

Youth Justice

Your Guide to Cops and Court in NSW

4th Edition

Macquarie Legal Centre

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Police searches

When can the police search you in a public place?

Police search powers are mostly found in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

Police must only search you if they have a good reason. They should not search you simply because you are young, or Koori, or from a particular ethnic group, or because they don't like you for some reason.

The Australian government has signed international human rights treaties that say that government authorities should respect people's privacy and avoid treating anyone in a degrading way.

If the police insist on searching you, don't resist a search, even if you think it is unfair or unreasonable. Stay calm and don't swear. If you feel that a police search is abusive or unnecessary, you can complain later (see *Complaints and cooperation: working to improve police practices* chapter).

Reasonable suspicion

Police may stop and search you (and anything you are carrying, eg a bag) and your car if they suspect on reasonable grounds that you have in your possession:

- something stolen or unlawfully obtained, or
- something used or about to be used in a crime (eg a weapon, a crowbar), or
- illegal drugs, or
- a knife or a dangerous implement (there are special rules for knife and weapon searches, see page 114).

Police may also stop and search your vehicle if they suspect on reasonable grounds that:

- your vehicle has been (or is being, or is likely to be) used in connection with a certain type of offence, or
- there are circumstances which are likely to cause a serious risk to public safety, and stopping and searching your car may lessen the risk.

What is reasonable suspicion?

Reasonable suspicion (or *reasonable grounds to suspect*) is difficult to define. Whether or not police have a reasonable suspicion which justifies searching you depends on all the circumstances.

A guess or a hunch is generally not enough to be *reasonable suspicion*. Being young, or hanging around in a certain place, or being out late at night, or even having a criminal record, is not usually enough.

If you have a record of drug offences, and the police see you hanging out with known dealers, for example, police may have reasonable grounds to suspect that you have illegal drugs on you. Just being near a methadone clinic or needle exchange is not enough to give the police a reasonable suspicion.

DO THE POLICE HAVE THE POWER TO SEARCH YOU FOR ID?

Sometimes the police ask a person to show ID and, when the person refuses, the police search the person or their bag for ID. The police have no power to do this, unless you consent.

With consent

Police may search you without any reasonable suspicion if you consent (agree) to being searched.

Be careful! Police often ask ‘would you mind emptying your pockets, mate?’ or ‘have you got anything on you that you shouldn’t have?’. If you agree to show police what’s in your pocket or bag, it might be hard for you to argue that the search was unlawful. The police will probably say you consented to the search, and therefore they did not need any reasonable grounds to suspect you had anything illegal on you.

With a warrant

Police may search you if they have a warrant to search you. This would be rare, although it is common for police to get warrants to search inside buildings.

After arrest or detention

The police may search you if they have lawfully arrested you (eg because they suspect on reasonable grounds that you have committed an offence) or detained you (eg for being intoxicated in public).

Special public disorder powers

Under special police powers intended to deal with *large-scale public disorders*, the police have powers to stop and search you or your vehicle if you are within a *target area* or on a *target road*. For more detailed information see *Special police powers and large-scale public disorder* on page 99.

Where the authorisation to use special powers is in force, police are allowed to stop and search any person (and anything in the person's possession or control) in a target area or on a target road, and detain the person for as long as is reasonably necessary to conduct a search.

Police may also stop and search any vehicle (and anything in or on the vehicle) in a target area or on a target road, and detain the vehicle for as long as is reasonably necessary to conduct a search.

The big difference between these powers and normal search powers is that no warrant or reasonable suspicion is required.

The rules for searches (see below) apply to a search under these special powers, except that police are not allowed to do a strip search.

Types of searches

Frisk search

Frisk searches are searches conducted by quickly running the hands or an electronic metal detector over your outer clothing.

If you are wearing or carrying anything that can be conveniently removed with your consent (eg a jacket, a cap or backpack), the police may conduct a search on these items as well.

Normal/ordinary search

This is the most common type of search. Police might:

- tell you to empty your pockets or your bag
- search your bags or other possessions
- do a frisk or pat-down search.

Searching for things in your mouth or hair

If a police officer suspects on reasonable grounds that you might have something unlawful hidden in your hair or inside your mouth, they may request you to move or shake your hair or open your mouth.

Although the police are not allowed to forcibly open your mouth, failing to comply with the request is an offence.

Strip search

Strip searches are searches where you remove most or all of your clothes, and the police search your clothes and the surface of your body. Strip searches don't include searches of body cavities.

Police are not allowed to perform strip searches when:

- using their power to search for knives and weapons, or
- using their emergency public disorder powers to search without reasonable suspicion.

Otherwise, they have the discretion to perform a strip search whenever they are legally entitled to perform a normal search. According to LEPRA, police should only resort to such invasive practices when they are necessary in the circumstances. For example, police often strip search when they are looking for drugs. On the other hand, police shouldn't strip search you if they've arrested you for crimes like offensive language or stealing a TV.

No one under the age of 10 can be strip searched.

Body cavity search

Body cavity searches are searches inside any of your body cavities (including your rectum or vagina). These searches can only be performed by a doctor. Body cavity searches are usually done to find concealed drugs and must be approved by a sergeant or a more senior officer.

What rules must the police follow when they search you?

Information and warnings

If police are searching you, they must:

- provide proof that they are police officers (unless they are in uniform)
- give their names and place of duty
- tell you the reason for the search, and
- warn you that failure to comply with their request may be an offence.

If the police request you to submit to a frisk search or to produce a dangerous implement or a metallic object, the police must give these details and warnings *before* (and not during or after) the search. See *Types of searches* on page 111.

For other types of searches they must give these details and warnings *before* or *during* the search, if it is practicable to do so. If this is not practicable, the police officer must provide the information and warnings as soon as is reasonably practicable after exercising the power.

See *Safeguards relating to police powers* on page 107.

Safeguards relating to all personal searches (including strip searches)

The police officer carrying out the search must, as far as is reasonably practicable:

- inform you whether or not you will be required to remove clothes and the reason why
- ask for your cooperation
- conduct the search as quickly as reasonably practicable
- provide reasonable privacy
- conduct the least invasive kind of search possible
- be of the same sex as you (if you are a transgender person, this means an officer of the gender you identify with)
- not search your genital area (or your breasts if you are female or transgender) unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search
- not conduct the search while you are being questioned
- let you get dressed as soon as the search is over, and
- if they have seized any of your clothing during the search, provide you with appropriate replacement clothing.

Safeguards relating to strip searches

There are certain rules that the police have to follow when conducting a strip search on you.

As far as is reasonably practicable in the circumstances, the strip search:

- must be conducted in a private area
- must be conducted by someone of the same sex as you

- must not be conducted within sight of someone who is of the opposite sex to you (unless it is a medical practitioner or support person present with your consent), and
- must not be conducted within sight of someone who does not need to be there (eg regular members of the public), and
- must be conducted in the presence of a support person if you are under 18 or if you have impaired intellectual functioning.

A strip search must not:

- involve a body cavity search
- involve the removal of more clothes than necessary
- involve more visual inspection than necessary, or
- be conducted on a child under 10 years of age.

Special rules for searching for knives and dangerous implements

When can police request a search?

The police can ask you to let them search you, your bag, your school locker and other things if they suspect on reasonable grounds that you have a knife or another type of dangerous implement.

While searching you, or instead of doing a search, police may ask you to produce anything they see which they reasonably suspect is a weapon.

If you refuse to be searched or to produce an item when requested, you might be guilty of an offence.

Dangerous implement

A dangerous implement can be any of the following items:

- a dangerous article including a firearm, spear gun, explosive or detonator
- any implement made or adapted for use for causing injury to a person
- anything intended by the person having custody of a thing, to be used to injure a person or cause damage to property, or
- a laser pointer.

Reasonable suspicion

The fact that you are in an area which is thought to have a high incidence of violent crime (eg outside the cinemas on George Street in the city) can help to arouse the reasonable suspicion of the police (but on its own it is not enough).

Types of search

When searching for knives or dangerous implements police may request a person to submit to a frisk search only, or a search of the person's bag or school locker.

The search can be electronic (using a metal detector) or a frisk search (this means the police quickly run their hands over your clothes). You only have to remove your hat or cap, your coat or jacket and your gloves.

Under this law, police are not allowed to strip search you.

Rules that police must follow

When searching you under this law, the police must:

- show evidence that they are police (unless they are in uniform)
- tell you their name and station
- tell you the reason for the search, and
- warn you that it might be an offence to refuse to cooperate (unless you are already cooperating).

They must give you this information before or during the search, if reasonably practicable in the circumstances; otherwise as soon as practicable after the search.

See *Safeguards relating to police powers* on page 107.

If you refuse to be searched

The police have no power to forcibly search you under this law; they can only request a search.

However, if you refuse to cooperate, then the police must warn you that it may be an offence to refuse to cooperate, and then ask you again. If you still refuse, you may be guilty of an offence.

If police suspect you have committed an offence, they might decide to arrest you, which means they also have the power to search you. Once you are under arrest, police powers to search you become wider – they don't need a reasonable suspicion.

If you think the search is unfair

If you think the search is unfair or the police didn't follow the rules and you want to do something about it, you have two options:

- cooperate with the search but complain later (see *Complaints and cooperation: working to improve police practices* chapter), or
- refuse to cooperate with the search. Police may tell you that you have committed an offence, and give you a penalty notice or court attendance notice – or they might even arrest you and search you anyway.

If the police fine you or charge you for failing to cooperate with the search, you can plead not guilty in court and explain to the magistrate why you believe that the search was wrong. If the magistrate decides that the police did not have reasonable grounds to suspect you of carrying a knife or weapon, or didn't carry out all the steps listed above, the magistrate may find you not guilty of failing to cooperate with the search.

If the police find a knife or weapon, without following the rules on searching, you may still be charged with possessing the knife or weapon. However, the magistrate may decide that because the search was illegal the police are not allowed to bring in the evidence obtained from the search (that is, the knife or weapon). If this happens, you will be found not guilty.

You could also do both – try your luck in court *and* complain later about the police. Either way, your chances of success are much better if you have witnesses to give evidence for you.

If the police find a knife or weapon

The law lets you carry a knife in a public place if you have a *reasonable excuse*.

If police don't think you have a reasonable excuse, they can fine you or take you to court for possessing the knife or weapon (or, if you are under 18 and you admit to the offence, they can offer you a caution).

It is up to you to convince the police or the court that your excuse is reasonable. Some reasonable excuses are:

- at your job, if you need the knife to do your work
- to prepare and eat food and drink
- for lawful recreation, sport, exhibitions and religion
- taking a knife to or from one of these things.

So if you need a knife for work, you can have it at work and on the way to work, but not on your day off. And just because you need one type of knife for work, you can't have other types of knives on you that you don't need for work.

Carrying a knife or weapon for self-defence and for defending other people are *not* reasonable excuses.

Confiscation of knives and weapons

Police can take anything that they believe could be used as a weapon, if they don't think you have a reasonable excuse for carrying it at that time and place. They can do this even if they decide not to fine or charge you.

The police don't have to ask you to give them the weapon, but may instead seize it from you.

Getting your knife back

To get your knife back, write to the local area commander (the head of that police station) within 28 days of the search. If you are under 18, your parent, guardian or carer must write for you.

If the knife isn't returned within 28 days of the search, you can apply to the Local Court (after 28 days but within 56 days of the search). If the court decides not to return your knife to you, or you don't apply to the court in time, the police will sell or destroy it.

Police drug detection dogs

Police have always been able to use drug detection (sniffer) dogs when carrying out a police search, where they *reasonably suspect* that the person is carrying illegal drugs. The dogs were simply another tool, like a metal detector, to assist with the search.

However, recent changes to the law have given the police additional powers to use sniffer dogs in certain public places to randomly detect people who are carrying drugs, *without* the requirement of reasonable suspicion.

After the case of *Darby* (see *Sniffer dog arouses reasonable suspicion* below) the NSW government introduced the *Police Powers (Drug Detection Dogs) Act 2001*, to define what police can and can't do when using drug sniffer dogs. This Act has now been replaced by Part 11 Division 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

SNIFFER DOG AROUSES REASONABLE SUSPICION

In February 2001, Glen Darby was 'searched' by a police sniffer dog on Oxford Street. Police found cannabis on him and charged him with possession of a prohibited drug. He pleaded not guilty and his case was heard in November 2001, by Deputy Chief Magistrate Jerram in the Downing Centre Local Court.

Mr Darby argued that the use of the dog was a police search, conducted without reasonable suspicion and was therefore unlawful. He then argued that, as the evidence obtained from the search was obtained unlawfully, it should be excluded.

The magistrate decided that the manner in which the dog was used (touching the defendant near his crotch, sniffing his pockets, etc) amounted to a search. She said that the search was unlawful as it was conducted without reasonable suspicion.

After taking into account the things mentioned in section 138 of the *Evidence Act 1995* (including the *International Covenant on Civil and Political Rights*, which says that individuals have the right to be protected from arbitrary interference with their privacy) the magistrate excluded the evidence of the drug. This meant that the police had no case to present against Mr Darby, and the charge was dismissed.

The police appealed to the Supreme Court and in November 2002 the magistrate's decision was overturned by Justice O'Keefe in *DPP v Darby* [2002] NSWSC 1157. Justice O'Keefe held that the actions of police sniffer dogs are not a search but are instead like a scent detecting tool which can arouse the reasonable suspicions of a police officer, so that a search can then lawfully be carried out. Justice O'Keefe accepted that the use of police sniffer dogs in public areas may be a violation of the reasonable expectations of the privacy of the individual but that, as neither the Australian Constitution nor legislation protect the right to privacy, such considerations were not important.

Mr Darby then appealed to the Court of Appeal in *Darby v DPP* [2004] NSWCA 431. The majority of the court (Justices McColl and Ipp) agreed with Justice O'Keefe and therefore Mr Darby's appeal was dismissed. Justice Giles dissented (disagreed with the majority) and was of the view that the dog's actions amounted to a search and a battery (an unlawful touching of a person).

Darby's case is important because it helps to define the extent of the right of people in New South Wales to be protected from arbitrary interference with their privacy. It also spearheaded the State government's decision to pass the *Police Powers (Drug Detection Dogs) Act 2001*, which has since been replaced by Part II Division 2 of LEPPRA.

When can police use sniffer dogs?

Under LEPPRA, the police may use sniffer dogs for *general drug detection* in designated public places, including pubs, nightclubs, dance parties, sporting events, railway stations or on most public transport routes which are specified in the legislation (which currently include most of the Sydney metropolitan area).

Using a dog for general drug detection means that the police can take the dogs into any of the designated areas and walk them around to see if they detect any illegal substances. Detection is at random, and in theory, these powers do not allow the police to command the dog to sniff particular individuals.

This is different to normal police search powers (see *Police searches* chapter) as there is no requirement that the police have *reasonable suspicion* that the person is carrying anything illegal. The courts and law makers have justified this expansive power (somewhat controversially) by arguing that general drug detection is different to a normal *police search* (see *Sniffer dog arouses reasonable suspicion* above).

Rules that police must follow

When police use a sniffer dog for general drug detection, they are restricted by some rules:

- they must try to keep the dog under control and to prevent it from touching anyone

- they are not allowed to detain anyone or prevent anyone from leaving the area. This means, for example, that they cannot obstruct doorways to venues while they allow a sniffer dog to do the rounds.

It is important to note that the Act and all of these rules only apply where the police are using the dogs for general drug detection.

If the police have legal grounds to conduct a normal police search (ie they have *reasonable suspicion* that you are carrying an illegal substance, or you are under arrest) they are legally entitled to use a sniffer dog as a *detection tool* in carrying out that search, just like they may use a metal detector or other equipment. Under normal police search powers, they may detain you for the purpose of the search.

Ombudsman's review

In 2006, the NSW Ombudsman, after a 2-year review of the drug detection dog legislation, concluded that there was a need to reconsider the use of sniffer dogs for general drug detection.

The review found that despite the best efforts of police officers, the use of drug detection dogs had proven to be an ineffective tool for detecting drug dealers. In the vast majority of cases, the use of drug detection dogs have led to public searches of individuals in which no drugs were found or only small amounts found (mostly young adults with a very small amount of cannabis for personal use).

The Ombudsman also expressed concerns about the high number of *false positives* (dogs picking out people who turned out to have no drugs on them) and about the privacy of individuals who were searched.

Despite these concerns, the government has not changed the law, and police still commonly use drug detection dogs.

Searching houses and buildings

When can police enter a building?

Police can enter a private house or building:

- if the occupier (someone who lives or works in the building) consents (agrees)
- in emergency situations (eg to save someone from serious harm, to deal with domestic violence)
- to prevent a breach of the peace (eg a situation where there is an immediate threat of violence or property damage)
- to arrest a person (but first they must have reasonable grounds to arrest the person and reasonable grounds to believe the person is in the building)

- if they have a crime scene warrant (see *Crime scene powers* on page 102), or
- if they have a search warrant. If police have a search warrant and you refuse entry, they can use reasonable force, including breaking down doors, to get into the building.

Otherwise, you can decide whether to let the police into your home or work.

When can the police search a building?

Police can search a house or building if they are lawfully allowed to enter the building and:

- if the occupier (someone who lives or works in the building) consents (agrees)
- if they have a search warrant
- if they enter the building to arrest someone (but they can only search the arrested person and their things, not the whole building), or
- if they enter a domestic violence situation they can search for firearms and weapons.

Can the police enter a house to do a bail check?

Police have no power to enter a house or flat, without the occupier's permission, to check whether a person is at home as required by their bail conditions. For more information see *Bail* chapter.

Search warrants

To get a search warrant, the police must persuade a magistrate or a justice of the peace that they have reasonable suspicion that they will find evidence of a crime (eg weapons, drugs or stolen property).

Rules for executing search warrants

Police can only execute (use) the search warrant once, and only before the warrant expires. They cannot search at night unless the warrant says they can.

If you are on the premises when police carry out a search with a warrant, you will be allowed to observe the search. Police must show you a copy of the warrant if you ask to see it, they must give you an occupier's notice (see below).

Police must give you a receipt for anything they take during the search.

If no one is home when the police want to execute the search warrant, the police can force their way onto the property (including breaking doors and windows) and do the search as set out in the warrant.

When police carry out a search with a warrant they will videotape the search. They should not turn the video off and on during the course of the search. If they do this, tell your lawyer.

Occupier's notice

Before police can carry out the search, they must give the occupier of the building an *occupier's notice*, a written notice which includes:

- the address
- what the police are looking for
- the warrant's expiry time, and
- what the warrant allows the police to do.

If no one is present when the police attend, they must leave the occupier's notice behind at the premises.

Refuges and shared accommodation

The same rules apply in a refuge or shared accommodation. If the police have a search warrant, they must give an occupier's notice to the person in charge of the premises.

The warrant might say which areas police can search. For example, police cannot use a warrant for Dave Young's room to also search Jenny Smith's room. But if the warrant says something like 'search the premises at 25 Bloggs Street', the police can search the whole building. You can still ask them to limit their search to part of the house, but they might not agree.

Covert search warrants

Covert search warrants are the same as normal search warrants but they may be executed covertly (without having the occupants of the premises ever knowing that a search occurred).

Covert search warrants can only be applied for by a very senior police officer and can only be issued by a Supreme Court judge. They will only be authorised in exceptional circumstances where it is considered necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of the premises.

Unlike with other search warrants, police do not have to serve an occupier's notice when executing a covert search warrant. Notice of the execution of a covert search warrant can be postponed for 6 months (or, in exceptional circumstances, for up to 3 years in total).

Drug premises

The *Police Powers (Drug Premises) Act 2001* came into force in 2001. It was designed to deal with *drug houses* in the Cabramatta area but applies all over New South Wales. It has now been replaced by LEPR Part 11 Division 1.

What are drug premises?

Drug premises are premises (eg house, flat or office) used for the unlawful supply or manufacture of illegal drugs (other than cannabis).

A place can be drug premises even if no drugs are found, or no one is caught dealing, on the premises.

The kinds of things that might lead a court to decide that premises are *drug premises* are the presence of:

- security arrangements such as fortified doors (especially if it appears that these have been used to wilfully obstruct police from entering)
- a person acting as a lookout
- syringes or anything else connected with the use, manufacture or supply of prohibited drugs
- firearms or other prohibited weapons
- documents or records that appear to relate to drug supply
- large amounts of money not accounted for by the owner or occupier, or
- any person who appears to be affected by a prohibited drug.

Search warrants and drug premises

Police can get a warrant to enter and search suspected drug premises. It is an offence to block entry or otherwise obstruct the execution of the search warrant. It is also an offence for you not to give police your name and address on request if you are on the premises when they are being searched.

Police may seize anything found on the premises that may be connected with an offence. This might include things such as drugs, syringes, firearms and money. The police also have power to seize business records, computers, fortified doors, etc, if they believe these things can provide evidence of an offence.

Offences connected with drug premises

Being on drug premises

If you are caught inside or entering or leaving drug premises you will be guilty of an offence unless you can prove that you have a lawful excuse to be there. To be guilty of this offence, the prosecution must convince the court that the premises are drug premises. If the court is convinced, the burden then falls on you to prove that you had a lawful excuse to be there.

Examples of lawful excuses could be that you:

- live there
- were visiting a family member who lives there
- didn't know the premises were being used for drug activity, or
- were being held there against your will.

Organising drug premises

It is an offence to organise, or to take part in the business being carried out in, drug premises. This includes acting as a lookout. You will not be guilty of this offence if you can prove that you didn't know the premises were being used for drug activity.

Knowingly allowing premises to be used as drug premises

If you are an owner or occupier (this includes when you are renting a place) you will be guilty of an offence if you knowingly allow the premises to be used as drug premises.