

The Shopfront

YOUTH LEGAL CENTRE

Traffic Fact Sheet 8 – Drugs, alcohol and driving

1 Introduction

There are several types of offences relating to drugs, alcohol and driving:

- **Prescribed concentration of alcohol** offences (PCA): there are limits on the amount of alcohol you are allowed to have in your blood when driving, depending on what type of licence you have. Penalties will depend on your licence type and the amount of alcohol in your system.
- **Driving with an illicit drug present** in oral fluid, blood or urine: this offence focuses on the presence of a drug in the driver's system (including cannabis, speed and ecstasy).
- **Driving with both a prescribed illicit drug and prescribed concentration of alcohol**: from 28 June 2021, you can be charged with a "combined offence" if you are detected driving with both a prescribed concentration of alcohol (PCA) in your breath or blood *and* a prescribed illicit substance in your oral fluid, blood or urine.
- **Driving under the influence** of alcohol or another drug (DUI): this offence focuses on whether the driver was actually affected by alcohol or other drugs.
- **Other offences** such as failing to stop for a random breath test, refusing a breath analysis, etc.

2 Driving with a prescribed concentration of alcohol (PCA) in your system

It is an offence to drive or ride a motor vehicle on a road or road-related area with a "prescribed concentration of alcohol" (PCA) in your blood above the legal limit.

There are 5 PCA limits:

- **Novice range PCA (0.00 – 0.02)**: applies to all learner drivers, P1 drivers, P2 drivers and interlock drivers.
- **Special range PCA (0.02 – 0.05)**: applies to all learner drivers, P1 drivers, P2 drivers and interlock drivers; also applies to drivers of heavy vehicles, vehicles carrying dangerous goods, and taxi or bus drivers.
- **Low range PCA (0.05 – 0.08)**: applies to all drivers.
- **Mid-range PCA (0.08 – 0.15)**: applies to all drivers.
- **High range PCA (0.15 and above)**: applies to all drivers.

3 Driving with drugs in your system

It is an offence to drive or ride a motor vehicle on a road or road-related area with a “prescribed illicit drug” (cannabis, amphetamine, ecstasy or cocaine) present in your “oral fluid” (saliva), blood or urine.

It is also an offence to have morphine (which can include heroin) in your blood or urine, unless you were using a morphine-based drug for medicinal reasons.

If you are using *cannabis* legally, on prescription for medicinal purposes, you can still be guilty of this offence. There are many people who believe this is unfair and are campaigning for a change to the law.

If you have traces of these drugs in your system, you will be committing this offence, even if you are no longer under the influence of the drug and your driving has not been affected.

4 Driving with both drug and prescribed concentration of alcohol in your system (combined offence)

From 28 June 2021 it is an offence to drive or ride a motor vehicle on a road or road-related area with both:

- a “prescribed illicit drug” present in your “oral fluid” (saliva), blood or urine; and
- a high-range or mid-range prescribed concentration of alcohol (PCA).

You can also be guilty of a combined offence if you have an illicit drug in your system with a novice, special, or low range PCA, but only if you have been convicted for a combined offence in the last 5 years.

Tougher penalties apply for combined offences, compared to separate drink-driving and drug-driving offences.

5 Driving under the influence of alcohol or drugs

It is also an offence to drive any vehicle (*including a non-motorised vehicle such as a pushbike*) on a road or road-related area whilst under the influence of alcohol or any drugs.

Unlike PCA or drug-driving charges, police are not required to provide any drug or alcohol test result. Driving under the influence (DUI) charges may be based on police observations about your driving and your actions that may suggest you were under the influence.

You can be charged with DUI in some situations where you can't be charged with a PCA or drug-driving offence, for example if police suspect you are affected by prescription medication or other drugs that don't make you guilty of a drug-driving offence, or if you are a cyclist.

6 Random breath testing and roadside drug testing

6.1 Random breath testing

In NSW, police have the power to randomly stop drivers of motor vehicles for an alcohol breath test. They may also breath test licence holders who are supervising learner drivers.

If you are found over the limit you may be arrested and taken to the police station where your alcohol levels will be tested again. If you fail this test, you will be charged.

It is an offence to refuse a breath test, and the penalties for doing so are often as severe as a drink-driving offence.

6.2 Roadside drug testing

Police in NSW now have the power to carry out roadside drug testing on any driver, rider or supervising licence holder of a motor vehicle in NSW.

The “oral fluid” drug test will test for the presence of:

- Delta-9-tetrahydrocannabinol (THC- the active component in cannabis);
- Methylamphetamine (speed, ice, crystal meth);
- Methylenedioxymethamphetamine (MDMA or ecstasy);
- (from 1 July 2018) Cocaine.

This will require you to lick the test pad of a device through the window of your vehicle.

If a positive sample is detected, you will have to provide a second sample which will be run through another oral screening device. If a second positive test is found, a sample of your saliva will be taken and sent to a laboratory for confirmation.

You will not be charged at this stage, *although police may suspend you from driving for 24 hours*. If the laboratory results are positive, you will usually receive a court attendance notice or a penalty notice within a few weeks.

Just like a breath test, it is an offence to refuse to submit to a roadside drug test.

6.3 Bicycle riders

In NSW, police do not have the power to stop a rider of a bicycle for a Random Breath Test or Random Oral Fluid Test. Also, cyclists can't be charged with PCA and “drive with illicit drug present” offences.

However, cyclists *can* be charged with driving under the influence (DUI). Police may charge you with DUI based on their own observations about your actions or your riding. Also, in the event of an accident where a bicycle rider is taken to hospital, a doctor has a duty to take a blood sample from the rider. If the sample indicates a presence of alcohol or drugs, the cyclist can then be charged.

For details please see Traffic Fact Sheet 12 – *Pushbikes and non-motorised vehicles*.

7 Immediate licence suspension and other police powers

7.1 Immediate licence suspension

Police may suspend your licence on the spot if you are charged with (or given a penalty notice for) certain offences including:

- a mid-range or high range PCA offence;

- (from 1 July 2018) driving under the influence of alcohol or other drugs;
- (from 20 May 2019) a special, low or novice range PCA offence;
- (from 28 June 2021) any combined offence;
- refusing to submit to a breath analysis or to the taking of a blood sample, preventing the taking of a blood sample, or wilfully doing anything to alter the concentration of alcohol in your breath or blood.

For more information, see *Traffic Fact Sheet 4 – Licence suspension and appeals*.

7.2 Powers to stop you from driving

A police officer also has the power to prohibit you from driving if they are of the opinion that you are under the influence of alcohol or any other drug, or if you fail or refuse an oral fluid test (or, from 1 July 2018, if you refuse or fail to pass a sobriety assessment).

They can direct you not to drive, require you to hand over your keys, or immobilise or detain your vehicle. They can stop you from driving until you sober up (or, in some situations, for up to 24 or even 48 hours). If you don't comply with these requirements you could be guilty of an offence and fined up to 10 penalty units (\$1,100).

7.3 Vehicle sanctions

From 3 December 2018, some repeat offenders may also incur vehicle sanctions, e.g. having a vehicle or numberplates confiscated. See *Traffic Fact Sheet 13 – Confiscation, impounding and forfeiture of vehicles*.

8 What are the penalties for these offences?

8.1 On-the-spot fines

Most drink-driving or drug-driving offences must be dealt with by a court.

From 20 May 2019, police can issue penalty notices (on-the-spot fines) for:

- novice range, special range or low range PCA (first offence);
- drive with prescribed illicit drug in oral fluid/blood/urine (first offence).

A penalty notice can only be issued if you have not been convicted of, or issued with a penalty notice for, a similar offence within the previous 5 years.

The penalty notice amount for these offences is \$581. As with all fines, you may elect to take it to court – but be warned, the court has power to impose more severe penalties.

If you *don't* take it to court, you will *not* get a criminal conviction. However, it will still be considered a previous offence when determining whether a new offence is a “second or subsequent offence”.

8.2 Licence suspension with on-the-spot fines

If you get a penalty notice for a PCA offence, the police may also suspend your licence on the spot for 3 months.

You won't get an on-the-spot suspension for a “drive with prescribed illicit drug” offence or a combined offence, but Transport for New South Wales (TfNSW, formerly known as Roads and Maritime Services) may suspend your licence for these offences or a PCA offence for 3 months *after* you pay the fine (or the time to court-elect has passed and you haven't paid the fine).

In relation to a PCA offence, in determining a period of suspension TfNSW is required to take into account any period of police-imposed suspension that you have served.

If you want to appeal against the suspension, this is different from court-electing on the fine. You will have to file a separate licence suspension appeal. See *Traffic Fact Sheet 4 – Licence suspension and appeals*.

8.3 Penalties if you are dealt with in court

If you are dealt with by a court, the penalty you receive will depend on a few factors such as how badly affected you were, how dangerous or harmful your driving was, the type of licence you hold, and whether you have a previous record for similar offences.

In most cases, you will have to pay a fine. In serious cases you could go to prison.

8.4 Disqualification if you are dealt with in court

Traffic offences involving alcohol and drugs also carry an automatic *disqualification*. This means that a person who is convicted by a court of one of these offences will be disqualified from having a licence for the *automatic* period set out by the law, unless the court decides to make a different order.

Instead of imposing the automatic disqualification, the court may:

- reduce the disqualification, but not below the minimum period set out by law;
- increase the disqualification period (this is rare);
- for some types of offences, make an alcohol interlock order; or
- in special cases, deal with the matter under section 10 of the *Crimes (Sentencing Procedure) Act* (or a similar law for juveniles). This means that there will be no penalty, no formal conviction and no disqualification.

However, the court will not grant you another section 10 order if you have received a section 10 order in the last 5 years for:

- any PCA, DUI, illicit substance or combined offence;
- failure to submit a breath analysis, blood sample or urine sample;
- failing to stop and assist after vehicle impact causing death, grievous bodily harm or other injury;
- menacing driving, negligent driving (occasioning death or grievous bodily harm), or furious or reckless driving; or
- aiding, abetting, counselling or procuring the commission of one of the above offences.

If your licence was suspended by the police when you were charged, the court must take into account the period you been suspended when imposing the disqualification.

9 Alcohol interlock program

9.1 What is the alcohol interlock program?

Alcohol interlocks are electronic breath testing devices linked to the ignition system of a vehicle. The driver must pass a breath test before their vehicle will start, as well as randomly-timed tests during a journey. If the interlock detects alcohol on the driver's breath, the ignition system will be disabled.

The alcohol interlock program means that people convicted of drink-driving offences can be disqualified from driving for a shorter period than usual, as long as they have an alcohol interlock device installed in their vehicle.

9.2 When can the court make an interlock order?

People convicted of certain repeat or serious drink-driving offences can be ordered to participate in the alcohol interlock program.

The following offences are *mandatory* interlock offences (which means the court must make an interlock order unless it grants an exemption):

- high range PCA;
- mid-range PCA (until 3 December 2018, it was only second or subsequent offences; now it also applies to first offences);
- any other PCA offence, if the offender has previously been convicted of an alcohol-related driving offence;
- driving or attempting to drive under the influence of alcohol (until 3 December 2018, it was only second or subsequent offences; now it also applies to first offences);
- combined offences (from 28 June 2021);
- failure or refusal to provide breath analysis or blood sample.

The court *may* also make an interlock order for someone convicted of dangerous driving causing death or grievous bodily harm, if the offender was under the influence of alcohol at the time.

9.3 Exemptions

For mandatory interlock offences, a court may grant an exemption, but ***only in special circumstances*** and ***only at the time of sentencing***.

You cannot ask for an exemption after the court case is finalised (except maybe if you appeal against your sentence – you should seek legal advice if you are in this situation).

For middle range PCA or a combined offence with middle range PCA, if it is a first offence, the court may grant an exemption if satisfied that:

- an interlock order would cause severe hardship, and
- an interlock exemption order is more appropriate in all the circumstances than an interlock order.

In this situation, the court can consider things such as financial hardship, the need to drive for work purposes, or the refusal of the registered owner (if it is not you) to install an interlock device in a work vehicle.

In all other cases, financial difficulties or employment reasons are not enough. To get an exemption, you must satisfy the court that:

- you do not have access to a vehicle in which to install an interlock device; or
- you have a medical condition diagnosed by a registered medical practitioner that prevents you from providing a sufficient breath sample to operate an approved interlock device and it is not reasonably practicable for an interlock device to be modified to enable you to operate the device.

9.4 Disqualification if an exemption is granted

If an exemption is granted, you will be disqualified from holding a licence for the automatic period for the offence, or a shorter period but not below the minimum set out for the offence.

The automatic and minimum periods for different offences are set out in the table below.

9.5 The interlock order

If an interlock order is made, you will first be disqualified from driving for a specified period of time.

This will be followed by a minimum 12-month interlock period. Longer interlock periods apply for more serious offences.

During the interlock period you will be allowed to drive only if you have an interlock device fitted in your vehicle. You are responsible for the installation and the cost of this (see below).

For a table showing the minimum and maximum disqualification periods as well as the minimum interlock periods for different offences, see:

<https://legislation.nsw.gov.au/view/html/inforce/2021-07-01/act-2013-018#sec.211>

9.6 If you have an interlock order and don't install an interlock device

A person who receives an interlock order and does not enter the interlock program will be disqualified from holding a licence (other than a learner or interlock licence) for **5 years** from the date of their conviction.

If you can't install an interlock device (eg because you don't have access to a vehicle, you will need to ask for an exemption at the time of sentencing. TfNSW, or the court *do not* have any power to exempt an offender after they have received an interlock order.

9.7 Costs of the program

The interlock program operates on a user-pays basis so you are required to pay all the costs of the program. The costs include installation, maintenance and removal of the interlock device, and a program administration fee to TfNSW. The cost is around \$2,200 a year.

For participants with a valid concession card, a concession rate will apply and the offender will receive a 35% discount off standard fees.

There is some help available for people suffering financial hardship. You must apply for a financial hardship assessment by contacting The Salvation Army on 1300 371 288.

9.8 More information

For more information about the alcohol interlock program, see the TfNSW website: <https://roads-waterways.transport.nsw.gov.au/roads/demerits-offences/drug-alcohol/interlock-program.html>, and

Transport for NSW participant guide:

<https://roads-waterways.transport.nsw.gov.au/documents/roads/safety-rules/alcohol-interlock-program/alcohol-interlock-program-participant-guide-november-2018.pdf>

Information on costs and financial support:

<https://roads-waterways.transport.nsw.gov.au/roads/demerits-offences/drug-alcohol/interlock-program.html#Programcosts>

10 Penalties and disqualifications for offences dealt with in court

This table outlines the penalties and disqualifications for the main types of alcohol and other drug-related offences. See the TfNSW website for a full list: <https://roads-waterways.transport.nsw.gov.au/roads/demerits-offences/drug-alcohol/drug-alcohol-offences.html>.

		Fine (max)	Prison term (max)	Disqualification (automatic)	Disqualification (minimum)	Mandatory alcohol interlock
High range PCA (0.15 or higher)	First offence	\$3,300	18 months	3 years	12 months	Y
	Second offence	\$5,500	2 years	5 years	2 years	Y
Middle range PCA (0.08 – 0.15)	First offence	\$2,200	9 months	12 months	6 months	Y (<i>from 3 Dec 2018</i>)
	Second offence	\$3,300	12 months	3 years	12 months	Y
Low range PCA (0.05 - 0.08)	First offence	\$2,200	-	6 months	3 months	N
	Second offence	\$3,300	-	12 months	6 months	Y
Special range PCA (0.02 – 0.05) (Provisional or Learner driver)	First offence	\$2,200	-	6 months	3 months	N
	Second offence	\$3,300	-	12 months	6 months	Y
Novice range PCA (0.00 – 0.02) (Provisional or Learner driver)	First offence	\$2,200	-	6 months	3 months	N
	Second offence	\$3,300	-	12 months	6 months	Y
Driving with illicit drug present in saliva, blood or urine	First offence	\$2,200	-	6 months	3 months	N
	Second offence	\$3,300	-	12 months	6 months	N
Combined offence with high range PCA (from 28/6/2021)	First offence	\$5,500	2 years	4 years	18 months	Y
	Second offence	\$11,000	2 years	6 years	3 years	Y
Combined offence with middle range PCA (from 28/6/2021)	First offence	\$3,300	18 months	2 years	12 months	Y
	Second offence	\$6,600	2 years	4 years	2 years	Y
Combined offence with novice, special or low range PCA and a conviction for a combined offence within the last 5 years		\$5,500	18 months	2 years	18 months	Y

		Fine (max)	Prison term (max)	Disqualification (automatic)	Disqualification (minimum)	Mandatory alcohol interlock
(from 28/6/2021)						
Driving under the influence of alcohol or another drug	First offence	\$3,300	18 months	3 years	12 months	Y (only if under influence of alcohol)
	Second offence	\$5,500	2 years	5 years	2 years	Y (only if under influence of alcohol)
Refusing a breath analysis/drug test	First offence	\$3,300	18 months	3 years	12 months	Y (refusing breath analysis only)
	Second offence	\$5,500	2 years	5 years	2 years	Y (refusing breath analysis only)

Updated September 2021

The information in this fact sheet contains a basic summary of the law in New South Wales. It is not legal advice. If you need legal advice, you should speak to a lawyer.

The Shopfront Youth Legal Centre
 356 Victoria Street, Darlinghurst, NSW 2010
 Tel: 9322 4808, Fax: 9331 3287
 Email: shopfront@theshopfront.org
 Web: www.theshopfront.org