

The Shopfront

YOUTH LEGAL CENTRE

Drug offences

1 Introduction

Most drug offences in NSW are set out in the *Drug Misuse and Trafficking Act*.

There are also offences in other Acts which relate to prescription drugs and legal drugs like alcohol and tobacco.

Please note that the penalties listed here are all *maximum* penalties, which are not often imposed. The court may also impose other penalties such as a good behaviour bond, community correction order, or intensive correction order.

Some minor drug offences (mainly possession and self-administration, and alcohol and tobacco-related offences) can be dealt with without going to court. See part 6 of this document for more details.

2 Prohibited drugs

2.1 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 it is there.

For a drug to be in your “custody”, it usually has to be in your immediate physical possession (eg. in your pocket or bag). However, a drug can be under your “control” even if it is not with you (eg. 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.

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

2.2 Using

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 charged if the police see you or if you admit to using. 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.

2.3 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 (clean or dirty).

Possessing a bong will sometimes (but not always) get you into trouble, as they can be used to smoke legal as well as illegal substances.

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

2.4 Supply

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

Supply has a very broad definition. 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 s29*), 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 s25A*), 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.

2.5 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, the method (eg hydroponic) and whether it was done in the presence of a child under 16.

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

2.7 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 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:

- enter or be on drug premises (unless you can prove you have a lawful excuse to be there) (s36X),

- (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) (s36Z), or
- (c) be an owner or tenant and knowingly allow your premises to be used as drug premises (s36Y).

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

2.8 Introducing drugs or syringes into prisons

- (a) Bringing alcohol, restricted substances or prohibited drugs into a prison (*Crimes (Administration of Sentences) Act s253C*).

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 a prison or attempting to supply a syringe to an inmate (*Crimes (Administration of Sentences) Act s253D*).

Max penalty: 2 years imprisonment.

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

2.9 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.

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 - 0.25g

Heroin, cocaine or amphetamine (including ice) - 1g

LSD - 4 trips or 0.0008g

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

Indictable quantity: for some offences (mainly involving manufacturing, etc), having more than the indictable quantity means you will end up in the District or Supreme Court instead of the Local Court.

Cannabis - 1 kg leaf or 50 plants

Ecstasy - 1.25g

Heroin, cocaine or amphetamine (including ice) - 5g

LSD - 25 trips or 0.005g

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

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

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

3 Prescription drugs, tobacco & alcohol

3.1 Prescribed restricted substances (prescription drugs)

Possession, attempted possession or supply of a **prescribed restricted substance** (ie. a prescription drug) without a prescription; forging or fraudulently altering a prescription; fraudulently obtaining a prescription; or knowingly possessing a prescription of that nature (*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.

3.2 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* s118), to **be in a restricted area of licensed premises** (s115), or to **use false identification to enter or consume alcohol on licensed premises** (s129).

Max penalty: \$1,100 fine.

- (c) **Supplying or selling alcohol** to (or obtaining alcohol on behalf of) a child under 18 (*Liquor Act* s117). Note: this does not apply to a parent or guardian 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 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 a \$5,500 fine (s141).

- (d) **Sending a person under 18** to go to licensed premises to obtain alcohol (*Liquor Act* s115(d)).

Max penalty: \$2,200 fine.

- (e) 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 ID that gives the licensee reasonable grounds to believe he or she is 18 or over (*Liquor Act s116B*)

Max penalty: \$5,500 fine.

3.3 Tobacco

- (a) It is an offence to **sell tobacco** or a non-tobacco smoking product (eg herbal cigarettes) **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 s22*).

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 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 person reasonable grounds to believe he or she is 18 or over) (*Public Health (Tobacco) Act s58A*).

Max penalty: \$2,200 fine.

- (c) Even though **it is not an offence for a child or young person to buy, possess or smoke cigarettes**, police may **confiscate** tobacco or non-tobacco smoking product from a person under 18 in a public place (*Public Health (Tobacco) Act s58*).

4 Police powers with drugs

4.1 Stop and search powers

The police can 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, s21, s36*).

“**Reasonable suspicion**” depends on the circumstances. A guess or a hunch, or the fact that you are near a methadone clinic or needle exchange, is generally not enough. However, if you have a record of drug offences, and are hanging around an area known for drug dealing without any other reason for being there, the police may have reasonable grounds to suspect that you have illegal drugs on you.

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. Failure to comply with such a request is an offence (maximum penalty \$550 fine) (*Law Enforcement (Powers and Responsibilities) Act s21A*).

4.2 Sniffer dogs

Under the *Law Enforcement (Powers and Responsibilities) Act s147-149*, 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 s146). *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 to form 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 might not be enough on its own.

To form a reasonable suspicion, the police will often rely on other things such as your appearance (eg. bloodshot eyes) or your answers to any questions they ask (eg. 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 usually best not to.

4.3 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**.

Most search warrants are issued under the *Law Enforcement (Powers and Responsibilities) Act* s48. Police must have reasonable grounds to suspect that there is something on the property connected with a criminal offence (eg 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.

5 Going to court for drug offences

5.1 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. Examples include **possession, self-administration, possession of equipment, introduction of drugs etc to prisons**, or a first offence relating to **drug premises**, are **summary offences**, (depending on the age of the defendant).

Indictable offences: offences such as **supply, manufacture, cultivation**, or a second or subsequent offence relating to **drug premises**, are **indictable offences**. 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**, or **ongoing supply**, 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.

5.2 The Drug Court

Drug courts deal with people who are dependent on drugs and whose offending is linked to this.

The **Adult Drug Court** sits at Parramatta, Sydney and in the Hunter area.

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

The Drug Court is quite difficult to get into. It will not accept people who:

- live outside the catchment area.
- have been charged with an offence involving violent conduct or a sexual offence.
- who have been charged with a strictly indictable supply of prohibited drugs (eg. a commercial quantity of drugs).
- have a problem with alcohol but not with illegal drugs.

See 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).

5.3 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.

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 outcome.

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

6 Alternatives to court

6.1 Young Offenders Act

The *Young Offenders Act* allows some 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**” (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*.

6.2 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.

6.3 On-the-spot fines

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

As of 25 January 2019, police may issue a person over 18 years of age with an on-the-spot fine of \$400 for possession of small amounts of prohibited drugs. This is known as a "criminal infringement notice".

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 to 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 fact sheet on *Fines* for more information.

7 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 mean 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*, with 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 countries such as the USA. 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*.

8 Being intoxicated in public

8.1 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** (eg friend, relative, welfare worker, refuge) (s206). 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 (s207).

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 (s208).

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 juveniles must be kept separate from adults. They must be provided with necessary food and bedding.

8.2 Police powers to give directions to people who are intoxicated and disorderly

Part 14 of the *Law Enforcement (Powers and Responsibilities) Act* allows police to give you a direction if:

- you are in a **public place**, and
- you are **intoxicated**, 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 if you are **disorderly** (s198).

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** (s198 (2) and (3)).

Failure to comply with a reasonable direction is an offence with a maximum penalty of \$220 (s199).

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 (eg you are still on your way home). The maximum penalty is \$660 (*Summary Offences Act* s9).

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

You are not guilty of an offence unless the police have identified themselves, told you the reason for the direction and warned you that failure to comply, or being intoxicated and disorderly in a public place within 6 hours, is an offence (these requirements are in *Law Enforcement (Powers and Responsibilities) Act* Part 15).

9 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*.

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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 2019 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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