A QUICK GUIDE TO
Drugs & Alcohol

THIRD EDITION

by the National Drug and Alcohol Research Centre (NDARC)

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DRUG LAWS IN NSW

In NSW, it is an offence to possess, use, produce or supply a drug which has been declared prohibited. Most drug charges in NSW are laid under the *Drug Misuse and Trafficking Act 1985 (NSW)*. The Commonwealth Criminal Code covers offences involving importing and exporting drugs.

The Drug Misuse and Trafficking Act 1985 (NSW)

The NSW *Drug Misuse and Trafficking Act 1985* [30] classifies a wide range of drugs as 'prohibited drugs' (and 'prohibited plants' in the case of cannabis, opium and coca). The Act creates offences for:

- use of prohibited drugs
- possession of prohibited drugs
- supply and trafficking of prohibited drugs (with the seriousness of the offence depending on the quantities involved)
- cultivation and possession of prohibited plants
- manufacture of prohibited drugs
- aiding and abetting and taking part in offences involving prohibited drugs or plants
- possession of drug-use implements.

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

Synthetic drugs

Synthetic drugs are criminalised by a combination of the *Poisons and Therapeutic Goods Act 1996* and the *Drug Misuse and Trafficking Act 1985*.
See also page 108.

Commonwealth Criminal Code

The Commonwealth Criminal Code [31] is a federal law, so it applies to all of Australia, including New South Wales. The Code aims, among other things,

to prevent the import and export of prohibited drugs. The range of drugs (again listed in a schedule) is similar to that in the *Drug Misuse and Trafficking Act 1985* (NSW).

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

International treaties and conventions

Australia is a signatory to a number of international treaties and conventions about drugs and drug policy. These treaties are all prohibitionist in their basic intent. Countries that sign these treaties must agree to pass laws against using and trading of recreational drugs.

International treaties and conventions are not law in Australia. The only law in NSW is legislation passed by state or federal parliament and precedent decisions made by the courts. The legal status of the treaties is to guide the federal government. In some cases, treaties give the federal government constitutional power to pass laws it might not otherwise have had. New South Wales and other Australian states are not signatories to international treaties so they are not strictly legally bound by their terms, although there is a tradition that states and provinces should act consistently with treaties entered by their national governments.

The main international treaties about drugs that Australia has signed are:

- Single Convention on Narcotic Drugs 1961
- Convention on Psychotropic Substances 1971
- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

These treaties require the nations that sign them to pass laws imposing criminal penalties on drug use, possession and supply. However, the treaties also allow for flexibility. For example, they allow signatory countries to permit the use of prohibited drugs for medical purposes.

Importantly, the treaties also provide an option to divert drug offenders to rehabilitation and treatment programs, instead of imposing criminal punishments.

Possession

Some of the most common drug offences are for possession, use and supply of prohibited drugs. Each drug offence has specific legal 'elements' which the prosecution must prove beyond reasonable doubt. In this section, we examine the necessary legal elements for these offences.

Possession of a prohibited drug is an offence under section 10 of the NSW *Drug Misuse and Trafficking Act*. To prove possession, the prosecution must show beyond reasonable doubt that:

- an illegal drug was in a person's 'custody' or 'control', and
- the person knew that they had custody or control of a prohibited drug.

Proving custody or 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 a car, or owns or rents a house, 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 (that is, the person does not own the drugs or have any right to use them), they are not guilty of possession.

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, it can be kept, consumed or shared.

Momentary custody and control

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

Proving knowledge

The prosecution must prove that the person knew they had something in their physical custody and 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. Knowledge can be inferred from the circumstances in which the drugs were discovered.

If someone is apprehended with drugs on them, a court would probably reasonably infer that they had knowledge and control of those drugs. It is difficult for someone in this situation to escape the inference that they knew what was in their bag or sock or pockets. Similarly, where drugs are stored in a part of a house that is private (say, in a person's bedroom) it is open to be inferred that they had possession of those 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 single person has possession of the drugs. The drugs could belong to anybody who had access to the room.

If no-one makes a statement to the police that the drugs are theirs (or belong to someone else), 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.

They could be possessed by someone else.

It is possible that all the people living in a shared house could be charged and convicted of possession if the police can prove that they all had knowledge and control over (or access to) the drugs. But that would require evidence that all people had access—for example, statements from all the residents admitting they had knowledge and access.

Charges against several persons

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

This can be difficult. Courts are not allowed to presume that all the people must have shared possession—each individual accused is presumed innocent. Without admissions ('Yeah, I knew the weed was in the cupboard...'), it may be difficult to prove that any one of the accused is guilty of possession.

Medicinal cannabis

The law around medicinal cannabis is subject to change.

In 2016, the Commonwealth passed amendments to the *Narcotic Drugs Act 1967*. The aim of the changes is to provide a pathway of legally-grown cannabis for the manufacture of suitable medicinal cannabis products in Australia while still meeting international obligations under the Single Convention on Narcotic Drugs. It also sets up a national regulator to track cannabis products for medicinal use from cultivation to supply. However these amendments do not actually legalise medicinal uses of cannabis. They just create a framework for States to legalise medicinal use.

From August 2016, the NSW Government has established a process where medicinal cannabis can be prescribed by a doctor, but there are many practical hurdles. The doctor (who is expected to be a specialist) must obtain approval to prescribe the cannabis product from a panel of experts appointed by NSW Health, proving that all other treatment options have been exhausted. If approved by the NSW panel, the doctor must then get permission from the Commonwealth Therapeutic Goods Administration (TGA). The medicinal cannabis product must be imported (there are no local products which have TGA approval) and cannot be in raw plant form.

Otherwise, the use of cannabis for medicinal reasons officially remains prohibited in NSW. It is not a defence to a charge of possession of cannabis (or self-administration or cultivation of cannabis) that the person used the cannabis for a legitimate medical reason. However, evidence of a significant illness or medical condition can be a relevant issue to be taken into account in sentencing.

NSW has been conducting clinical trials with medicinal cannabis. The three trials have been for terminally ill patients (see Medicinal Cannabis Compassionate Use Scheme); children with severe epilepsy; and for severe nausea and vomiting in patients undergoing chemotherapy. The drug can be administered without the psychoactive effects of smoking cannabis.

Many cannabis preparations designed for medicinal applications will have a higher proportion of cannabidinol (CBD) and less tetrahydrocannabinol (THC) than other cannabis.

Cannabis oil is defined in the *Drug Misuse and Trafficking Act 1985* to mean any liquid containing THC, so it would not be an offence to possess or supply a cannabis preparation with zero THC.

Medicinal cannabis will be legal in Victoria from 2017, for people in exceptional circumstances who are authorised by a medical specialist under the *Access to Medicinal Cannabis Act 2016* (Vic).

Medicinal Cannabis Compassionate Use Scheme

People with terminal illnesses and their carers can register on the Medicinal Cannabis Compassionate Use Scheme (previously the Terminal Illness Cannabis Scheme). [32] The register is maintained by the NSW Police. The registration process requires a doctor to certify that the person has a terminal illness, which is defined to mean an illness which in reasonable medical judgement, in the normal course and in the absence of extraordinary measures, will likely result in the person's death.

A person listed on the register or their carer will not be prosecuted for possession of up to 15 grams of cannabis or 2.5 grams of cannabis resin (hashish). Being on the register is not a defence to a charge of cultivation or supply or driving under the influence of a drug or driving with the presence of THC in saliva.

Synthetic drugs

'Synthetic' drugs are, or are at least marketed as, chemically different from but with similar effects to better known illegal drugs. The possession, manufacture, production or supply of 'synthetic' drugs is criminalised by a combination of the *Poisons and Therapeutic Goods Act 1966* and the *Drug Misuse and Trafficking Act 1985*. A number of synthetic drugs are listed by their market names in Schedule 9 of the Poisons Standard (a list of poisons and other substances). It is an offence under the *Drugs Misuse and Trafficking Act 1985* to possess, manufacture, produce or supply a substance listed on Schedule 9 of the Poisons Standard. See Chapter 15: New & emerging psychoactive substances.

'Psychoactive substances'

In addition, the *Drug Misuse and Trafficking Act 1985* creates offences for dealings with 'psychoactive substances', which may include synthetic drugs not included on Schedule 9 of the Poisons Standard.

A psychoactive substance is defined as a substance that, when 'consumed', has the capacity to induce a psychoactive effect. 'Psychoactive effect' is broadly defined to include any stimulation or depression of the central nervous system, hallucination or significant disturbance or change to perception.

It is an offence to manufacture or supply a psychoactive substance for human consumption, either knowingly or recklessly in relation to the intended supply. There is no offence of possession of a psychoactive substance.

It is an offence to publish or display any form of advertising which, knowingly or recklessly, promotes the consumption, sale or supply of a substance for its psychoactive effect, or provides information on how or where a psychoactive substance may be acquired.

There are no categories of offence based on quantity.

Use

Using an illegal drug (also known as 'self-administration') is an offence under the NSW *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.

Intoxication as a defence to criminal charges

Self-induced intoxication with illegal drugs does not generally provide defence to criminal charges.

Prescription drugs

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

Injecting methadone

It is an offence to inject methadone, even by someone on a methadone program. Methadone is legally prescribed subject to conditions on quantity and the 'purpose' of the prescription, which must be according to 'recognised therapeutic standards' (NSW Poisons and Therapeutic Goods Regulation 2002).

The 'purpose' specified in methadone prescriptions is oral dose. Administration by any other method means the methadone is not lawfully prescribed and is illegal.

Administering drugs to others

It is also an offence to administer a drug to someone else, for example by injecting them, or to allow someone to administer drugs. It is an offence even if the person consents to the drug being administered to them.

Drink spiking

The offence of administering a prohibited drug includes drink spiking, where a prohibited drug is added to someone's alcoholic drink, and the person is not aware and does not consent to the administration of the drug.

If someone dies

A person who injects someone else with a drug that causes their death may be charged with manslaughter. Manslaughter means causing an unlawful death where the intention was not to kill or inflict a serious injury, but to inflict a minor injury or commit some other criminal offence.

Getting medical help

If an overdose or other emergency situation involving drug use occurs, you should call an ambulance or seek other suitable medical help. It is obviously the best medical option for the person who has overdosed.

The ambulance service does not notify the police when it attends a drug overdose. Hospitals and doctors also do not notify the police if you go to them requesting medical attention.

Police sometimes do attend overdose scenes. But police guidelines are designed to encourage people to seek medical help when necessary.

So police are directed not to arrest an overdose victim or their friends, or any other people who are present at an overdose and may have also consumed drugs or be in possession of drugs.

Injecting rooms

The NSW Government has licensed one medically supervised injecting centre, in Kings Cross. The injecting centre's licence is issued under the *Drug Misuse and Trafficking Act*.

It is lawful for a person to use or possess a small quantity of a prohibited drug while in the injecting centre.

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 in or near the injecting centre 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.

Harm reduction

Harm reduction focuses on minimising the negative impacts associated with drug use, individually and socially. While not advocating drug use, supporters of harm reduction argue that we should accept that some drug use will occur, and focus on addressing the harms caused.

In 1985, the federal and state governments adopted a National Drug Strategy which included a pragmatic mixture of prohibition and a stated objective of harm reduction. Harm reduction has been an official part of Australian drugs policy ever since, although most resources by far are devoted to policing and border patrol attempts at interdiction ('supply reduction'). Fewer resources are made available for health treatment and drug rehabilitation programs, or for preventative public health programs such as needle exchange. The needle exchange program has been successful. Australia maintains an extremely low rate of HIV infection among injecting drug users. The success of the needle exchange programs encouraged governments to at least consider adopting other harm minimisation initiatives.

Australia has been tentative about allowing legal injecting rooms, with NSW the only state to permit an injecting room, and then only one. The Medically

Supervised Injecting Centre (MSIC) operated from 2001 to 2010 on a 'trial' basis. In October 2010, legislation to make the Kings Cross MSIC permanent was passed by both Houses of the NSW Parliament. The Police Commissioner and the Director-General of NSW Health will continue to oversee the centre and it undergoes regular statutory evaluations every five years.

In all states, the impact of prohibitionist laws on drug users is somewhat modified by a number of diversion programs, diverting some eligible users from the criminal justice system to cautions or treatment.

Discrimination against drug users

The social stigma attached to illegal drug use means that people who are identified as drug users can experience discriminatory treatment such as denial of services or accommodation.

Is drug addiction a disability?

Under both NSW and federal anti-discrimination laws, it is unlawful to discriminate against a person on the grounds of disability. Over a number of years, it had been frequently suggested that drug dependence was a form of disability, and therefore covered by the discrimination laws. Following a complaint to the Australian Human Rights Commission, a Federal Court case decision found that drug addiction could be classed as a disability according to the Commonwealth *Disability Discrimination Act 1992*.

The NSW Government amended the NSW law (the *Anti-Discrimination Act 1977*) to legally allow discrimination against a person on the grounds of addiction to a prohibited drug - but only in the area of employment.

Discrimination remains unlawful in other fields, including:

- providing goods and services
- education
- accommodation.

The NSW Act does not allow discrimination:

- against users of methadone or buprenorphine
- on the grounds of being hepatitis C or HIV positive, or having any other medical condition.

So, if a person is refused a job because they are on a methadone or buprenorphine program or are seropositive, they could make a claim for disability discrimination under the NSW Act.

Supply

Supply is very broadly defined to include not only selling or giving away drugs but also simply agreeing to supply them.

Supply also includes 'deemed supply'—possessing certain quantities of drugs which are deemed to be for the purpose of supply.

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 if they deliver drugs to 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 that 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 or not. For example, a person who offers to supply someone with heroin when all they have is icing sugar is considered guilty of supplying heroin.

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.

Deemed supply

A person will be presumed to be supplying a drug if they are simply in possession of a particular quantity of the drug, known as the traffickable quantity. This amount varies from one drug to another, and in many cases is not especially large.

If the police can prove that a person is in possession of a traffickable quantity of a drug, the person then has the onus of proving that the possession was not for the purpose of supply.

A traffickable quantity of a drug is an amount deemed in law to be in a person's possession for the purpose of supply.

Purity does not matter—only weight. Under NSW law, one gram of a powder that is 10% heroin and 90% glucose is treated as one gram of pure heroin.

Anybody found in possession of a traffickable quantity is presumed to be a supplier unless they can prove otherwise—for example, that the drug was intended for personal use, or disposal.

Ongoing dealing

Ongoing dealing 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 drug.

A charge of ongoing dealing could be laid where an undercover police officer 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.

Large scale supply

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

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 (which is obviously more difficult the larger the quantity).

Drug use equipment

It is an offence to possess equipment with the intention of using it to consume drugs. 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.

The prosecution must show that the equipment was illegally possessed. The law is the same as for possession—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.

It is (technically) an offence to possess other injecting equipment, such as tourniquets, spoons, and swabs. In practice, possession of this equipment is not 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.

Offences involving prohibited plants

The cultivation or possession of prohibited plants, such as cannabis, is an offence.

It is an offence to:

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

a prohibited plant.

Cultivation

Cultivation is defined to include sowing seed, planting, tending, nurturing or harvesting.

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 of cultivation.

Possession of plants is also an offence under the same section and with the same maximum penalty as for cultivation. A charge of possession of prohibited plants would be laid where there was no evidence of any act of cultivation (such as planting or watering), but there was evidence of possession (again, requiring proof of knowledge and custody or control) of the plants.

Quantities

The penalty categories for cultivating cannabis depend on the number of plants, not their gender or size. Cultivating a hundred seedlings that can fit into a baking tray is treated the same as cultivating a hundred mature female plants. Having 250 seedlings is regarded as more serious than having five big plants, even though the weight of the five 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.

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 prosecution may rebut the accused's evidence by bringing, with leave of the court, evidence of any previous convictions.

Hydroponic cultivation

It is an offence to participate in the 'cultivation by enhanced indoor means' of cannabis plants. The offence requires the cultivation to be:

- inside a building or structure and
- involve growing the plant in nutrient enriched water or applying artificial light or heat or suspending the roots and spraying them with nutrient solution.

Where the number of plants involved is more than 5, the maximum penalties are significantly higher than for an equivalent number of plants cultivated outdoors.

For cases involving between 5 and 50 plants cultivated by enhanced indoor means, the prosecution must also prove the cultivation was for a 'commercial purpose'. 'Commercial purpose' means intending to sell or believing that another person intended to sell the product. For cases involving 50 or more plants cultivated by enhanced indoor means, the prosecution does not need to prove a commercial purpose.

Exposing a child to indoor cultivation

It is 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 penalties are substantial, with heavy fines and imprisonment possible even for one to four plants.

It is a defence if the defendant can prove that the exposure did not endanger the health and safety of the child. For these purposes, a child is defined as a person under 16.

Manufacturing drugs

It is an offence to manufacture, or to take part in the manufacture of, a prohibited drug.

The maximum penalty for manufacture of a prohibited drug depends on the quantity involved, with the same penalties applying as for supply offences involving comparable amounts.

Possession of precursors

It is an offence to possess a 'precursor' intended to be used in the manufacture of a prohibited drug. Substances defined as precursors are listed in Schedules 1 and 2 to the Drug Misuse and Trafficking Regulation 2006 (NSW). The Regulation also provides that, for legitimate uses, records must be kept for any storage or supply of precursors, including an 'end user certificate' which includes the name and address and proof of identity of the end user.

Knowingly take 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.

'Taking part in' manufacture, cultivation, or supply is defined to mean:

- the person takes, or participates in, any step, or causes any step to be taken in the process of manufacture, cultivation or supply; or

- the person provides or arranges finance for any step in that process; or
- the person provides the premises in which any step in that process is taken, or allows any step in the process to be taken in premises owned, leased, occupied or managed by the person.

A person may be considered to 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 or distributing or growing drugs. It would also include making a telephone call to arrange a meeting or allowing their house to be used for a meeting at which supplying drugs is discussed.

The participation must be done 'knowingly'. Proof that a person suspected 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.

Similarly, the word 'permits' means the owner or controller of the premises knew or had grounds for reasonable suspicion that the premises would be used by someone for that purpose, and was unwilling to take reasonable measures to prevent it.

Drug premises

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

It is an offence to be found on or entering or leaving drug premises. It is also an offence for an owner or other occupier to allow property to be used as drug premises, or for a person to organise or conduct drug premises, or to assist in the conduct of drug premises (for example, 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.

Importing and exporting

It is an offence to import, or try to import, prohibited drugs.

The prosecution must prove that the accused intended to import the substance. In other words, a person will be acquitted if they did not realise that they were carrying drugs.

It is also an offence under the Commonwealth Criminal Code to assist or be knowingly concerned in any illegal importation of drugs. The prosecution must prove that the accused was fully aware of what was going on and performed some act such as providing money. Mere knowledge or inaction does not establish the offence.

Alcohol, drugs and driving in NSW

The *Road Transport Act 2013* (NSW) Part 5.1 deals with road offences that involve alcohol and/or drugs. The procedures for testing for alcohol or other drug use by drivers and other road users are covered in Schedule 3 to the *Road Transport Act 2013*.

Driving under the influence

It is an offence under section 12 of the *Road Transport Act 2013*, to drive or attempt to drive 'under the influence' of a drug or alcohol. A full list of drugs can be found in Schedule 1 of the *Drug Misuse and Trafficking Act 1985* (NSW). Proof of this offence requires proof beyond reasonable doubt that the driver was intoxicated to some degree by the drug or alcohol.

If the police reasonably suspect that a person is driving under the influence of a drug, they have the power to take them to a hospital for a blood or urine test for the presence of drugs, under the supervision of a doctor. The sample is divided into two. One half is sent to government laboratories and the other half is given to the person for independent analysis.

It is an offence to refuse to submit to a blood test or a urine test in these circumstances. It is likewise an offence to wilfully alter the amount of drug in your blood or urine before having the test, unless it is more than two hours since you were driving.

Prescribed content of alcohol

Since the introduction of breathalysers and random breath testing (RBT) for alcohol, drink-driving offences are now much more commonly charged as driving with the relevant 'prescribed concentration of alcohol' (PCA).

This in effect bypasses any need to prove intoxication — the presence of alcohol in a person's system is sufficient evidence for the offence to be proved.

Blood alcohol concentration is measured in grams per 100 mL (g/100 mL). For most fully licensed drivers, the prescribed limit is 0.05. For drivers with a learners or provisional licence — L or P-plate drivers—the limit is zero. For people driving heavy vehicles or public passenger vehicles — trucks or buses — and people driving vehicles containing dangerous goods, the limit is 0.02.

The amount of alcohol that can be consumed before a person reaches the legal limit varies considerably from one person to another, and for the same person in different circumstances.

There is also a range of offences relating to refusal or failure to submit to a roadside breath testing, providing blood samples and for interfering with samples, set out in Schedule 3 to the *Road Transport Act*.

Presence of certain drugs

It is an offence under the *Road Transport Act 2013* (NSW) to drive with THC (the psychoactive ingredient of cannabis), methamphetamine or ecstasy 'present' in the driver's saliva, blood or urine (although only saliva is usually tested).

It is also an offence to drive with morphine or cocaine present, but these substances will not be detected by saliva swab.

The police have the powers to test drivers for the presence of these drugs. Mobile drug testing (MDT) involves a saliva test using drug screening equipment. If the initial saliva test indicates positive, then the driver must undertake a second saliva swab at a mobile drug bus or police station.

If the second swab shows positive, the police issue the driver with a direction not to drive for 24 hours. If the second swab is negative, the driver is free to go. But the second sample is sent to the laboratory for analysis, whether it is positive or negative. If the laboratory analysis confirms the presence of THC, methamphetamine or ecstasy, the driver is issued with a court attendance notice for the offence. It is the analysis by the laboratory, not the roadside test results, which the police rely on as evidence in court.

The offence requires only proof of the presence of one of the three drugs in the saliva sample. It is not necessary for the police to prove any impairment of driving ability. It is a defence to this charge if the driver had an honestly held and reasonably based belief that they did not have any relevant drug present in their saliva at the time of the driving.

As with Random Breath Testing, there are offences for failing or refusing to submit to a saliva test or provide a blood sample in Schedule 3 to the *Road Transport Act*.

Penalties

On conviction for a first offence under section 110, for 'prescribed content of alcohol' or under section 111, 'presence of certain drugs (other than alcohol) in oral fluid, blood or urine', the driver must be disqualified from holding a driver's licence for a minimum of three months (with six months the 'automatic' period of disqualification). For a second offence, the minimum disqualification period is six months, with a 12-month 'automatic' period. Fines also apply.

The licence disqualification periods are mandatory, but only on conviction. They can only be avoided if the magistrate deals with the case under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to impose no conviction for the offence. A person cannot receive the benefit of two section 10 dismissals without conviction in a five-year period, and any subsequent offence will mean mandatory disqualifications apply.

For prescribed content of alcohol offences, the penalties increase with a higher blood alcohol readings. The offences are in 'ranges', measured in grams per 100 millilitres of blood or in 210 litres of breath:

- novice range: zero - 0.02
- special range: 0.02 – 0.05
- low range: 0.05 – 0.08
- middle range: 0.08 – 0.15
- high range: over 0.15.

These prescribed limits are set out in section 108 of the *Road Transport Act 2013* (NSW). For serious and repeat offences imprisonment is an option.

Penalties for driving 'under the influence' include imprisonment as an option and are equivalent to a second offence or middle range offence under section 110.

Fatal accidents

Police can obtain blood or urine samples from drivers involved in fatal road accidents. A person convicted of driving under the influence of a drug and causing death is liable for a maximum penalty of 10 years' jail (or 14 years if there are circumstances of aggravation such as speeding).

Drugs in sport

Sporting associations have a general right to make rules for the conduct of organised sporting competitions. Those rules are binding, on the basis of a contract, on players who want to participate in those organised competitions.

At elite levels, the rules always include the right of sporting bodies to require players to have a drug test for performance enhancing drugs like anabolic steroids, in and out of competition. Some sports also test for recreational drugs.

The general principle is that if an athlete refuses or fails a drug test, the sporting bodies are entitled, subject to their own constitutions and rules of procedural fairness, to suspend or ban the player.

Police powers

Police have 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.

Personal searches

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

Search after arrest

The police have the right to search a person after an arrest and they generally do.

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.

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

Sniffer dogs

Police use specially trained dogs to detect the presence of prohibited drugs.

Police can use sniffer dogs without a warrant to detect illegal drugs (under the *NSW Law Enforcement (Powers and Responsibilities) Act 2002*) but only for 'general drug detection', defined to mean using a dog to detect the potential presence of drugs by smell, before the police conduct any actual search of the person or their belongings.

Police can use a dog to assist with general drug detection without a warrant 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)
- at, entering or leaving a public place being used for 'a sporting event, concert or other artistic performance, dance party, parade or other entertainment'
- at, entering or leaving a train, bus or light rail vehicle, on a prescribed route, or a station, platform or stop
- at, entering or leaving any premises licensed to perform body art tattooing, or any other premises that the police officer reasonably suspects are being used to perform body art tattooing procedures for fee or reward
- at any public place in the Kings Cross precinct (being the area including and bounded by the parts of streets specified in Schedule 2 to the *Liquor Act 2007* (NSW)).

In other circumstances—for example, in a public street (other than the Kings Cross precinct)—police can only use drug detection dogs to search people or vehicles with a warrant.

Personal searches by customs officers

People coming into Australia are obliged to 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* (Commonwealth) in relation to a person suspected of carrying border controlled drugs: 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 made.

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 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.

Searches of property

To enter a person's home or any other private property without the invitation or consent of an occupier, the police must have a search warrant (except in emergency situations such as chasing an escaping suspect, or where there is apparently an assault occurring on the premises). To obtain a search warrant, the 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 of that suspicion.

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 the premises.

It is an offence to obstruct or delay police entry, or give an alarm. It is an offence for a person to resist a police officer who appears at their door with a search warrant.

Police powers with a warrant

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.

In the case where police have a warrant to search a property reasonably suspected of being drug premises, police can cross property owned by others, break open doors and windows, and do other 'necessary' acts to gain entry.

Evidence from illegal searches

Evidence obtained through illegal police searches (or otherwise illegally or improperly obtained) is admissible, but only if the judge or magistrate uses their discretion to allow it. The prosecution must establish the desirability of admitting the evidence.

Detection by helicopter

Where a police helicopter detects cannabis plants from the air, police still must obtain a search warrant to enter the property. Without a warrant, any evidence would be unlawfully obtained and so inadmissible (unless the judge or magistrate used their discretion).

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.

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.

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.

Under NSW and federal legislation, otherwise unlawful conduct by police (such as the supply of prohibited drugs) is made legal, provided it is authorised as part of a controlled operation.

Police directions in public places

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.

Youth drug and alcohol issues

Drugs in state schools

State school principals have wide legal powers to make rules about the conduct of the students at their school and to suspend students who break the rules in a serious way. Most schools have rules against possessing or using drugs at school.

If a student is found possessing or using drugs, they will probably be suspended for at least several days. If a student is caught dealing drugs at school they will probably be expelled, or at least suspended for a lengthy period of time.

The school may also report the student to the police, in which case they may be dealt with by a warning or caution; or charged and brought before the court (the Children's Court if they under 18 years of age) unless they are dealt with by a caution or warning.

Teachers' powers

Teachers do not have the same powers as the police have. Teachers do not have the right to:

- search a student, their clothing or their bag (unless the student agrees being searched)
- hold a student or lock them in a room.

However, teachers can:

- search school property, like a desk or a locker (if the student has not paid to use it)
- confiscate any drugs they find.

The school may call the police, who do have the right to search the student.

Suspension and expulsion

State school principals have the power to suspend students for a limited period of time, but principals don't have the power to expel. A decision to expel a student can only be made by the Department of Education (NSW). The principal must write to the student and their parents or carers if they are considering recommending expulsion to give the student a chance to dispute the reasons or make any other comment. If the principal then decides to recommend expulsion, the student must receive a copy of the principal's submission to the department. The student has 14 days to make any comment.

If a student is suspended or expelled because of drugs and they are not guilty or they think the penalty is too severe, they can appeal to the Secretary of the Department or the Minister for Education and ask that the decision be reconsidered.

Drugs in private schools

Private schools each have different rules. Private school principals usually have more independent authority than their public school system equivalents.

Generally private schools and state schools could be expected to have a similar approach in cases of possession or supply at school. Expulsion or suspension are likely, depending on the circumstances.

Alcohol and young people

There is no general law that absolutely prohibits young people drinking alcohol. It is illegal in some circumstances, but not in others.

It is illegal for a person under 18 to possess or drink alcohol in a public place, if they are not under the supervision of a responsible adult. The young person can be fined and the alcohol confiscated.

It is also illegal for a person under 18 years to drink alcohol on licensed premises, such as pubs, clubs and licensed restaurants. It is illegal for a person under 18 years to even be in some parts of some licensed premises.

But it is *not* illegal for a person under 18 years to consume alcohol in a private place—for example, at home or at a private barbecue or party. A person under 18 can also legally drink in a public place (provided it is not in a declared alcohol-free zone) or in an unlicensed (BYO) restaurant, with the permission of and in the company of their parent or guardian).

It is an offence for anyone except the parent or guardian of the young person to supply alcohol to a person under 18 years old, or to obtain alcohol on behalf of someone under 18. Similarly, it is an offence for the licensee of licenced premises to allow alcohol to be supplied to a person under 18.

It is an offence for a young person to obtain or attempt to obtain alcohol from licensed premises, including a bottle shop. It is also an offence for a young person to use false evidence of age to obtain alcohol.

It is legal to supply (but not sell) alcohol to a person under 18 provided the supply is done by the young person's parent or guardian (or with their authorisation) and provided it is 'consistent with the responsible supervision' of the young person. Factors taken into account on that issue include the age of the young person, whether the person supplying the alcohol is intoxicated and the quantity and type of alcohol. It is illegal to supply alcohol to a person under 18 who is intoxicated, because that is not consistent 'in any circumstances' with responsible supervision.

The exception allowing a parent or guardian to supply alcohol to a young person does not apply to licensed premises. Parents and guardians are not allowed to supply their under 18-year-old children with alcohol in pubs, clubs and licensed restaurants.

Tobacco and young people

It is not an offence for a person under 18 to possess or use tobacco cigarettes. However, police have the power to confiscate tobacco (and e-cigarettes) from a person under 18 in a public place.

It is an offence to sell tobacco or 'non-tobacco smoking products' (for example, herbal cigarettes) to a person under 18 or to purchase tobacco products (or herbal cigarettes) for a person under 18, under the *Public Health (Tobacco) Act 2008* (NSW).