

# The Shopfront

## YOUTH LEGAL CENTRE

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## Drug offences

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### 1 Introduction

#### 1.1 Types of drugs and their legal status

When people hear the word “drug”, they often think about illegal substances like heroin, cocaine, ecstasy and cannabis.

Not all drugs are illegal, though. A drug is any substance (other than food and water) that changes a person’s physical or mental state.

- **Legal drugs** include substances like caffeine, tobacco and alcohol. Most legal drugs are regulated in some way: for example, you can only buy alcohol from licensed premises and you can’t legally buy it if you are under 18.
- **Illegal (prohibited) drugs** include a long list of substances. You will be committing an offence if you possess, use, grow, make, supply or import them without a prescription or special permission. Some of these offences carry harsh penalties.
- **Pharmaceutical drugs** are available with a prescription from a doctor, or sometimes over the counter without a prescription. It is an offence to possess prescription drugs without a valid prescription. There are also restrictions on manufacture and sale of these drugs.

#### 1.2 Decriminalisation

Decriminalisation can mean different things in different contexts.

Currently when we talk about decriminalisation in Australia, we are usually talking about the removal of criminal penalties for drug use or possession for personal use. Decriminalisation is not the same as full legalisation.

Under decriminalisation, it is still illegal to supply prohibited drugs. Under some decriminalisation models, possession is still an offence, but is usually dealt with by a penalty notice (on-the-spot fine) or a caution instead of going to court.

The key feature of decriminalisation is that drug possession and use does not usually carry a criminal record (much like road traffic offences such as speeding).

Decriminalisation has been considered by the NSW government in recent years, including as part of a Special Commission of Inquiry into the drug “ice” in 2019. However, in spite of that Inquiry’s recommendations, decriminalisation is not on the present NSW government’s agenda.

#### 1.3 Penalties for drug offences

Please note that the penalties listed in this fact sheet are all *maximum* penalties. These are usually saved for the worst cases.

As well as fines and imprisonment, courts have other sentencing options such as good behaviour bonds, community correction orders, intensive correction orders, or dismissing the charge without recording a formal conviction.

For more information, see part 9.4 below and our fact sheet on *Sentencing*.

## 2 Prohibited drugs

### 2.1 Introduction

Prohibited drugs are made illegal by the *Drug Misuse and Trafficking Act 1985* (NSW).

These include drugs such as cannabis, amphetamines, ecstasy, heroin, and cocaine. They also include some prescription drugs which are considered drugs of dependence, such as Xanax/Alprax (alprazolam), buprenorphine, anabolic steroids etc.

A list of prohibited drugs is in Schedule 1 of the *Drug Misuse and Trafficking Act*: <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1985-226#sch.1>

### 2.2 Possession

It is an offence to **possess** a prohibited drug (*Drug Misuse and Trafficking Act* section 10).

*Maximum penalty: \$2,200 fine and/or 2 years imprisonment.*

To be in possession of a drug, it has to be in your “custody” or “control”, and you must know it is there. For a drug to be in your “custody”, it usually has to be in your immediate physical possession (e.g. in your pocket or bag). However, a drug can be under your “control” even if it is not with you (e.g. in a storage unit that you have access to).

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.

There are some exceptions, for example:

- If you are in possession of a “small quantity” (see part 2.9 below) of a drug at a licensed injecting centre. Currently there is only one of these centres in NSW, the Medically Supervised Injecting Centre (MSIC) at Kings Cross.
- If you have a prescription (or you are caring for someone else who has a prescription and are helping them with their medication).

It is now possible to get **medicinal cannabis** on prescription from a doctor with approval from the Therapeutic Goods Administration (TGA) and the NSW Health Department. If you are under 16, your doctor will need to be granted special approval from NSW Health. See <https://www.medicinalcannabis.nsw.gov.au/patients/your-doctor> and <https://www.tga.gov.au/medicinal-cannabis-information-consumers>.

Police have guidelines relating to drug overdoses which encourage them not to charge people who are treated by paramedics after an overdose. See [https://www.police.nsw.gov.au/data/assets/pdf\\_file/0011/533783/drug\\_overdose\\_unclassified.pdf](https://www.police.nsw.gov.au/data/assets/pdf_file/0011/533783/drug_overdose_unclassified.pdf)

### 2.3 Using

**Self-administration** of a prohibited drug is an offence (*Drug Misuse and Trafficking Act* section 12). It is also an offence to administer a prohibited drug to another person (section 13) or to permit another person to administer a prohibited drug to you (section 14).

*Maximum penalty: \$2,200 fine and/or 2 years imprisonment.*

There are exceptions, for example:

- If the drug has been lawfully prescribed or supplied.
- If you are using in a licensed injecting centre.

It is quite unusual for police to charge people with self-administration, even if people admit to using drugs. The police overdose guidelines mentioned above also apply to self-administration charges.

## 2.4 Equipment

It is an offence to possess **equipment for self-administration** of a prohibited drug (*Drug Misuse and Trafficking Act* section 11).

*Maximum penalty: \$2,200 fine and/or 2 years imprisonment.*

This may include equipment like ice pipes and bongs (although people don't usually get charged for possession of bongs, as they can also be used to smoke legal substances like tobacco).

It is *not* an offence to possess a syringe (clean or dirty).

## 2.5 Supply

It is an offence to **supply** a prohibited drug (*Drug Misuse and Trafficking Act* section 25).

**Supply has a very wide meaning.** For example:

- It includes **offering or agreeing to supply, whether or not any drugs change hands**. If you sell aspirin and pass it off as heroin, you may be guilty of supply!
- Supply also includes **giving drugs away without receiving any payment**.
- If you **introduce someone to a dealer**, you may 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 the "**traffickable quantity**" you may be charged with "**deemed supply**" (*Drug Misuse and Trafficking Act* section 29), and it will be up to you to prove that you didn't intend to supply the drug to anyone else.

There is also the offence of **ongoing supply** (*Drug Misuse and Trafficking Act* section 25A), which involves supplying drugs for financial gain on 3 or more separate occasions within one month. It doesn't have to be the same type of drug each time.

*The maximum fine for supply 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, and whether it was supplied to a child under 16.*

## 2.6 Cultivation

**Cultivating** a prohibited plant is an offence (*Drug Misuse and Trafficking Act* section 23).

*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, the method (e.g. hydroponic) and whether it was done in the presence of a child under 16.*

## 2.7 Manufacture

**Manufacturing** a prohibited drug is an offence (*Drug Misuse and Trafficking Act* section 24).

*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, and whether it was done in the presence of a child under 16.*

It is also an offence to possess a **precursor** (a chemical that is a starting material for the manufacture of illicit drugs, e.g. pseudoephedrine) or a **drug manufacture apparatus** with the intention of using it in the manufacture or production of a prohibited drug (*Drug Misuse and Trafficking Act* section 24A).

## 2.8 Drug premises

"**Drug premises**" are any premises (e.g. house, flat, office) which are **used for the unlawful supply or manufacture of prohibited drugs** (other than cannabis). A place may be "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).

*Max penalty: First offence, \$5,500 fine and/or 12 months imprisonment. Second or subsequent offence, \$55,000 fine and/or 5 years imprisonment.*

## 2.9 Quantity and purity of drugs

The quantity of the drugs in your possession can be quite important. This may affect what type of offence you are charged with, which court you have to go to, and whether you have to go to court at all. It will also affect the penalty if you are found guilty.

The **purity** is not relevant in determining what quantity you possess. For example, a kilogram of 60% heroin and 40% bicarbonate of soda is treated as one kg of heroin. However, the purity may be relevant when deciding on your sentence if you are guilty.

The *Drug Misuse and Trafficking Act* classifies drugs by quantity, using the following categories:

**Small quantity:** if you are caught in possession of no more than the small quantity, you may be eligible for a fine or caution instead of going to court.

The "small quantity" for some common types of drugs is:

- Cannabis - 30g leaf or 5 plants
- Ecstasy (MDMA) - 0.25g
- Heroin, cocaine or amphetamine (including ice) - 1g
- LSD - 4 trips or 0.0008g
- Ketamine – 2.5g
- Oxycodone – 2.5g
- Alprazolam (Xanax) 5g

**Traffickable quantity:** if you have more than the traffickable quantity, you could be charged with supply based on the principle of "deemed supply". This means that you will have to prove that you didn't intend to supply the drug.

- Cannabis - 300g leaf (there is no traffickable quantity for plants)
- Ecstasy – 0.75g
- Heroin, cocaine or amphetamine (including ice) - 3g
- LSD - 15 trips or 0.003g
- Ketamine – 7.5g
- Oxycodone – 7.5g
- Alprazolam (Xanax) 15g

**Indictable quantity:** for some offences (mainly involving manufacturing, etc), the indictable quantity means the charge will end up in the District or Supreme Court.

- Cannabis - 1 kg leaf or 50 plants
- Ecstasy – 1.25g

Heroin, cocaine or amphetamine (including ice) - 5g  
 LSD - 25 trips or 0.005g  
 Ketamine – 12.5g  
 Oxycodone – 12.5g  
 Alprazolam (Xanax) 25g

**Commercial quantity:** supply offences will end up in the District or Supreme Court if they involve more than the commercial quantity. Offences involving commercial quantities also have higher maximum penalties.

Cannabis - 25kg leaf or 250 plants (50 plants if grown hydroponically indoors)  
 Ecstasy – 125g  
 Heroin, cocaine or amphetamine (including ice) - 250g  
 LSD – 0.0005kg  
 Ketamine – 1.25kg  
 Oxycodone – 1.25kg  
 Alprazolam (Xanax) 1.25kg

**Large commercial quantity:** offences involving large commercial quantities have even higher penalties.

Cannabis - 100kg leaf or 1000 plants (200 plants if grown hydroponically indoors)  
 Ecstasy – 500g  
 Heroin, cocaine or amphetamine (including ice) – 1kg  
 LSD – 0.002kg  
 Ketamine – 5kg  
 Oxycodone – 5kg  
 Alprazolam (Xanax) 5kg

## 2.10 Importing, cross-border trafficking, etc

As well as state and territory laws that prescribe drug offences, there are Commonwealth laws that create offences in relation to serious drug crime. These are contained in the Commonwealth Criminal Code 1995, which applies all over Australia. They prohibit possession, manufacture/production, trafficking, and import/export of drugs. The main purpose of Commonwealth drug laws is to target drug crime that has an international element.

Penalties for these offences depend on the type of offence and the quantity of the drug/plant involved. For importing, it can be as high as life imprisonment.

Whilst State law does not deal with importing/exporting offences, there is an overlap between the Commonwealth controlled drug offences and state law. The relationship between Commonwealth and State law means that if there is a discrepancy between the two, Commonwealth law will prevail.

## 3 Prescribed restricted substances (prescription drugs)

### 3.1 What is a prescribed restricted substance?

Prescribed restricted substances are prescription drugs which are usually used to treat illness, injury and pain.

They are regulated by the *Poisons and Therapeutic Goods Act 1966* (NSW) and by the Poisons Standard, which is a Commonwealth standard that applies to all of Australia.

A list of prescribed restricted substances is in Appendix D of the *Poisons and Therapeutic Goods Regulation 2008* (NSW): [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol\\_reg/patgr2008398/xx3.html](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_reg/patgr2008398/xx3.html)

Some prescribed restricted substances, such as anabolic steroids, are also prohibited drugs under the *Drug Misuse and Trafficking Act*.

### 3.2 Possession

It is an offence to possess or attempt to possess a prescribed restricted substance without a valid prescription or other lawful authority. It is lawful to possess someone else's medication if they have a valid prescription and you are helping to care for them. There are also offences relating to forged or fraudulently altered prescriptions (*Poisons and Therapeutic Goods Act* section 16).

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

### 3.3 Supply

It is an offence to supply certain restricted substances without the appropriate authority (*Poisons and Therapeutic Goods Act* section 10).

*Max penalty: \$1,650 fine and/or 6 months imprisonment (or 2 years' imprisonment for substances prescribed by the Regulations).*

## 4 Alcohol

It is not illegal for a child under 18 to drink alcohol. However, if you are under 18 it may be an offence to have alcohol in public or to be in licensed premises without adult supervision. There are also restrictions on supplying alcohol to under-18s.

- (a) It is an offence for a **child under 18 to possess or consume alcohol in a public place**, without responsible adult supervision or reasonable excuse (*Summary Offences Act* section 11).

*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* section 118), to **be in a restricted area of licensed premises** (section 115), or to **use false identification to enter or consume alcohol on licensed premises** (section 129).

*Max penalty: \$1,100 fine.*

- (c) It is an offence for a **licensee to allow a person under 18 to be on licensed premises** unless the young person is removed immediately, or is 14 or over and has produced identification that gives the licensee reasonable grounds to believe he or she is 18 or over (*Liquor Act* section 116B).

*Max penalty: \$5,500 fine.*

- (d) It is an offence to **supply or sell alcohol** to (or obtain alcohol on behalf of) a child under 18 (*Liquor Act* section 117). This does not apply to the child's parent or guardian, or someone authorised by a parent or guardian, as long as this is consistent with the responsible supervision of the child.

*Max penalty: \$5,500 fine (or \$11,000 and/or 12 months imprisonment in "circumstances of aggravation". Circumstances of aggravation exist where a court is of the opinion (having regard to factors such as the quantity or nature of the liquor involved, or the age of the person involved) that the offence is so serious as to warrant a penalty in excess of a \$5,500 fine (Liquor Act section 141).*

- (e) It is an offence to **send a person under 18** to licensed premises to obtain alcohol (*Liquor Act* section 118(2)).

*Max penalty: \$3,300 fine.*

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## 5 Tobacco, smoking, vaping

It is not an offence for a young person under 18 to buy, possess or smoke cigarettes, nicotine-free e-cigarettes or other types of smoking products. However:

- (a) It is an offence to **sell tobacco, non-tobacco smoking products** (e.g. herbal cigarettes, shisha), **e-cigarettes** or **e-cigarette accessories to a person under 18** (unless the young person is 14 and over and has produced ID that gives the seller reasonable grounds to believe he or she is 18 or over) (*Public Health (Tobacco) Act 2008 (NSW)* section 22).

*Max penalty: First offence: \$11,000 fine (for an individual), \$55,000 (for a corporation). Second or subsequent offence: \$55,000 fine (individual), \$110,000 fine (corporation).*

- (b) It is an offence for a **person over 18 to purchase tobacco, smoking or vaping products on behalf of a person under 18** (unless the young person is 14 and over and has produced ID that gives the person reasonable grounds to believe he or she is 18 or over) (*Public Health (Tobacco) Act* section 23).

*Max penalty: \$2,200 fine.*

- (c) Police may **confiscate tobacco, non-tobacco smoking products or e-cigarettes** from a person under 18 in a public place (*Public Health (Tobacco) Act* section 26).

- (d) Unless you have a prescription, it is an offence to possess and vape **e-cigarettes that contain nicotine**, as nicotine is listed in Schedule 4 of the Poisons Standard and is considered a prescribed restricted substance (*Poisons and Therapeutic Goods Act* section 16(1)).

There are many other laws about smoking and vaping: for example, smoke-free areas where you can't smoke or vape, restrictions on packaging and advertising.

For more information about these laws, see our fact sheet on *Smoking and vaping*.

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## 6 Inhalants

It is not illegal to possess or use inhalants, such as glue, petrol, "poppers" (amyl nitrite) or "nangs" ("nitrous oxide").

However, nitrous oxide is considered a "psychoactive substance", and it is an offence to supply a psychoactive substance knowing that (or being reckless about whether) it is being acquired primarily for human consumption. *Max penalty: \$2,200 fine and/or 2 years' imprisonment.*

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## 7 Bringing drugs, syringes and other restricted substances into prisons

- (a) It is an offence to bring alcohol or prohibited drugs or restricted substances (such as prescription medication) into a prison (*Crimes (Administration of Sentences) Act* section 253C).

*You don't have to intend to give the substance to a prisoner.* Even if you leave it in a locker (or in your car parked on the prison grounds) while you are visiting, you are committing an offence.

*Max penalty:*

*Alcohol: 6 months imprisonment and/or \$1,100 fine.*

*Poisons listed in Appendix D of Schedule 4 or in Schedule 8 of the Poisons List: 2 years imprisonment and/or \$2,200 fine.*

*Prohibited drugs: 2 years imprisonment and/or \$5,500 fine.*

- (b) It is also an offence to introduce a syringe into a prison or attempt to supply a syringe to an inmate (*Crimes (Administration of Sentences) Act* section 253D).

*Max penalty: 2 years imprisonment.*

- (c) It is an offence to smoke, use tobacco in any form, or use an e-cigarette (with or without nicotine), when in a prison.

*Max penalty: \$110 fine*

- (d) It is an offence to possess tobacco in any form, any tobacco-related accessory, e-cigarettes or e-cigarette accessory within designated areas of a prison. The area will be designated by signs or notices.

*Max penalty: \$550 fine*

## 8 Drugs and driving

It is an offence to drive under the influence of alcohol or drugs, with a “prescribed concentration of alcohol” in your blood, or with certain prohibited drugs present in your saliva, blood or urine.

See our separate fact sheet on *Drugs, Alcohol and Driving*.

## 9 Going to court for drug offences

### 9.1 Which court?

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

**Summary offences:** these are less serious offences which are always dealt with by the Local Court or Children’s Court (depending on the age of the defendant). Examples include possession, self-administration, possession of equipment, introduction of drugs etc to prisons, or a first offence relating to drug premises

**Indictable offences:** these include offences such as supply, manufacture, cultivation, or a second or subsequent offence relating to drug premises. This means they may be dealt with by a higher court such as the District or Supreme Court – although, in practice, most indictable offences are actually dealt with by the Local or Children’s Court.

Supply cases involving a **commercial quantity** are **strictly indictable** and always dealt with by the District or Supreme Court.

**Supply cases involving less than a commercial quantity** can be dealt with in the Local or Children’s Court.

Offences involving the **cultivation or manufacture of cannabis** plant or leaf can also be dealt with in the Local Court as long as it’s less than the commercial quantity.

Offences involving **manufacture** of drugs other than cannabis can be dealt with by the Local Court but only if it’s less than the indictable quantity.

## 9.2 The Drug Court

Drug courts deal with people who are dependent on drugs and whose offending is linked to this (for example, stealing or fraud to support a drug habit).

The Adult Drug Court sits at Parramatta, Sydney and the Hunter area, and in 2023 will start sitting at Dubbo.

For several years there was also a Youth Drug and Alcohol Court in NSW, but it stopped operating in 2012.

The Drug Court is quite difficult to get into. You must be over 18, live in one of the Drug Court's catchment areas, be dependent on illicit drugs, and be pleading guilty to a non-violent offence.

There are exclusions for violent and sexual offences, for strictly indictable offences (e.g. supplying a commercial quantity of drugs), and for people who have a problem with alcohol but not with illegal drugs.

See [http://www.drugcourt.justice.nsw.gov.au/Pages/dc\\_program/dc\\_eligible.aspx](http://www.drugcourt.justice.nsw.gov.au/Pages/dc_program/dc_eligible.aspx).

People on the Drug Court program are 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 the program can expect a more lenient sentence (for example, a community-based order instead of full-time imprisonment).

## 9.3 The MERIT program

**MERIT** (Magistrates Early Referral Into Treatment) is a program for people who are appearing at the Local Court and who have problems with illegal drugs. It is available at most Local Courts around New South Wales and generally deals with less serious offences than the Drug Court.

You don't have to enter a plea to get into MERIT.

Participants take part in a 3-month program and, if they successfully complete it, they are likely to receive a more lenient outcome if they plead guilty or are found guilty.

There is also an **Alcohol MERIT** program available at a few Local Courts.

## 9.4 Penalties

The penalties for drug offences vary widely depending on the charge, the quantity of the drug involved, the circumstances of the offence, and a person's criminal record.

Penalties for supplying, manufacturing, and cultivating drugs are much more serious than for possessing and using drugs. The penalty may also vary depending upon the quantity and type of the drug, and the role of the offender in the supply chain.

See also our fact sheet on *Sentencing*.

# 10 Alternatives to court

## 10.1 Young Offenders Act

The *Young Offenders Act* allows some offences committed by people under 18 to be dealt with by an **informal warning, formal police caution or Youth Justice Conference** instead of going to court.

**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**" (see part 2.9 of this fact sheet for examples of small quantities for some common types of drugs).

There is a slightly different rule for cannabis: a caution can't be given under the Act for more than 15g (which is half the small quantity), unless the police believe there are exceptional circumstances and that it would be in the interests of the young person's rehabilitation.

**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.' For cannabis, the 'small quantity' 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 no more 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*.

Unfortunately, the *Young Offenders Act* **does not apply to supply offences**.

## 10.2 Cannabis cautioning scheme

For adults, there is a cannabis cautioning scheme, which allows police to issue a caution instead of laying a charge.

It applies to use or possession (but not 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 getting a second caution, the offender is required to contact the Alcohol and Drug Information Service (ADIS) for mandatory education on cannabis use.

## 10.3 On-the-spot fines

The police can issue on-the-spot fines (penalty notices) for most alcohol and tobacco-related offences.

From 25 January 2019 onwards, police may issue a person over 18 years of age with "criminal infringement notice" (on-the-spot fine) of \$400 for possession of small amounts of prohibited drugs. The police issue these files quite rarely, mainly at music festivals.

The drug in your possession must be no more than the "small quantity" set out in the *Drug Misuse and Trafficking Act* (see 2.9 above). The rules are slightly different for MDMA (ecstasy): if it's in capsule form, it must be no more than 0.25g, but in any other form, you can still get a criminal infringement notice for possession of up to 0.75g.

You can choose to pay the fine or contest it in court. Taking it to court may be a good idea in some cases, but you run the risk of getting a criminal record, so it's best to get legal advice before you decide.

Doing nothing will not make the fine go away and may have serious consequences. See our fact sheet on *Fines* for more information.

# 11 Convictions and criminal records for drug offences

If you are found guilty by a court (including pleading guilty), the court will usually record a conviction, which means you will get a criminal record. The exceptions are:

- If you are an adult, the court may use section 10 of the *Crimes (Sentencing Procedure) Act* which means a conviction won't be recorded.
- If you are a juvenile, the court can decide whether or not to record a conviction.

- If you are under 16 and dealt with in the Children’s Court, the court has no power to record a conviction.

If you are dealt with under the *Young Offenders Act*, or if you get a cannabis caution or an on-the-spot fine, you will not get a conviction.

A drug conviction may affect your employment or your ability to travel to some countries. However, every case is different and you should get legal advice about your situation.

For more information see our fact sheet on *Convictions and Criminal Records*.

## 12 Police powers with drugs

For more information see our fact sheet on *Police Powers and Your Rights*.

If you think the police have acted illegally (e.g. searched you without any reasonable suspicion), it’s a good idea to get legal advice. If you have been charged with a drug offence, you may be able to get evidence excluded if it has been illegally obtained.

### 12.1 Stop and search powers

The police can stop and search you or your vehicle without a warrant if the police **suspect on reasonable grounds** that you have in your possession (or in your vehicle) a **prohibited drug** (*Law Enforcement (Powers and Responsibilities) Act*, sections 21, 36).

“**Reasonable suspicion**” depends on the circumstances. A guess or a hunch, a criminal history, or the fact that you are near a methadone clinic or needle exchange, is generally not enough on its own. Police usually rely on a combination of factors.

Police may search you **without any reasonable suspicion if you freely consent** to being searched. There is a difference between cooperation and consent.

### 12.2 Sniffer dogs

Under the *Law Enforcement (Powers and Responsibilities) Act* section 147-149, the police may use dogs for “**general drug detection**” in designated public places (including pubs, nightclubs, dance parties, sporting events, railway stations, and most public transport routes). In other public places they need a warrant to use sniffer dogs.

This means the police can take the dogs into any designated area and walk them around to see if they detect any illegal drugs (*Law Enforcement (Powers and Responsibilities) Act* section 146). *They don’t need a reasonable suspicion that any person is carrying illegal drugs.*

Detection is at random and (in theory at least) does not allow the police to command the dog to sniff particular individuals. The police must try to prevent the dog from touching anyone. *The police are not allowed to detain anyone or prevent anyone from leaving the area while the dogs are doing general drug detection.*

If a dog detects a scent on someone, it is trained to sit down next to the person. The police may then use this as a basis for a reasonable suspicion that the person is carrying drugs, which would allow the police to do a search. However, because of the large number of false positives (dogs detecting a scent on people who have no drugs on them), an indication by a sniffer dog is not usually enough on its own.

To form a reasonable suspicion, the police will often rely on other things such as your appearance (e.g. bloodshot eyes) or your answers to any questions they ask (e.g. you admit that you smoke cannabis on a regular basis). *Remember, in most situations you do not have to give police your ID or answer any questions,* and it’s often best not to.

### 12.3 Types of searches

In most situations, police may quickly run their hands over your outer clothing, require you to remove outer clothing (e.g. jacket, shoes, hat, gloves), examine anything in your possession (e.g. your bag), and/or run a metal detector over you (*Law Enforcement (Powers and Responsibilities) Act* section 30).

If a police officer suspects on reasonable grounds that a prohibited drug is **concealed in your mouth or hair**, they may ask you to open your mouth or to shake or move your hair. This does not authorise them to forcibly open your mouth.

**Strip searches** must not be performed except when the police officer suspects that it is *necessary for the purpose of the search* and (unless you are at a police station or other place of detention) *that the seriousness and urgency of the circumstances* require it (*Law Enforcement (Powers and Responsibilities) Act* section 31). When conducting a strip search, **police must not touch the person** and must ensure that the person's privacy is respected.

Apart from asking you to open your mouth, **police are not allowed to search your body cavities**.

### 12.4 Searching premises

Generally, the police may only search private property with a **search warrant** or with the **consent** of the occupier (usually the owner or tenant).

Most search warrants are issued under the *Law Enforcement (Powers and Responsibilities) Act* section 48. 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* section 140. The police do not have to suspect that there are actually any drugs on the premises.

### 12.5 Move-on directions to stop drugs being obtained or supplied

The police may give you a direction if they believe on reasonable grounds that you are in a public place for the purpose of supplying or obtaining any prohibited drug (*Law Enforcement (Powers and Responsibilities) Act*, section 197).

The direction must be reasonable in the circumstances to stop the obtaining or supply of the drug.

**Failure to comply with a reasonable direction** without a reasonable excuse is an offence with a maximum penalty of \$220 (*Law Enforcement (Powers and Responsibilities) Act*, section 199).

### 12.6 Move-on directions to people who are intoxicated and disorderly

The police may give you a direction if:

- you are in a **public place**, and
- you are **intoxicated**, (i.e. your speech, balance, co-ordination or behaviour is noticeably affected, and it is reasonable in the circumstances to believe that this is the result of the consumption of alcohol or any drug), and
- police believe on reasonable grounds that you are likely to cause **injury to any other person(s)**, or **damage to property**, or **a risk to public safety**, or your behaviour is **disorderly** (which is similar to being offensive) (*Law Enforcement (Powers and Responsibilities) Act* section 198).

The direction must be **reasonable in the circumstances** for the purpose of preventing injury or damage, reducing or eliminating the risk you may cause, or preventing you from continuing with disorderly behaviour in a public place.

The police can direct you to **leave a public place and not return for up to 6 hours** (section 198 (2) and (3)).

**Failure to comply with a reasonable direction** without a reasonable excuse is an offence with a maximum penalty of \$220 (*Law Enforcement (Powers and Responsibilities) Act*, section 199).

Even if you obey the direction, **it is an offence for you to be found in any public place while still intoxicated and disorderly, for up to 6 hours** after you were directed to move on. It is not an offence if you have a reasonable excuse (e.g. you are still on your way home). The maximum penalty is \$1,650 (*Summary Offences Act* section 9).

*You can't be charged with both of these offences at the same time.*

## 12.7 Police powers to detain intoxicated persons

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** (e.g. friend, relative, welfare worker, refuge) (section 206). If necessary, they may **detain the intoxicated person in a police station** while finding a responsible person. If no-one can be found, police may detain the person until they cease to be intoxicated. The person must be released as soon as they cease to be intoxicated (section 207).

**Reasonable restraint** may be used to ensure that the intoxicated person does not injure anyone (including himself or herself) or damage property. Police may search the intoxicated person when they are detained and may take possession of their belongings, but the possessions must be returned when the person is released (section 208).

Intoxicated people who are detained under the *Law Enforcement (Powers and Responsibilities) Act* **are not charged with an offence** and their details are not entered in the COPS database, nor are they fingerprinted. They should be **kept separate from people detained for criminal offences**, and children must be kept separate from adults. They must be provided with necessary food and bedding.

### Updated February 2023

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*The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.*

*This document was last updated in February 2023 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time. This provides a summary only of the subject matter covered, without the assumption of a duty of care. It should not be relied on as a substitute for legal or other professional advice.*

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