supplied can be added together (which means the person could end up facing a more serious penalty than if dealt with for supplying three separate small amounts.)

The maximum fine can range from \$220,000 to \$550,000, and the maximum term of imprisonment can range from 10 years to life, depending on the type and quantity of drug (cannabis is treated less seriously), and whether it was supplied to a child under 16.

1.5 Cultivation

Cultivating a prohibited plant (*Drug Misuse and Trafficking Act s23*)

The maximum fine can range from \$220,000 to \$550,000, and the maximum term of imprisonment can range from 10 years to life, depending on the type and quantity of drug (cannabis is treated less seriously)

1.6 Manufacture

Manufacturing a prohibited drug (*Drug Misuse and Trafficking Act s24*)

The maximum fine can range from \$220,000 to \$550,000, and the maximum term of imprisonment can range from 10 years to life, depending on the type and quantity of drug (cannabis is treated less seriously)

1.7 Drug premises

"**Drug premises**" are any premises (eg house, flat, office) which are **used for the unlawful supply or manufacture of prohibited drugs** (other than cannabis). A court can find that premises are drug premises even if no drugs are found, or no-one is caught dealing, there.

Under the *Drug Misuse and Trafficking Act*, it is an offence to:

- (a) enter or be on drug premises (unless you can prove you have a lawful excuse to be there) (section 36X),
- (b) organise or help organise drug premises, including being a lookout or door guard (unless you can prove that you didn't know, and could not reasonably be expected to know, that they were drug premises) (section 36Z), or

- (c) be an owner or tenant and knowingly allow your premises to be used as drug premises (section 36Y).

For a first offence, the maximum penalty is a fine of 50 penalty units (\$5,500) or twelve months' imprisonment or both.

For a second or subsequent offence, the maximum penalty is a fine of 500 penalty units (\$55,000) or five years' imprisonment or both.

1.8 Introducing drugs or syringes into prisons

- (a) Bringing alcohol, restricted substances or prohibited drugs into a prison (*Summary Offences Act* section 27B).

*Max penalty: alcohol - 6 months imprisonment and/or \$1,100 fine
restricted substances/poisons - 2 years imprisonment and/or \$2,200 fine
prohibited drugs: 2 years imprisonment and/or \$5,500 fine*

- (b) Introducing syringe into prison or attempting to supply a syringe to an inmate (*Summary Offences Act* section 27C)

Max penalty: 2 years imprisonment

You don't have to intend to give the syringe to a prisoner to be guilty of introducing a drug or syringe into the prison. It is an offence even if it's for your own personal use and you leave it in a locker while you are visiting.

2 Prescription Drugs, Tobacco & Alcohol

2.1 Prescribed restricted substances

- (a) Possession, attempted possession or supply of a **prescribed restricted substance** (ie a prescription drug) without a prescription, or forging or fraudulently altering a prescription (*Poisons and Therapeutic Goods Act s16*)

Max penalty: \$2,200 fine and/or 6 months imprisonment; for anabolic or androgenic steroids: \$2,200 fine and/or 2 years imprisonment

- (b) Obtaining, by a false or misleading representation, a prescription that includes a prescribed restricted substance or knowingly possessing a prescription of that nature (*Poisons and Therapeutic Goods Act s16*)

Max penalty: can be up to \$2,200 fine and/or 6 months imprisonment.

2.2 Alcohol

- (a) Possession or consumption of **alcohol** by a child under 18 in a public place, without responsible adult supervision or reasonable excuse (*Summary Offences Act s11*).

Max penalty: \$20 fine

- (b) If you are **under 18**, it is an offence to **drink, obtain or attempt to obtain, or carry away alcohol on licensed premises** (*Liquor Act s 115*), to **be in a restricted area of licensed premises** (*s 116A*), and to **use false identification to enter or consume alcohol on licensed premises** (*s113*)

Max penalty: \$1,100 fine

- (c) **Supplying or selling alcohol** to (or obtaining alcohol on behalf of) a child under 18 (*Liquor Act s114*). Note: this does not apply to a parent or guardian of the child.

Max penalty: \$5500 fine (or \$11000 and/or 12 months in "circumstances of aggravation").

s114(4A): Circumstances of aggravation exists where the court is of the opinion (having regard to the quantity or nature of the liquor involved or the age of the person involved or other relevant considerations) that the offence is so serious as to warrant the imposition of a penalty in excess of \$5,500 fine.

- (d) **Sending a person under 18** to go to licensed premises to obtain alcohol (*Liquor Act s 115(d)*)

Max penalty: \$2,200 fine

- (e) It is an offence for a **licensee** to allow a person under 18 to be on a **licensed premises** unless the minor is removed immediately (*s116B*), (unless the young person is 14 and over and has produced ID that gives the licensee reasonable grounds to believe he or she is 18 or over)

Max penalty: \$5,500 fine

2.3 Tobacco

- (a) It is an offence to **sell tobacco**, or a non-tobacco smoking product, to a person under 18 (*Public Health Act s59*)

Max penalty: \$5,500 fine

- (b) It is an offence for a person over 18 to **purchase tobacco** products, or non-tobacco smoking products, on behalf of a person under 18 (unless the young person is 14 and over and has produced ID that gives the licensee reasonable grounds to believe he or she is 18 or over)

- (c) (*Public Health Act s58A*)

Max penalty: \$2,200 fine

- (d) Even though it is not an offence for a child or young person to buy, possess or smoke cigarettes, **police may seize tobacco or non-tobacco smoking product in possession of persons of a person under 18 in a public place** (*Public Health Act s58*)

3 Police Powers with Drugs

3.1 Stop and Search Powers

The police can search you or your car or possessions without a warrant if the police **“reasonably suspect” you or your vehicle** has a **prohibited drug** (*Law Enforcement (Powers and Responsibilities) Act 2002*, section 45).

“Reasonable suspicion” depends on the circumstances. A guess or a hunch is generally not enough to be ‘reasonable suspicion’. However, if you have a record of drug offences,

and are hanging around an area known for drug use or dealing, the police may have reasonable grounds to suspect that you have illegal drugs on you. Just being near a methadone clinic or needle exchange is not enough to give the police a 'reasonable suspicion'.

3.2 Sniffer Dogs

Under the *Law Enforcement (Powers and Responsibilities) Act s147*, the police may use sniffer dogs for '**general drug detection**' in designated public places specified in the legislation (including pubs, nightclubs, dance parties, sporting events, railway stations, most public transport routes and some streets).

Using a dog for '**general drug detection**' means that the police can take the dogs into any designated area and walk them around to see if they detect any illegal substances. **There is no requirement that the police have a reasonable suspicion that the person is carrying illegal drugs.**

Detection is at random, and, in theory, does not allow the police to command the dog to sniff particular individuals. In addition, the police must try to prevent the dog from touching anyone and the police are not allowed to detain anyone or prevent anyone from leaving the area.

If a dog detects a scent on someone, it is trained to sit down next to the person. Police can then claim to have a reasonable suspicion that the person is carrying drugs and can conduct a search.

3.3 Searching Premises

Generally, the police may only search private property with the consent of the occupier (usually the owner or tenant) or if they have a search warrant they must show the occupier of premises.

Most search warrants are issued under the *Law Enforcement (Powers and Responsibilities) Act 2002*. Police must have reasonable grounds to suspect that there is something on the property connected with a criminal offence (e.g. drugs, stolen goods).

If the police have **reasonable grounds** to suspect premises are being used for the **manufacture or supply of prohibited drugs**, they may get a search warrant under the *Law Enforcement (Powers and Responsibilities) Act s140*. The police do not have to suspect that there are actually any drugs on the premises.

4 Court, Conference or Caution?

4.1 Courts

Most offences involving illegal drugs must be dealt with by a court.

Possession, self-administration, possession of equipment and introduction of drugs etc to prisons are *summary* offences, which means they are always dealt with by the Local Court or Children's Court (depending on the age of the defendant).

Offences such as supply and cultivation are *indictable* offences. This means they may be dealt with by a higher court such as the District or Supreme Court. However, in practice, most indictable offences are actually dealt with by the Local or Children's Court. Cases

involving very large quantities of drugs, or ongoing supply, are always dealt with by the District or Supreme Court. For example, the District Court will hear charges involving more than 5 grams of heroin, cocaine or speed, 1.25 grams of ecstasy, 1 kilogram of cannabis leaf or 50 cannabis plants.

Offences concerning drug premises are *summary* if it is the person's first offence, but *indictable* if it is a second or subsequent offence.

The 'purity' of a drug is not relevant in determining what quantity of drugs you possess or what you are charged with. For example, one kilogram of 60% pure heroin and 40% bicarbonate soda is treated as one kilogram of heroin. However, the purity will be relevant when determining the severity of your sentence. The 'purer' the drug, the harsher the sentence will be.

The larger the quantity of drugs, the more severe your sentence will be. The more harmful the court believes the drug is, for users and for the community, the more severe your sentence will be. If you are fairly high up the supply chain, or if you are an adult supplying drugs to someone under 16 years, this also can result in a longer sentence.

4.2 Drug courts

Currently there is an **Adult Drug Court** (based at Parramatta) and a **Youth Drug and Alcohol Court** (operating out of different Children's Courts in the Sydney metropolitan area). At this stage these are pilot programs. The Adult Drug Court only takes people who live in Western Sydney or have committed offences in the area.

Drug courts deal with people who have drug dependencies and who commit offences to support their habits. The Adult Drug Court won't take anyone who has committed a violent offence (eg. armed robbery) or a serious drug offence (eg. dealing more than a certain quantity of drugs). It also doesn't deal with people whose main drug of dependence is alcohol. The Youth Drug and Alcohol Court is more flexible and will deal with children who commit violent offences and who have problems with alcohol.

People on the drug court program will be placed in an individualised rehabilitation program for 12 months or more, with support from a case manager and strict supervision by the court. A person who successfully completes a drug court program can expect to receive a more lenient sentence (for example, a suspended sentence instead of a full time custodial sentence).

4.3 The MERIT program

The **MERIT** (Magistrates Early Referral Into Treatment) program is another pilot program for offenders with drug problems. It is available at several Local Courts (but not Children's Courts) around New South Wales. The MERIT program generally deals with less serious offences than the Drug Court. Participants take part in a 3-month program as part of their bail conditions. If they successfully complete the program, they are likely to receive a more lenient sentence.

4.4 Young Offenders Act

The *Young Offenders Act* provides for certain offences committed by people under 18 to be dealt with by a warning, caution or Youth Justice Conference instead of going to court. Unfortunately, the *Young Offenders Act* does not apply to most drug offences.

Possession or self-administration of drugs may be dealt with by warning, caution or conference, as long as the quantity is no more than a "small quantity". The "small quantity" as defined by the *Drug Misuse and Trafficking Act* for various types of drugs is as follows:

Cannabis - up to 30g* or 5 plants
 Ecstasy - up to 0.25g
 MDMA - up to 0.8g
 Heroin - up to 1g
 Amphetamine - up to 1g
 Cocaine - up to 1g
 LSD - up to 4 "trips" or 0.0008g

* For cannabis, a caution can't be given under the Act for more than 15g, unless the police believe there are exceptional circumstances.

Cultivation or possession of prohibited plants may also be dealt with under the *Young Offenders Act* if the amount of the plant is no more than half the "small quantity". The "small quantity" of cannabis plants is 5 plants (this means that half the small quantity would be 2.5 plants!). In exceptional circumstances, a matter involving more than half the small quantity may be dealt with under the *Young Offenders Act*, as long as the amount is less than the small quantity and dealing with the matter under the Act would be in the interests of the young person's rehabilitation.

Offences relating to drug premises, prescribed restricted substances, alcohol and tobacco may be dealt with under the *Young Offenders Act*.

4.5 Cannabis Cautioning Scheme (CCS)

For adults, there is a Cannabis Cautioning Scheme, which allows police some discretion as to whether to formally charge offenders or to simply issue a caution. It applies to use or possession (as opposed to supply) of up to 15g of cannabis, as long as the offender has no prior convictions for drug, sexual or violent offences.

A person can receive up to 2 cautions, which do not count as criminal convictions. Upon a second, and final, caution, the offender is required to contact the Alcohol and Drug Information Service (ADIS) for mandatory education on cannabis use.

4.6 On-the-spot fines

For most alcohol or tobacco related offences, the police will usually give you an infringement notice (an on the spot fine). You can choose to pay the fine or contest it in court. Doing nothing will not make the fine go away, and may have serious consequences. See fact sheet on *Fines* for more information.

5 Being Intoxicated in Public

The *Law Enforcement (Powers and Responsibilities) Act Part 16* applies to people who are **intoxicated** (seriously affected by alcohol or any other drug) and who are **behaving in a disorderly manner** or who **need physical protection** because of their intoxication.

Police may take an intoxicated person home or place them in the care of a **responsible person** (eg friend, relative, welfare worker, refuge) (*Law Enforcement (Powers and Responsibilities) Act s206*). If necessary, they may **detain the intoxicated person in a**

police station while finding a responsible person. If no responsible person can be found, police can detain the intoxicated person until they cease to be intoxicated.

Reasonable restraint may be used to ensure that the intoxicated person does not injure anyone (including himself or herself) or damage property. An intoxicated person can be searched by a police officer when they are detained and the officer can take possession of their belongings but the personal possessions must be returned to the person when they are released (*Law Enforcement (Powers and Responsibilities) Act s208*).

Intoxicated people who are detained under the *Law Enforcement (Powers and Responsibilities) Act* **are not charged** and their details are not entered in the COPS database or a charge book, nor are they fingerprinted. They should be **kept separate from people detained for criminal offences**, and juveniles must be kept separate from adults. They must be provided with food and bedding necessary to their needs. Intoxicated people must be released as soon as they cease to be intoxicated (*Law Enforcement (Powers and Responsibilities) Act s207*).

6 Drugs and Driving

It is an offence to drive under the influence of a drug, or with a 'prescribed concentration of alcohol' in your blood. See the separate fact sheet on 'Drugs, Alcohol and Driving'.

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This document was last updated in February 2006 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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