The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

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21

Drug Offences

Steve Bolt – Solicitor

Legislation

[21.10] In NSW, drug use is regulated by both state and federal laws.

[21.20] The Drug Misuse and Trafficking Act

Most drug charges are laid under the *Drug Misuse and Trafficking Act 1985* (NSW), which creates offences for:

- drug use;
- drug possession;
- supply and trafficking (with the seriousness of the offence depending on the quantities);
- cultivation;
- manufacture;
- aiding and abetting;
- possession of drug-use implements.

The drugs "prohibited" by the Act are listed in a schedule. They include the common street drugs – cannabis (marijuana), methamphetamine (ice), heroin, ecstasy, amphetamines, LSD, cocaine, methadone – and many others.

[21.30] The Commonwealth Criminal Code

The Commonwealth *Criminal Code* is a federal law that aims, among other things, to prevent the import and export of "border controlled" drugs. The range of border controlled drugs is similar to that in the *Drug Misuse and Trafficking Act*.

Criminal Code offences include dealing with imported drugs after they have been brought into the country.

Offences

[21.40] Possession

Possession of a prohibited drug is an offence under s 10 of the *Drug Misuse and Trafficking Act*.

To prove possession, the prosecution must show beyond reasonable doubt that:

- illegal drugs were in a person's "custody or control"; and
- the person knew that this was the case.

What is custody or control?

Custody means immediate physical possession, such as a person having something in their pockets.

Control refers to the right to do something with the drug – for example, to keep, consume or share it.

Proving custody and control

The police must prove that the person actually had control over drugs found, for example, in their car or house. The fact that a person owns or rents a house, or owns a car, does not necessarily mean that they own things in it. If a person knows that there are drugs in their house, but someone else has control of them (ie, the person does not own the drugs or have any right to use them), they are not guilty of possession.

Momentary custody or control

A person can be found guilty even if their custody or control was only momentary; for example, by taking a joint passed to them.

Knowledge but no control

A guest at a party left marijuana in a bathroom cupboard. During a raid some time later, a resident of the house told police that he knew the drugs were there and that he had intended to dump them. He was found not guilty of possession because he had laid no claim to the drugs and had exercised no control over them. Knowledge that the drugs were there was not enough to constitute an offence (*R v Solway* (1984) 11 A Crim R 449).

Proving knowledge

The prosecution must prove that the person knew they had something in their physical custody or under their control that was, or was likely to be, a prohibited drug.

The legal test for the prosecution is not what a reasonable person might or should think in

the circumstances. The actual knowledge of the accused person must be proved. However knowledge can often be inferred from the circumstances in which the drugs were found.

If someone is apprehended with drugs on them, a court would probably reasonably infer knowledge and control of the drugs. It would be difficult for a person to escape the inference that they knew what was in their bag or underpants or pocket. Similarly, where drugs are stored in a private part of a house (say, a person's bedroom), it is open to be inferred that the person had possession of the drugs.

Shared houses

When drugs are found in a place that is accessible to a number of people (such as the living room of a shared house), it may not be inferred that any one person has possession of them. The drugs could belong to anyone with access to the room, so that it could be difficult for the police to prove the guilt of any particular person beyond reasonable doubt.

If none of the residents makes an admission to the police that the drugs are theirs (and none make a statement that the drugs are someone else's), and in the absence any other evidence, it is likely that no-one will be convicted.

The prosecution must rule out all other reasonable explanations. If there is the possibility of several people having access to the drugs, there is room for reasonable doubt about whether the drugs are possessed by the accused person.

If a number of people are charged with shared possession of drugs, the prosecution must prove in each case that the person charged had possession.

Whose drugs?

A man lived with his girlfriend, his mother, his brother and another couple in a three-bedroom house. The police found cannabis inside the lounge in the living area, a room to which all the occupants had regular access. The man's conviction was overturned on appeal. The Court of Criminal Appeal said that it was necessary to prove that he had the cannabis in his exclusive physical control, and that this was difficult because of the large number of people having equally free access to the room in which the cannabis was found (*R v Fillipetti* (1984) 13 A Crim R 335).

[21.50] Use

Using a prohibited drug, also known as self-administration, is an offence under s 12 of the *Drug Misuse and Trafficking Act*. The police must prove that the substance consumed was a prohibited drug. Obviously they cannot analyse the substance if it has been completely consumed, and blood tests can only be taken by a doctor after arrest. So for most convictions, they must rely on admissions made by the accused.

It is also an offence to administer drugs to someone else, for example by injecting them or spiking their drink (s 13), or to allow someone to administer drugs to you (s 14).

Prescription drugs

It is legal to possess and use some drugs, like methadone and benzodiazepines (such as Serapax and Valium), if they have been prescribed by a doctor. It is an offence to possess or use these drugs without a prescription.

Medicinal cannabis

There have been recent changes to both Federal and State laws which make it possible for some people with serious health conditions to obtain cannabis for medicinal use lawfully on prescription. The process requires an application from the treating doctor and usually a specialist establishing, to both NSW and Federal authorities, that cannabis is a viable treatment for the condition and that there is no other alternative available. The process of applying for a prescription can take many months and the cannabis lawfully provided on prescription is expensive. Only a small number of legal prescriptions have been issued in the first few years since the law change.

It remains illegal for a person who does not have a legal prescription to use cannabis medicinally.

It is not a lawful defence to a charge of possession of cannabis (or self-administration or cultivation of cannabis) that the person used the cannabis for a legitimate medicinal reason.

However, such motivation can be a relevant issue to be taken into account in sentencing. Many magistrates will apply leniency in cases involving people with genuine significant medical conditions. In appropriate cases, charges involving medicinal cannabis could be dismissed without conviction.

Methadone

It is an offence to inject methadone. Methadone is legally prescribed subject to conditions on quantity and the "purpose" of the prescription,

which must be according to "recognised therapeutic standards" (*Poisons and Therapeutic Goods Regulation 2008* (NSW), cl 79).

The "purpose" specified in methadone prescriptions is oral dose. Administration by any other method means the methadone is not lawfully prescribed under s 12(2) of the *Drug Misuse and Trafficking Act* and is illegal.

Injecting rooms

The NSW government has permitted the establishment of one licensed medically supervised injecting centre in Kings Cross, Sydney. The centre's licence is issued under s 36E of the *Act*.

It is lawful for a person to use or possess a small quantity of a prohibited drug while in the injecting centre (s 36N). Police guidelines also encourage the exercise of discretion to not arrest or charge a person who is on their way to or from, or in the vicinity of, the injecting centre, with possession offences. Supply offences are policed.

It is an offence for anyone except the operators of the licensed injecting centre to "advertise or hold out in any way" that their premises are available for the administration of a prohibited drug (s 18A).

Drugs and driving

There are two separate offences involving drug use and driving: driving with the presence of a drug in saliva and driving under the influence of alcohol or a drug.

Drive with presence of drug

By far, the more common is the charge of driving with one of four illicit drugs present in the driver's saliva (*Road Transport Act 2013* (NSW), s 111). The four drugs are THC (the psychoactive ingredient of cannabis), methamphetamine, MDMA (ecstasy) and cocaine.

Police have the power to randomly stop drivers and take saliva swabs to test for the presence of those drugs. If the swab gives a positive result, the driver is arrested and taken to a specially equipped bus or a police station for a saliva sample to be taken. The sample is tested in a machine and if positive, the driver is prohibited from driving for 24 hours. If the test is negative, the driver is free to go. But either way, the saliva sample is sent to the laboratory for analysis.

If the laboratory detects the presence of one of the four prescribed drugs, and it is the driver's first serious traffic offence, the driver will receive an "on the spot" fine and be disqualified from driving for three months. The driver can make a court election to have the case dealt with by a magistrate, who might decide to reduce the fine or impose no conviction (and so avoid the licence disqualification).

If it is a repeat offence, when the result comes back positive from the laboratory, the driver will be sent a court attendance notice.

It is important to note that the offence is to drive with any amount of THC, methamphetamine, MDMA or cocaine present in saliva. It is **not** part of this offence that the police have to prove any degree of impairment of the driver's capacity to drive. The testing devices are able to detect very small quantities of drugs, so that with THC in particular, a driver might test positive several days after consuming the cannabis when the effect has fully worn off. Depending on the driver's record, the court could be prepared in those cases to dismiss the charge without recording a conviction, or impose a bond without conviction, and therefore not be required to impose the mandatory minimum three month licence disqualification.

As with the similar law in relation to random alcohol testing, it is an offence to:

- wilfully refuse to provide a swab or saliva sample; and
- consume a drug after driving and before undergoing a test.

The maximum penalty for refusing to provide a swab or a saliva sample is fine of $3,300 for a first offence and $5,500 and 18 months imprisonment for a second offence, and a minimum six months licence disqualification (ie, a higher maximum penalty and longer disqualification than the offence of driving with the presence of the relevant drug).

Defence of honest and reasonable mistake

The defence of honest and reasonable mistake of fact is available and could be applied in appropriate cases to dismiss the charge. The driver would need to establish that they had an honestly held belief that they did not have the prescribed drug present in their saliva and that there was a reasonable basis for having that belief. Once the defence is raised, the onus is on the prosecution to prove (beyond reasonable doubt) that the driver did not have such a belief or that it was not reasonably held.

In a 2016 case (*Police v Carrall* (Lismore Local Court, 1 February 2016)), a Lismore magistrate dismissed a case against a driver who had tested positive to THC and who gave evidence that he had not

consumed cannabis for nine days before the driving. He also gave evidence that he had been told by a police officer administering the saliva swab test on a previous occasion, that the test would detect THC up to a week after consumption. The court was satisfied on the evidence on those issues and dismissed the charge on the basis that the driver had an honest and reasonable belief in a relevant fact: that he did not have THC in his system.

The NSW Centre for Road Safety website says the period of time within which the police tests can detect drugs "depends on the amount taken, frequency of use of the drug, and other factors that vary between individuals". The website goes on to say that the saliva test would "typically" detect THC for "up to 12 hours after use" and methamphetamine and MDMA for "one or two days" after use.

Penalties

The maximum penalty for driving with THC, methamphetamine, MDMA or cocaine present in saliva is a $2,200 fine for a first offence, and $3,300 for a second or subsequent offence.

On conviction, there is a *minimum* licence disqualification period of three months. The "automatic" period of disqualification is six months. If it is the second serious driving offence in the previous five years, the automatic disqualification period is 12 months, with a six month minimum period.

For second and subsequent offenders, the matter goes to court for determination including penalty. That is, the driver is issued a Court Attendance Notice.

Driving under the influence

It is an offence under s 112 of the *Road Transport Act 2013* to drive under the influence of a drug or alcohol. For this offence, the police must prove at least some degree of impairment. Establishing this offence requires proof beyond reasonable doubt that the drug or alcohol had at least some impact on the person's driving. In most cases, that evidence will be the observation of the police officers about the manner of driving and the appearance and behaviour of the driver.

Since the introduction of breathalysers and random breath testing for alcohol, drink driving offences are now commonly charged as "prescribed concentration of alcohol" offences. This in effect bypasses any need to prove any influence on the driving – the presence of the alcohol in a person's system is sufficient evidence for the offence to be proved – so charges of driving under the influence of alcohol are now rare.

Charges of driving under the influence of drugs are less rare. And this offence encompasses impairment by any drug, whether lawfully used or not.

The maximum penalty for driving under the influence is a $3,300 fine and 18 months imprisonment for a first offence (with a six month licence disqualification) and $5,500 fine and two years imprisonment for a second or subsequent offence (and 12 months disqualification).

[21.60] Drug equipment

It is an offence to possess equipment with the intention of using it to consume drugs (*Drug Misuse and Trafficking Act*, s 11). The use must be future use. Evidence that the equipment has been used in the past is not relevant or sufficient to prove the charge (*Erickson v Pittard* [1976] 2 NSWLR 528).

The prosecution must show that the equipment was possessed by the accused. The law is the same as for possession of drugs – there must be knowledge and custody or control.

Injecting equipment

It is *not* an offence to possess a needle or syringe, whether it has been used or not (s 11(1A)).

It is (technically) an offence to possess other injecting equipment, such as tourniquets, spoons and swabs. In practice, possession of this equipment is never prosecuted.

Sale of bongs and pipes

It is an offence to sell, supply or display for sale a bong or ice pipe, or the component parts of a bong or pipe, whether or not the bong or pipe was intended to be used to administer a prohibited drug (s 11A).

Synthetic drugs

"Synthetic" drugs are, or are at least marketed as, chemically different but with similar effects to better known illicit drugs.

A number of synthetic drugs are listed, by their market names, on Sch 9 of the *Poisons List*.

It is an offence under s 25B of the *Drug Misuse and Trafficking Act* to possess, manufacture, produce or supply a substance listed on Sch 9 of the *Poisons List*. This list is published on the NSW Department of Health website (www.health.nsw.gov.au/pharmaceutical/Documents/poisons-list-alpha.pdf).

The maximum penalties for offences involving synthetics are generally less than for comparable offences involving prohibited drugs. There are no categories of offence based on quantity, so the maximum penalty is the same whether the offence involves a substantial amount or a smaller amount.

[21.70] Supply

Supply is very broadly defined (s 3) to include not only selling or giving away drugs but also simply agreeing to supply them, or having drugs in possession for the purpose of supply.

There is also *deemed supply* – possessing certain quantities of drugs which are deemed to be for the purpose of supply (see [21.80]).

A person can be charged with supply if they tell police they intended to sell even a small quantity of drugs found in their possession, or even that they intended to share drugs in their possession with a friend.

They are also guilty of supply if they simply offer to supply a drug, even if they have no hope, or no intention, of fulfilling the offer.

What if it isn't really a drug?

If a person offers a substance to someone and says it is a drug to persuade that person to buy or take it, they are guilty of supplying the drug whether the substance is actually the drug it is represented to be or not (s 40). A person who offers to supply someone with methamphetamine when all they have is icing sugar is considered guilty of supplying methamphetamine.

This is the case whether they have made a genuine mistake or are deliberately attempting to cheat the buyer.

For possession and use offences, the court must be satisfied that the substance is in fact a prohibited drug.

[21.80] Deemed supply

Anybody found by a court to be in possession of a "traffickable quantity" of a drug is presumed to be a supplier, unless they can prove the possession was for reasons other than supply – for example, that the drug was intended for personal use, or for disposal as waste (s 29).

The *traffickable quantity* varies from one drug to another, and in many cases is not very large. Some traffickable quantities are:

- cannabis (leaf or heads) – 300 grams;
- heroin – three grams;
- methamphetamine – three grams;
- ecstasy – three grams or 15 tablets;
- LSD – 0.003 grams or 15 tablets.

Purity does not matter for this purpose – only weight. Under the Act, one gram of a powder that is 10% heroin and 90% glucose is treated as one gram of pure heroin (s 4).

Possession but not supply

A woman was found with "deemed supply" quantities of cannabis and cocaine in her bedroom. She told police that her sister had given them to her to look after, and that if the sister had not picked them up the next day she would have disposed of them. She was found guilty of possession, but not supply – because the court accepted that she was not in possession of the drugs for the purposes of supply (*R v Carey* (1990) 20 NSWLR 292).

[21.90] Ongoing dealing

Section 25A of the *Drug Misuse and Trafficking Act* creates a special offence of supplying drugs on an ongoing basis. The offence involves the supply of a prohibited drug (except cannabis) on three separate occasions within a 30-day period. The acts of supply must be for some financial or other material reward. They do not all have to involve the same type of drug.

A charge of ongoing dealing could be laid where an undercover police officer (see [21.150]) buys drugs from the same street dealer on three different days. The police are not obliged to arrest the dealer immediately after the first sale.

Penalty

The maximum penalty for ongoing dealing is a $385,000 fine and 20 years' jail, regardless of the weight of the drug supplied or the value of the transactions. This is equivalent to the maximum penalty for the supply of a commercial quantity of drugs (250 grams of heroin or amphetamine, or 500 grams of ecstasy).

Which court?

This offence is classed as strictly indictable, which means it must be finalised in the District Court rather than the Local Court. A person convicted of an offence under this section (and other indictable offences) is not eligible to be dealt with by a drug court (see [21.250]).

[21.100] Large-scale supply

Higher penalties apply for charges involving the supply of larger amounts of drugs.

Trafficking offence categories

The Act divides trafficking offences into:

- indictable quantities;
- commercial quantities;
- large commercial quantities.

As with deemed supply, proof of possession of the relevant quantity is sufficient to establish that a person is guilty of that particular trafficking offence, unless the person can prove that the possession was for a reason other than supply. This is obviously more difficult the larger the quantity.

The following table shows the scheduled quantities.

	Indictable	*Commercial*	*Large commercial*
Cannabis leaf/heads	1 kg	25 kg	100 kg
Heroin	5 g	250 g	1 kg
Amphetamine	5 g	250 g	1 kg
Ecstasy	5 g/ 25 tabs	0.5 kg	2 kg
LSD	0.005 g/25 tabs	0.5 g	2 g

Penalties

The maximum penalty for dealing with an indictable quantity of a drug is a $220,000 fine and 15 years' imprisonment (10 years for cannabis).

For a quantity of drugs in the commercial range, the maximum penalty is a $385,000 fine and 20 years' jail (15 years for cannabis).

For a large commercial quantity, fines of $550,000 and life imprisonment (20 years for cannabis) can be imposed.

[21.110] Offences involving prohibited plants

Under s 23 of the *Drug Misuse and Trafficking Act*, it is an offence to:

- cultivate;
- knowingly take part in the cultivation of;
- possess;
- supply.

a prohibited plant (eg, cannabis).

Cultivation

Cultivation is defined to include sowing seed, planting, tending, nurturing or harvesting (s 3).

Watering a plant, shading it from the sun, picking the heads off a friend's plant, even watering ungerminated seeds, all come within the definition.

Possession

Possession of prohibited plants is also an offence under s 23, carrying the same maximum penalty as cultivation. A possession of plants charge would be laid where there was no evidence of any act of cultivation by the person, but evidence of their possession of the plants.

Proof of knowledge and custody or control of the plants is required for conviction (see [21.40]).

Quantities

The penalty categories for cultivating cannabis depend on the number of plants, not their gender or size. Cultivating 100 seedlings that can fit into a baking tray is charged in the same way as cultivating 100 mature female plants. Having 250 seedlings results in a more serious charge than having five big plants, even though the weight of the big plants may be many times greater.

Higher penalties apply to offences involving the cultivation, supply and possession of a "commercial quantity" of prohibited plants.

Hydroponic cultivation

Section 23(1A) prohibits the "cultivation by enhanced indoor means" of five or more plants for a commercial purpose. If the number of plants

is between five and 49, the prosecution must also prove the cultivation was for a commercial purpose. Under s 23(6), cultivating plants for a commercial purpose means cultivating them with the intention of selling them, or in the belief that someone else so intends. For quantities of 50 or more plants, proof of that element is not required.

Offences under this section are strictly indictable, so they must be finalised within the District Court.

"Cultivation by enhanced indoor means"

Section 3 defines "cultivation by enhanced indoor means" as cultivation:

1. that occurs inside a building or structure; and
2. that involves any one or more of the following:
   (a) the nurture of the plant in nutrient-enriched water (with or without mechanical support);
   (b) the application of an artificial source of light or heat;
   (c) suspending the plant's roots and spraying them with nutrient solution.

Offence categories

There are two entries for cannabis as "prohibited plants" in the Schedule ("cannabis cultivated by enhanced indoor means" and "cannabis cultivated by any other means"). The relevant offence categories in the Schedule are as follows:

	Small	*Indictable*	*Commercial*	*Large commercial*
Indoor	5 plants	50 plants	50 plants	200 plants
Outdoor	5 plants	50 plants	250 plants	1,000 plants

Penalties

Less than a "small quantity"

Cultivation of less than a "small quantity" of hydroponic plants (ie, less than five plants) is treated in the same way as cultivation of outdoor cannabis plants. The maximum penalty is $5,500 and two years' imprisonment if the offence is dealt with summarily (s 30(3)). It is $220,000 or 10 years if the offence is dealt with on indictment (s 32(1)(h)).

Small quantities

The maximum penalty for the cultivation of five to 49 hydroponic plants is $385,000 and 15 years' imprisonment (s 33(2)(b)).

Commercial quantities

For cultivation of 50 or more hydroponic plants, the maximum penalty is also $385,000 and 15 years' imprisonment (s 33(2)(b)).

Large commercial quantities

For cultivation of 200 or more hydroponic plants, a "large commercial quantity", the maximum penalty is $550,000 and 20 years' imprisonment (s 33(3)(b)).

Exposing a child to indoor cultivation

Section 23A(1) makes it an offence to:

- cultivate "a plant" (note the singular) by enhanced indoor means; and
- "expose a child" to the cultivation process or to substances stored for use in cultivation.

The maximum penalty for this offence where it involves one to four plants is a fine of $11,000 and two years' imprisonment if it is dealt with summarily, or a $264,000 fine and 12 years' imprisonment if it is heard on indictment.

The maximum penalty where the offence involves five to 199 plants is a $462,000 fine and 18 years' imprisonment.

The maximum penalty where there are 200 or more plants is a $660,000 fine and 24 years' imprisonment.

These offences are strictly indictable.

It is a defence if the accused can prove that the exposure did not endanger the health and safety of the child.

A child is a person under 16 for the purposes of these provisions.

Defences to cultivation

It is a defence to a charge of cultivation of a prohibited plant if the accused can establish that they did not know the plant was a prohibited plant. The accused must inform the court if they propose to give such evidence (s 23(4)(a)(i)). The onus of proof is on the accused (s 40A(2)).

The prosecution may rebut the accused's evidence by bringing, with leave of the court, evidence of any previous convictions (s 23(5)).

[21.120] Manufacture

Under s 24, it is an offence to manufacture, or to take part in the manufacture of, a prohibited drug.

Penalties

The maximum penalty depends on the quantity involved, with the same penalties applying as for supply offences involving the same amounts.

Indictable quantities

The maximum penalty for manufacturing an indictable quantity of a drug is a $220,000 fine and 15 years' imprisonment.

Commercial quantities

For manufacturing a quantity of drugs in the commercial range, the maximum penalty is a $385,000 fine and 20 years' gaol.

Large commercial quantities

For manufacture of a large commercial quantity, the maximum penalty is a fine of $550,000 and life imprisonment.

Possession of precursors

It is an offence under s 24A to possess a "precursor" intended to be used in the manufacture of a prohibited drug. Substances defined as precursors are listed in Schs 1 and 2 of the *Drug Misuse and Trafficking Regulation 2011* (NSW).

Legitimate uses

The Regulation also provides that records must be kept of any storage or supply of precursors for legitimate uses, including an *end user certificate* that includes the name and address, and proof of identity, of the end user.

Penalty

The maximum penalty for this offence is a $220,000 fine and/or 10 years' imprisonment.

[21.130] "Knowingly taking part in" cultivation, manufacture or supply

It is an offence to "knowingly take part in" the supply, cultivation, or manufacture of a prohibited drug or plant (*Drug Misuse and Trafficking Act*, ss 23, 24, 25).

"Taking part"

A person "takes part in" manufacture, cultivation or supply if they:

- take, or participate in, any step in the process of manufacture, cultivation or supply; or
- cause such a step to be taken; or
- provide or arrange finance for such a step; or
- provide the premises in which such a step is taken; or
- "suffer" or "permit" such a step to be taken in premises owned, leased, occupied or managed by them (s 6).

A person may be taking part in supply, for example, if they arrange or provide finance, or provide premises, or allow their premises to be used for selling, distributing or growing drugs. They may also be doing it if they make a phone call to arrange a meeting, or allow their house to be used for a meeting, where supplying drugs is discussed.

Knowing

The participation must be done "knowingly". Proof of suspicion that somebody else might be involved in drug offences is not proof of knowledge, but knowledge may be inferred if someone shuts their eyes to suspicious circumstances (*R v Thomas* (1976) 63 Cr App R 65).

Similarly, the word "permit" means that the owner or controller of premises knew, or had grounds for reasonable suspicion, that the premises would be used by someone for the unlawful purpose, and was unwilling to take reasonable measures to prevent it (*Sweet v Parsley* [1970] AC 132 at 165).

[21.140] Drug premises

Drug premises are premises used for the supply or manufacture of prohibited drugs or the commercial indoor cultivation of cannabis.

Offences

It is an offence for a person:

- to be found on or entering or leaving drug premises;
- to allow property owned or occupied by them to be used as drug premises;
- to organise or conduct drug premises;
- to assist in the conduct of drug premises (eg, as a lookout or door attendant).

Any place where there are five or more indoor cannabis plants being grown for profit is capable of being a drug premises, exposing occupants and visitors to prosecution for offences such as entering or being on drug premises.

Proving the case

A court must be satisfied beyond reasonable doubt that premises are drug premises before finding a person guilty of these offences.

The prosecution does not have to prove that drugs were found on the premises or in the possession of any person. The court can have regard to matters such as:

- evidence of any obstruction of or resistance to a police search;
- the physical security of doors and entrances;
- the type of lighting employed;
- electricity consumption, exhaust fans and fertilisers;
- any documents, firearms or large sums of money found;
- the presence of drug-affected people.

[21.150] Importing and exporting

It is an offence to import, or try to import, "border controlled" drugs (Commonwealth *Criminal Code*, para 307.1).

The prosecution must prove that the accused intended to import the substance. In other words, a person should be acquitted if they did not realise that they were carrying drugs (*R v He Kaw Teh* (1985) 157 CLR 523).

Undercover police

Police investigations into drug offences commonly involve the use of undercover officers who either offer a degree of encouragement to people to commit an offence, or participate in criminal activity, or both. There is no substantive defence of entrapment in Australian law (*Ridgeway v The Queen* (1995) 184 CLR 19).

The fact that drugs are supplied to an undercover police officer who encourages the supplier to break the law is not a mitigating circumstance in sentencing (*R v Chan* [1999] NSWCCA 103).

In *Ridgeway*, the High Court ruled that although generally evidence obtained by undercover police agents in the course of their participation in a drug importation was admissible, the degree of police involvement in the criminal activity in that particular case was excessive (and so the resulting evidence obtained was inadmissible).

In response to this decision, both NSW and federal governments passed legislation to make otherwise unlawful conduct by police (such as participating in the supply of prohibited drugs) legal, provided it is authorised as part of a *controlled operation*.

Police search powers

[21.160] Police have some powers to search people and property, and seize articles such as drugs for evidence, but their powers are not unlimited.

There are different rules for personal searches, and searches of houses or land.

[21.170] Personal searches

The police can search a person without arresting them under s 21 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). This section gives police the power to "stop, search and detain" anyone who they "reasonably suspect" might be in possession of drugs.

Police also have the power to strip search a person under the same LEPRA provision (s 21) if they believe it is "necessary" to do so where the search occurs at a police station, or that it is "urgent and necessary" to do so where the search occurs at any other place.

Search of vehicles

Police can search a vehicle if they have a similar reasonable suspicion under s 36 of the *Act*.

Objecting to a search

If police want to search you, the appropriate thing to do is to say clearly that you do not want to be searched, and that you want that written down (the police might be wearing bodycam) – so that the police cannot claim later that the search was with your consent.

If police insist, it is better not to resist, to avoid being charged with resisting or hindering police, even if nothing is found in the search.

The police have the right to search a person after arresting them (s 23).

Women should only be searched by a woman police officer. If no female officer is available, however, the police can request "any female" to conduct the search under their direction.

A police officer above the rank of sergeant can request that a doctor examine a person in custody – if such an examination is relevant to the charge – without the person's consent.

Sniffer dogs

Police use specially trained dogs to detect prohibited drugs. This practice has raised questions about whether the activity of sniffer dogs itself amounts to a search.

The situation has been clarified by both legislation and a NSW Supreme Court decision.

Under legislation

Under s 148 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, police can use sniffer dogs without a warrant for "general drug detection", which is defined to mean using a dog to detect the potential presence of illicit drugs by smell, before the police conduct any actual search of the person or their belongings.

Sniffer dogs and warrants

Police can use a dog to assist with general drug detection without a warrant (s 148), in relation to a person who is at, entering or leaving:

- premises licensed for the consumption of liquor sold there (not including a restaurant or dining room);
- a public place being used for "a sporting event, concert or other artistic performance, dance party, parade or other entertainment";
- a train, bus or light rail vehicle, on a prescribed route, or a station, platform or stop.

In other circumstances – for example, in a public street – police can only use drug detection dogs to search people or vehicles with a warrant issued under s 149 of the *Act*.

A police officer is authorised to use a dog for general drug detection only as provided under the Act (s 147).

In the Supreme Court

In *DPP v Darby* [2002] NSWSC 115, the defendant was searched outside a nightclub after a sniffer dog had indicated to police that he was in possession of prohibited drugs. The court ruled that the sniffer dog's activity did *not* amount to a search. It found that the dog's reaction was a basis for forming a suspicion by the police, just as information from another officer, or from a member of the public, or an officer's own perceptions (eg, of a strong odour of cannabis) might be a basis for an officer to form a suspicion.

Police directions to suspected suppliers or purchasers

Police can legally give a "reasonable direction" to a person in a public place who they believe on reasonable grounds is supplying, or soliciting supply of, or purchasing prohibited drugs. The direction must be "reasonable in the circumstances for the purpose of stopping" the supply or purchase. It is an offence to fail to comply with the direction without reasonable excuse (*Law Enforcement (Police Powers and Responsibilities) Act 2002*, s 197).

Personal searches by customs officers

People coming into Australia must answer questions from a customs officer about prohibited drugs. Luggage can be inspected even where there is no reason to suspect that it might contain drugs.

Types of search

There are two types of personal searches available under the *Customs Act 1901* (Cth) in relation to a person suspected of carrying prohibited imports: *frisk searches* and *external searches*.

A frisk search is a quick feel of a person's outer garments, including any clothing voluntarily removed. An external search involves a search of a person's body (but not body cavities) and any of their clothing.

If a person refuses a frisk or an external search, the customs or police officer may apply to a specially authorised customs officer or a magistrate for an order that an external search be carried out.

Detention and search

If a customs or police officer suspects on reasonable grounds that a person is carrying prohibited imports, they may be detained and searched. The search must be conducted as soon as practicable by an officer of the same sex, and appropriate arrangements must be made for privacy.

If internal concealment is suspected

People reasonably suspected of internally concealing a suspicious substance may be detained by a customs officer or police officer. The chief executive officer of customs or a police officer must then seek a detention order (up to 48 hours, but renewable) from a judge or magistrate.

If the person detained does not consent to an internal search, the customs or police officer must apply to a judge for an order for a medical practitioner to carry out the search.

[21.180] Search warrants

Searches of houses and land

To enter a person's home (or any other private property) without an invitation, police must have a search warrant.

Generally, police and members of the public are presumed to be impliedly invited to the front door of premises, but if asked to leave by an occupier, they must leave – and get a warrant if they want to return.

To obtain a search warrant, police must swear on oath to an authorised officer that they have reasonable suspicion of a crime being committed on those premises, and the basis for that suspicion (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss 47, 48).

Police can also enter a property without invitation in an emergency, such as chasing an escaping suspect or where an assault is apparently occurring on the premises.

When police are at the premises

When police go to premises with a search warrant they must produce an *occupier's notice*, otherwise they do not have the right to enter.

It is an offence to obstruct or delay police entry, or give an alarm. A person should not resist a police officer who appears at their door with a search warrant; to do so is an offence (s 52).

The police can use as much force as is reasonably necessary to conduct the search, which can mean pulling out drawers (and ceilings).

Search warrants also give police the right to search a person found in or on the premises if they have a reasonable suspicion that the person has the thing mentioned in the warrant (s 50).

If police reasonably suspect that a property is drug premises, they can get a warrant that allows them to cross property owned by others, break open doors and windows and do other "necessary" acts to gain entry.

Customs warrants and writs of assurance

Wide powers are given to customs officers in possession of a *writ of assistance* (issued by a Supreme Court judge), and customs and police officers in possession of a *customs warrant*.

These are general warrants; they last for periods of time and are not confined to the investigation of a specific set of circumstances. Those in possession of these warrants can, at any time, enter and search any premises, including houses, in which drugs are suspected to be. They do not have to show reasonable suspicion, and may use force.

Seeking the proceeds of crime

Search warrants can also be issued under the legislation dealing with the confiscation of proceeds of crime. They can, for example, cover documents that can assist in tracking down property that is drug-derived or which belongs to those who are reasonably suspected of drug-related activities.

[21.190] Evidence from illegal searches

Evidence obtained through illegal police searches (or other unlawful or improper means) is not admissible, unless the magistrate or judge uses their discretion to allow it. The prosecution must

establish the desirability of admitting the evidence (*Evidence Act 1995* (Cth), s 138). In many cases, evidence obtained improperly or illegally will be admitted by the judge or magistrate, balancing such factors as the importance of the evidence and the seriousness of the offence charged against the degree of impropriety or illegality involved in obtaining the evidence.

Bail

[21.200] Assessment of risk

Under the *Bail Act 2013* (NSW), for most offences, the primary consideration in deciding whether bail should be granted is whether the alleged offender represents an "unacceptable risk" of either failing to attend court or committing serious offences or endangering victims, witnesses or others while on bail.

If the risk is considered unacceptable, the decision maker (ie, the police, or if bail is refused by the police, the court) must refuse bail. If the bail decision maker determines that there is no unacceptable risk, then bail must be granted without conditions, or, if the bail decision maker has "concerns" about bail, they can grant bail with conditions that address those concerns.

For serious offences, such as offences involving the possession, cultivation, supply or manufacture of commercial quantities of prohibited drugs, the defendant must "show cause" why bail should be granted. If the defendant can show cause, the bail decision maker must then still consider whether there is an unacceptable risk, and if not, whether any bail conditions are necessary.

Penalties

[21.210] On the spot fines for possession offences

Police now have the discretion to issue an on the spot fine (a penalty notice) for some drug possession cases, instead of having to lay a charge and requiring the case to go to court.

The cases that qualify for a penalty notice are possession of 0.25 g or less of MDMA in capsule form or 0.75 g or less of MDMA in any other form, or a "small quantity" of any other drug. If the person pays the fine on time (within 28 days), there is no criminal conviction. As with penalty notices for other offences, the person can elect to have the matter determined in court.

Cannabis possession has not been included among the eligible offences for penalty notice because of the availability of the cannabis cautions.

[21.220] Court penalties

Most drug offences involve small quantities of drugs and are dealt with in the Local Courts where the jurisdictional limit (for a single offence) is an $11,000 fine and two years' imprisonment, even if the maximum penalty set out in the *Drug Misuse and Trafficking Act* is higher.

The penalty imposed will depend on the quantity of drugs involved and the person's prior record. The most common penalty for possession offences is a fine, with about a quarter of cases having no conviction recorded. For relatively small scale supply or cultivation offences, first offenders might be placed on good behaviour bonds but repeat offenders might receive prison terms.

For more serious charges dealt with in the District Court, involving commercial quantities of drugs, the most common penalty is a prison term and next most common is an intensive corrections order (a from of parole served in the community under supervision).

Pleas and previous record

A plea of guilty for dealing or trafficking carries less weight than is usually the case for other offences, but still attracts a discount on sentence. Similarly, having no previous record carries less weight than usual in sentencing for dealing offences.

Diversion from the criminal justice system

[21.230] There are some programs that aim to divert some minor drug offenders from the criminal justice system (through cautioning) and to encourage drug dependent offenders into treatment programs (through drug courts).

[21.240] Cannabis cautioning

NSW police have an official discretion to caution adults for minor cannabis offences and to caution people under 18 for minor offences involving any prohibited drug.

For adults

The official police guidelines recommend that police officers use their discretion to issue an official caution, rather than charge a person over 18 who is found:

- in possession of up to 15 grams of cannabis; or
- using cannabis; or
- in possession of smoking implements (a pipe or bong).

There is no need for the police to weigh the drug, as long as they are satisfied that the amount involved is under the 15 gram limit.

The cautioning scheme for adults does not include cultivation of cannabis, even for small numbers of plants.

Guidelines

The guidelines provide that to qualify for a caution the person must:

- admit the offence;
- have no criminal history for drug offences (including possession), sexual assault or other offences involving violence;
- have received no more than two cannabis cautions previously;
- establish their identity (normal checks on identity will be carried out);
- satisfy the police that the cannabis is for personal use only;
- have no other charges that must be determined in court anyway. (For example, if the police find a few grams of cannabis in the pocket of a person charged with stealing, both the theft charge and the drug possession charge will go to court.)

As well, there is an overriding discretion in the hands of police. So even if these guidelines are satisfied, the police can still decide to prosecute.

Procedure

Cannabis cautions to adults are issued on the spot. The police will give the person a cannabis cautioning notice, a pamphlet about the legal status of cannabis and information on the health consequences of cannabis use. Their name and address will be recorded on the police computer system.

If an adult receives a second cannabis caution, they are referred to a compulsory drug education session.

For people under 18

For people under 18, the discretion to not prosecute applies to cannabis cultivation, and to minor offences involving other drugs as well as cannabis.

For young people, the drug cautioning system is part of a range of alternative systems under the *Young Offenders Act 1997* (NSW) to divert young people from courts and prisons. Those alternatives are formal police cautions, warnings and youth justice conferences (where the offender and the victim meet to discuss the impact of the offence and determine an outcome plan). Conferences for drug offences are rare, and are only used where there is another offence which is to be dealt with at a conference.

What offences can be dealt with?

The following drug offences can be dealt with under the *Young Offenders Act 1997*:

- possession of 15 grams of cannabis or less;
- possession of smoking implements;
- cultivation of no more than five cannabis plants;
- possession of no more than one gram of heroin, cocaine or amphetamine;
- possession of no more than 0.0008 grams of LSD;
- possession of no more than 0.25 grams of ecstasy;
- use of a prohibited drug.

As for adults, the police must accept that the drugs are for personal use rather than supply, the young

person must admit the offence, and there must be no other offences committed or suspected that would require the person to go to court anyway. The person has the right to obtain legal advice before making an admission of guilt.

Procedures

A juvenile caution is not administered on the spot, but a week or so later at a police station or another place (eg, a youth centre). The caution can be given by a police officer or someone else (such as a drug and alcohol worker).

Only three juvenile cautions can be issued to a young person.

Cautions are discretionary.

Warnings

For young people, warnings can also be used. A warning is less formal than a caution and is issued on the spot by a police officer. The young person does not have to admit guilt, but they must supply their name and address.

[21.250] Drug courts

There are presently two separate types of drug court in NSW:

- the Drug Courts at Parramatta, Toronto on the Central Coast and in central Sydney;
- the Local Court MERIT scheme.

The Drug Court

The Drug Court's statutory object is to reduce drug-related criminal activity by diverting drug-dependent offenders to rehabilitation programs. It is a sentencing court, with the jurisdiction of both the Local Court and the District Court. Offenders are referred to the Drug Court by other courts (from the Court's respective catchment areas in western Sydney and the Central Coast).

Who is eligible?

To be eligible to be dealt with by the Drug Court, an offender must:

- be apparently dependent on a prohibited drug (not alcohol);
- plead guilty; and
- have been charged with an offence which is "highly likely" in the circumstances (eg, the offender's prior record) to result in their imprisonment.

A person is not eligible for sentencing by the Drug Court if they are charged with:

- an indictable offence under the *Drug Misuse and Trafficking Act* which cannot be dealt with summarily (eg, supply of a commercial quantity of a prohibited drug); or
- an offence involving "violent conduct" or sexual assault.

Alternatives to punishment

The Drug Court can, instead of imposing a punishment, require an offender to participate in an ongoing rehabilitation program, under court supervision. Unlike a conventional court, the Drug Court encourages a collaborative involvement of judge, defence lawyer, prosecutor and clinical staff in determining how a matter is dealt with. Typical program orders include attendance at counselling or other therapy sessions, and regular drug testing. The court can also impose conventional punishments.

Action by the court

The offender must agree to the program of treatment and conditions proposed by the court. The conditions of a person's program can be varied by the court.

As well as determining a program for the offender, the Drug Court must also impose a penalty for the offence, but it immediately suspends the sentence. If the offender satisfactorily completes the program, that will be taken into account in determining the final sentence, such as a good behaviour bond. The final sentence cannot be higher than the original suspended sentence.

The MERIT scheme

The Local Court program for diversion to treatment is called MERIT (*Magistrates' Early Referral Into Treatment*). MERIT is available at most NSW Local Courts.

The scheme allows for a case to be adjourned while the defendant undertakes drug rehabilitation. Suitable MERIT candidates are not required to enter a plea to the charges before being accepted into the program.

MERIT participants are granted bail, generally for three months, with attendance at MERIT program activities being a condition of bail. Generally, participants will be required to attend court several times after commencing treatment to have their progress monitored.

Failure to attend a MERIT program activity is reported to the court, but is not treated as a breach of bail conditions.

Who can participate?

Potential candidates for participation in the MERIT program must:

- be suitable for release on bail;
- be over 18;
- not be charged with assault, sexual assault or a wholly indictable offence;
- have a demonstrable and treatable illicit drug problem;
- be assessed by a court-based clinician as suitable for the program;
- be approved for participation by the magistrate.

Participation is voluntary. A person assessed as suitable can elect not to participate, and instead have their matter referred back to the Local Court for determination or sentencing.

Treatment

Suitable candidates who choose to participate are offered drug treatment considered appropriate to their situation, including medically supervised detoxification, home detoxification, methadone or other pharmacotherapy, residential rehabilitation, and/or counselling.

Completion of program

Satisfactory completion of the program will be reported to the court and will be taken into account in determining the penalty.

Failure to respond to treatment, or to undertake treatment, does not result in any punishment, or any additional penalty for the offence charged.

Confiscation of proceeds of crime

[21.260] Legislation

There is both NSW and federal legislation that can be used to seize assets obtained through serious drug offences, and other offences. Some of these laws apply only after a person is convicted of an offence. Some apply without a conviction, or even without a criminal charge being laid.

These confiscation laws do not apply to minor drug offences, such as use and possession, and small-scale dealing.

The Acts that come into operation after conviction are the:

- *Confiscation of Proceeds of Crime Act 1989* (NSW);
- *Proceeds of Crime Act 1987* (Cth).

The Acts that apply regardless of conviction are the:

- *Criminal Assets Recovery Act 1990* (NSW);
- ss 229A and 243B of the *Customs Act 1901*.

How cases proceed

Cases run under these laws are civil, not criminal actions. This means that a person does not get a criminal record if the court orders forfeiture of their property, or the payment of a monetary penalty. It also means that the court must only be satisfied on the balance of probabilities (not beyond reasonable doubt) that the property in question is *tainted*.

NSW cases are conducted in the Supreme Court, with proceedings brought by the NSW Crime Commission.

Federal cases are run in the Federal Court.

[21.270] Forfeiture after conviction

NSW legislation

Under the *Confiscation of Proceeds of Crime Act 1989*, a person convicted of a serious drug offence is liable to have orders made that "tainted" property be forfeited (or an equivalent money value paid) to the state, in addition to any criminal penalty such as a fine or imprisonment.

Tainted property

Tainted property is property used in connection with an offence (eg, a car or a boat), or which was derived from the commission of an offence. The connection between the property and the crime must be actual, but not necessarily substantial.

Restraining orders can be obtained at short notice to ensure that assets are not disposed of. The burden in such cases is on the convicted person to prove that there is no connection between criminal activity and the property.

Federal legislation

The *Proceeds of Crime Act 1987* is the equivalent federal legislation. It applies where the person

has been convicted of a federal offence (such as importing or conspiring to import drugs), and it allows the court to seize property or require payment of a money amount.

[21.280] Forfeiture without conviction

NSW legislation

The *Criminal Assets Recovery Act 1990* allows for the confiscation of property where the court believes that it is more likely than not that a person has engaged in "serious crime-related activity", including a drug trafficking offence and a second or subsequent offence of allowing premises to be used for drug premises (s 6(2)).

A "drug trafficking offence" is any offence of cultivation, supply or manufacture of a prohibited drug or plant, regardless of quantity (s 6(3)).

How property is confiscated

Property may be confiscated under the *Criminal Assets Recovery Act 1990* if the Supreme Court makes a finding, on the balance of probabilities, that the defendant was involved in serious crime-related activities. It does not matter that the defendant was acquitted of criminal charges, or even whether the defendant was ever charged.

Orders can be made:

- to stop any dealings with targeted property;
- for forfeiture of assets to the state; and
- for payment to the state of the proceeds of drug-related activity.

Time limits

The court can only make an order within six years of the person engaging in the drug-related activity.

Federal legislation

The *Customs Act 1901* provisions (ss 229A, 243B) apply where the Federal Court is satisfied, on the balance of probabilities, that money or assets are the proceeds of drug importing, even if the person has not been convicted or charged.

The court may consider the seriousness of the offence and any hardship likely to be caused.

Contact points

[21.290] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

See also Contact points of:

- Chapter 4, Assistance With Legal Problems;
- Chapter 7, Children and Young People;
- Chapter 14, Criminal Law.

Alcohol and Drug Foundation NSW
www.adfnsw.org.au
ph: 9660 5818

Alcohol and Drug Information Service (ADIS) – St Vincent's Hospital
www.svhs.org.au
ph: 9361 8000
24 hr support line
ph: 1800 250 015

Director of Public Prosecutions, Office of
www.odpp.nsw.gov.au
ph: 9285 8606 (Head office)
Witness Assistance Service
ph: 1800 814 534

Drugs and Alcohol Specialist Advisory Service *(for health professionals only)*
ph: 9361 8006 (Sydney) and toll-free for country areas 1800 023 687 (24 hr)

Drug Court of NSW
www.drugcourt.justice.nsw.gov.au
Hunter Registry
ph: 4935 8338
Paramatta Registry
ph: 8688 4525
Sydney Registry
ph: 9287 7305
Legal Aid
ph: 4935 8338 (Hunter), 9685 8020 (Parramatta) or 9685 8026 (Sydney)

Family Drug Support Australia
ph: 4782 9222 or 1300 368 186 (24 hr)

Lifeline
www.lifeline.org.au
ph: 13 11 14 (24 hr)

Nar-Anon Family Groups (Australia) Inc
www.naranon.com.au
ph: 8004 1214

Narcotics Anonymous Australia
www.na.org.au
ph: 1300 652 820

Mental Health and Drug and Alcohol Office NSW
www.health.nsw.gov.au/mentalhealth

NSW Users and AIDS Association Inc (NUAA)
www.nuaa.org.au
ph: 1800 644 413 or 8354 7300

Odyssey House
www.odysseyhouse.com.au
ph: 1800 397 739
Odyssey House also has centres for assessment, referral and after care, and a main treatment facility.

Ted Noffs Foundation
www.noffs.org.au
ph: 1800 151 045 or 9305 6600

The Wayside Chapel
www.waysidechapel.org.au
ph: 9581 9100
Offers advice and counselling, a refuge and a detoxification centre.

We Help Ourselves (WHOS)
www.whos.com.au
Therapeutic programs aimed at achieving recovery from alcohol and other drug dependence.