Published in Sydney
by Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668
100 Harris Street, Pyrmont NSW 2009

First edition published by Redfern Legal Centre as The Legal Resources Book (NSW) in 1978.
First published as The Law Handbook in 1983
Second edition 1986
Third edition 1988
Fourth edition 1991
Fifth edition 1995
Sixth edition 1997
Seventh edition 1999
Eighth edition 2002
Ninth edition 2004
Tenth edition 2007
Eleventh edition 2009
Twelfth edition 2012
Thirteenth edition 2014

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National Library of Australia
Cataloguing-in-Publication entry
The law handbook : your practical guide to the law in NSW / Redfern Legal Centre.
Includes index
ISBN: 9780455234557
Law – New South Wales – Handbooks, manuals, etc
Legislation – New South Wales
Jurisprudence – New South Wales – Handbooks, manuals, etc
Civil rights – New South Wales – Handbooks, manuals, etc
349.944

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This edition is up to date as of 1 October 2014.
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Editor: Ben Brocherie
Product Developer: Karen Knowles
Publisher: Robert Wilson
Indexed and proofread by: Puddingburn Publishing Services
Printed by: Ligare Pty Ltd, Riverwood, NSW

This book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.
Criminal law

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[16.60] Basic principles of criminal law  [16.200] Sex work
[16.10] The words crime and criminal are easily applied to violence and theft. But crime also includes victimless crimes such as possession of marijuana, parking violations and minor traffic offences.

In its widest sense, the term criminal law includes any law which declares that certain conduct is an offence and lays down a penalty for it.

In practice, however, parking violations and minor traffic offences are not generally regarded as crimes. They are separately recorded by Roads and Maritime Services and, unlike serious offences, generally do not need to be disclosed in job applications.

Drug offences are discussed in chapter 23, Drug offences. Sexual offences are discussed in chapter 38, Sexual offences.

The difference between crimes and civil wrongs

Who is wronged?

One way of looking at it is to say that a crime is a wrong against the community, which attracts community condemnation and punishment, while a civil wrong is a wrong against an individual, which requires compensation or repayment to the person wronged. For example, if a person takes money from someone’s bag without their permission, they are committing a criminal offence for which they can be punished by the state. If they carelessly damage someone’s bag, the owner may take them to a civil court and they may be ordered to pay compensation, this is quite separate from the punishment process.

On the other hand, a person who fails to pay back a loan is not committing a crime. Although a civil case can be taken against them to get the money back, the person cannot be prosecuted for a criminal offence.

Of course, a crime is often (not always) also a wrong against an individual.

Who takes action?

Crimes are normally prosecuted by the state or Commonwealth, whereas it is generally up to an individual to take court action against a person who has committed a civil wrong.

It is possible for someone to commence criminal proceedings against a person who has committed a crime against them, such as assault, but it is rarely done.

Actions that are both crimes and civil wrongs

Many acts, such as assault, can constitute a crime and a civil wrong at the same time. The police may be reluctant to commence criminal charges for minor assaults unless there are witnesses or noticeable injuries, and they will leave it up to the person assaulted to take action. In this case the person may have to choose between starting criminal proceedings and starting civil proceedings.

If the police bring criminal proceedings, the person can still bring a civil action.

[16.20] Types of crime

Crimes may be tried by a magistrate, or by a judge and jury. Usually this depends on the seriousness of the crime.

[16.30] Crimes tried by a magistrate

Crimes tried by a magistrate in a Local Court are called summary offences. They are less serious than those tried by a judge and jury (indictable offences), and the penalties are less.
Time limits
Proceedings for a summary offence must be started within six months of the date of the alleged offence (Criminal Procedure Act 1986 (NSW), s 179(1)).

Children and summary offences
When a person under 18 is charged with a criminal offence, the case is heard, at least initially, in the Children’s Court, and special provisions apply (see chapter 8, Children and young people).

[16.40] Crimes tried by a judge and jury
Crimes tried by a judge and jury are generally more serious (indictable offences). In jury trials, the judge rules on questions of law, and the jury rules on questions of fact.

In the Supreme Court
Only extremely serious charges – generally murder, terrorism and major corporate frauds – are heard in the Supreme Court.

In the District Court
Cases arising from other indictable offences such as robbery, malicious wounding and dangerous driving causing death are heard in the District Court.

Time limits
There is no time limit for a charge to be laid for an indictable offence.

The committal hearing
Before people charged with indictable offences are tried there is usually a committal hearing (a preliminary hearing in a Local Court).

At the committal hearing, evidence is presented to determine whether there is a reasonable prospect that a jury would convict the person charged of an indictable offence (Criminal Procedure Act, s 65).

The court hierarchy is discussed in chapter 1, About the legal system. Court proceedings are discussed in chapter 14, Court.

[16.50] Crimes tried by either a magistrate or a judge and jury
Many less serious types of indictable offences, such as stealing and breaking and entering, may (or must) be dealt with by a magistrate in the Local Court under some circumstances. There are special procedures for dealing with these cases.

Time limits
There is no time limit for the prosecution to lay a charge for indictable offences that can be dealt with summarily, even though they are heard in the Local Court.

Indictable offences dealt with summarily
Legislation divides indictable offences into those which may:
• not be tried summarily;
• be tried summarily unless the prosecuting authority or the accused elects to have the offences dealt with on indictment (Table 1); and
• be dealt with summarily unless the prosecuting authority elects to have them dealt with on indictment.
This means that a large number of indictable offences are likely to be tried summarily. The tables, which are found at the end of the Criminal Procedure Act, should be checked, as they are changed regularly.

Choosing a District Court trial
An accused can choose between a Local Court hearing and a District Court jury trial if property involved is valued at more than $5000 or, in the case of an assault, the assault is serious.

Is a jury trial desirable?
Because a magistrate in a Local Court may view the facts very differently from a jury of 12 citizens hearing the case in the District Court, deciding whether a jury trial is desirable is an important decision.

What about penalties?
Once a matter goes to the District Court, that in itself, may result in the matter being viewed more seriously.
Maximum penalties available to judges are significantly greater than those available to magistrates, who are restricted to a maximum of 100 penalty units, two years’ imprisonment for one offence and five years for multiple offences (Criminal Procedure Act 1986 (NSW), ss 267, 268; Crimes (Sentencing Procedure) Act 1999 (NSW), s 58). Section 267(4) of the Criminal Procedure Act specifies certain offences with a different maximum penalty.

[16.60] Basic principles of criminal law

Historically four basic principles of our criminal law were that:
- a person is innocent until proven guilty
- guilt must be proved by the prosecution beyond reasonable doubt
- silence cannot be used to infer guilt
- a person who has been acquitted cannot be tried again for the same offence.

This section shows the recent watering down of the latter two of these fundamental principles.

[16.70] Innocent until proven guilty

The basis of our system of criminal justice is that a person charged with an offence is innocent until proven guilty.

[16.80] Proof beyond reasonable doubt

What the prosecution must prove

In accordance with the principle that a person is innocent until proven guilty is the rule that the prosecution must prove guilt.

It is not up to the person charged to establish their innocence, although sometimes the accused has to show that there is sufficient evidence to raise an issue as a defence.

The prosecution must satisfy the magistrate, judge or jury that the accused person is guilty beyond reasonable doubt. If there is any reasonable doubt about their guilt, they should be acquitted (that is, found to be not guilty of the offence). The prosecution must not only prove that the accused did the prohibited act with the necessary criminal intent, but also disprove any defences raised by the accused.

What the defendant may have to prove

In some cases the defendant merely has to raise a defence, that is, suggest it is a reasonable possibility, and the prosecution will then have to disprove it beyond a reasonable doubt. In other cases the burden of proving a particular defence, such as insanity, may be on the accused person. However, unlike the prosecution, the defence only has to be proved to the lesser standard of on the balance of probabilities.

[16.90] The right to remain silent

There is no general right in the Australian Constitution, or anywhere else in Australia, that says a person is entitled to remain silent when questioned by police.

However, a person is not required to answer questions put by a police officer, except in certain limited situations (see chapter 4, Arrest, interrogation and bail).

Is silence evidence of guilt?

Until 2013, the fact that a person chose to remain silent could not be used as evidence of their supposed guilt (see chapter 4, Arrest, interrogation and bail). However, in 2013 the NSW Parliament introduced new rules with regards to the right to silence following reforms in England (Evidence Act 1995 (NSW), s 89A). Now a suspect will be cautioned that although they have the right to remain silent, “it may harm their defence if they fail to mention something now that they later rely on at trial”. The special
caution only applies if the suspect has received legal advice at the time.

[16.100] Double jeopardy
The principle of double jeopardy requires that no-one should be punished more than once for the same offence, and that no-one should be twice placed in jeopardy of being convicted for the one offence. This means generally that if a person has been tried and acquitted of an offence, they cannot be tried again on the same charge. This principle emphasises the finality of verdicts in the resolution of disputes and ensures that prosecutions are not used as an instrument of tyranny or harassment.

In 2006, the NSW Parliament passed legislation abolishing the rule against double jeopardy in cases where:

- an acquittal of a “life sentence offence” (murder, manslaughter, gang rape, large commercial supply or production of illegal drugs) is debunked by “fresh and compelling evidence of guilt”; or
- an acquittal of a “15 years or more sentence offence” was tainted by perjury, bribery or perversion of the course of justice (Crimes (Appeal and Review) Act 2001 (NSW), ss 99 – 112).

Where to find the criminal law
Most crimes in NSW are covered by statutes passed by parliament. The main Act is the Crimes Act 1900 (NSW), but specific areas are covered by other Acts such as the Drug Misuse and Trafficking Act 1985 (NSW) and the Summary Offences Act 1988 (NSW). Crimes affecting federal powers or property are generally regulated by Commonwealth Acts such as the Crimes Act 1914 (Cth) and the Criminal Code Act 1995 (Cth).

Some crimes only exist at common law as a result of the rulings of courts over the years (for example, attempts to commit some crimes and conspiracies).

References to the Crimes Act in the following sections are to the NSW Act, unless otherwise specified.

Examples of crimes

[16.110] Assault

What is assault?
There are two types of assault covered by s 61 of the Crimes Act.

1. Battery assault
   Battery assault is intentional or reckless application of unlawful force, for example, hitting someone.

   What if the person consented?
   The application of force is unlawful unless the victim has consented (eg boxing). A person cannot consent to actual bodily harm or more, unless the defendant’s actions were within lawfully recognised exceptions such as surgery, boxing, contact sports, lawful corrections and manly pastimes (R v Brown [1994] 1 AC 212).

   In England it was held that victims could not consent to sado-masochistic activities, and thus the accused was guilty of assault. However, in Australia, the defendants would not be charged due to the Human Rights (Sexual Conduct) Act 1994 (Cth).

   Assaults, except where bodily harm is caused or excessive force is used (R v Raabe (1985) 14 A Crim R 381), require evidence that the victim did not consent.

   Mere touching can amount to an assault
   Touching and spitting can amount to an assault, provided it is intentional or reckless unlawful contact.

   2. Psychic assault
   Psychic assault is intentionally or recklessly creating the fear of imminent unlawful contact in the victim. For example, “give me your money or I’ll shoot” is an assault (and robbery).

   What about threats?
   A threat of immediate physical violence is enough, so long as it is a real rather than a
fanciful or impossible threat. The accused does not need to have the ability or the intention to carry out the threat (eg threatening with a plastic gun). The essence of psychic assault is that the victim felt fear.

Types of assault
The Crimes Act distinguishes between different types of assault, and each offence carries its own penalty. Common assaults have a maximum penalty of two years’ imprisonment (s 61). Assaults can also be aggravated by additional elements:

• assault occasioning actual bodily harm (maximum penalty five years (s 59))
• intentionally wounding or inflicting grievous bodily harm (“really serious bodily injury”) (maximum penalty 25 years (s 33))
• recklessly wounding or inflicting grievous bodily harm (maximum penalty 14 years (s 35))
• assaults on victims with special status. For example, assaults on police carry higher penalties, regardless of whether the accused knew the victim was a police officer (s 58).

The law about weapons

Guns
In 1996 there was a concerted effort by parliaments across the country to reassess laws relating to firearms. The Firearms Act 1996 was a result of this national approach. Firearm possession is confirmed by the Act as being a privilege, not a right, conditional on the overriding need to ensure public safety.

The key provisions of the Act are:

• the prohibition in most circumstances of the possession and use of automatic and self-loading rifles and shotguns
• a national licensing and registration scheme
• strict requirements for the licensing, sale and acquisition of firearms
• requirements for the safe keeping of firearms.

Other weapons
The Weapons Prohibition Act 1998 (NSW) regulates the possession, sale, manufacturing, safe-keeping and licensing of such weapons as extendable batons, machine guns, laser guns, knuckle dusters, studded gloves, explosives, crossbows, flick knives and star knives, missile launchers and flame throwers. This Act similarly confirms that firearm possession is a privilege, not a right, and requires that each person who possesses or uses a prohibited weapon under the authority of a permit has a genuine reason for possessing or using the weapon.

See also Offences involving knives at [16.150].

[H16.120] Homicide

What is homicide?
Homicide is the killing of a human being. To be charged with a homicide offence, a person must have caused the death of a human being.

Murder
For the charge of murder, the prosecution must prove that at the time of causing death, the accused had the mens rea or mental state of either an intention to kill or to cause grievous bodily harm (that is really serious bodily harm), or the recognition of the probability of death. Alternatively, a person can be found guilty of murder if they caused the death of the victim during or immediately after a 25-year offence. An example of this is where a person has broken into a house and inflicted grievous bodily harm (Crimes Act, s 18).

Voluntary manslaughter
If a person is charged with murder they can argue complete defences such as self-defence which, if successful, will lead to acquittal. An accused can also argue a partial defence which, if successful, will reduce the charge of murder to (voluntary) manslaughter. An accused might argue that the killing was in response to extreme provocation by the deceased (s 23), or they suffered a substantial impairment of the mind (s 23A), and/or they had acted in self-defence but had used excessive force (s 421).

Involuntary manslaughter
If an accused caused the death of the victim, but lacked the necessary mens rea for murder, they may still be charged with (involuntary) manslaughter. An accused may be charged with unlawful and dangerous act
manslaughter, which requires the prosecution to prove that the accused caused the death of the victim during an unlawful and dangerous act (Wilson v The Queen (1992) 174 CLR 313). An example of this may be during a bar brawl where an accused hit the victim (assault), causing the victim to fall back and hit their head, resulting in death.

Alternatively, an accused may be charged with manslaughter by criminal negligence. This arises where the accused’s gross negligence has caused the death of a victim. This may be charged where the accused has failed to act, where they had a legal duty to act. For example, legal duties have been found in parent/child relationships and voluntary assumption of care for helpless persons: Tuktuk v The Queen (1988) 14 NSWLR 226.

Assault causing death
Where a person assaults another by intentionally hitting them which causes their death the person can be charged with assault causing death. This particular offence has a maximum penalty of 20 years. If the person carrying out the assault is over 18 and intoxicated the maximum penalty is 25 years. Importantly the minimum sentence and non-parole period the court can impose is eight years, regardless of any matters raised in mitigation of penalty (ss 25A, 25B).

[16.130] Stealing

What is stealing?
If a person takes and carries away another person’s personal property with the intention of permanently depriving the owner of the property without their consent, that person can be guilty of larceny – that is, stealing (Crimes Act, s 117).

Intention to permanently deprive
The intention to permanently deprive can include not just keeping another person’s property, but acting in a way that the owner would not see the property again. This would include discarding it, selling it, giving it away or altering it.

Claim of right made in good faith
If a person honestly believes that they are legally entitled to property, then they cannot be guilty of larceny if they take the property or the value of the property: R v Fuge (2002) 123 A Crim R 310; R v Lopatta (1983) 35 SASR 101.

If a person finds something and keeps it
Someone who finds property and keeps it for themselves can be guilty of stealing, unless they honestly and reasonably believe that there was no likelihood the owner could be found.

For example, if you find a $20 note on the road, it would be reasonable to believe that the owner would not be found, so you could not be charged with theft if you decided to keep the money. However, if you found a wallet with identification, then you would be expected to make some effort in finding the owner (eg calling them, giving the wallet to the police).

“Borrowing” money without consent
A person who took money intending to use it, for example, to bet on the races, and later return it, could also be guilty of stealing (s 118).

Fraud
There is a basic offence of fraud where a person dishonestly obtains property or financial advantage by deception (s 192E). Deception can include words or conduct and covers situations where a person causes a computer to make a response the person is not authorised to cause it to make.

Eating a meal at a restaurant and then running out without paying would be fraud, as by sitting down at the restaurant you are dishonestly indicating that you will pay for the meal.

Other stealing offences
The Crimes Act also prohibits receiving stolen property.
Shoplifting

Summary stealing offences include shoplifting, perhaps the most common form of stealing or larceny.

Because shoplifting is such a prevalent offence, innocent shoppers can be wrongly accused. The simple explanation “I forgot to pay” is very often met with disbelief. Medical evidence, character evidence and the like, can be called to show that there was no intention to steal; that is, to take property without paying for it.

Can the person be searched or detained?

If a police officer suspects on reasonable grounds that a person has under his or her control anything stolen, the police officer may stop, search and detain the person.

Summary or indictable?

Stealing offences can be indictable or summary offences.

Summary offences are dealt with in the Local Court by a magistrate.

The maximum penalty for a stealing offence dealt with by a magistrate is two years’ jail and/or a fine of $11,000.

Offences where the property is valued at over $5000 can be dealt with by a judge and jury with the consent of the prosecution or the accused.

Car stealing

Driving or being a passenger in a stolen car

Joyriding is the unauthorised borrowing of a car with the intention of returning or abandoning it. The prosecution only needs to prove taking without consent.

Section 154A(1) makes it a criminal offence to drive or allow yourself to be a passenger in a car, knowing that the car has been taken without the owner’s consent. The maximum penalty before a judge is five years’ jail.

[16.140] Burglary

The Crimes Act seeks to cover all aspects of the range of activities involved in burglary.

Entering

Section 109 specifies that “entering with intent to commit a serious indictable offence” (such as stealing), or entering and actually committing a serious crime, are both offences where the person then breaks out, carrying a maximum penalty of 14 years’ imprisonment. Where a person enters a dwelling house with intent to commit a serious indictable offence, but does not break out, they will be liable for up to 10 years’ imprisonment.

Aggravated entry

If the offence is aggravated by violence, the use of a weapon (offensive weapon under s 109(2); dangerous weapon under s 109(3)), company or deprivation of liberty, heavier penalties, up to a maximum of 25 years, apply (s 109). Standard mandatory minimum sentences also apply. (See Sentencing at [14.170]).

Breaking out

Section 109 also covers situations where entry was not by force (such as through an
open door, but exit was obtained by breaking out.

**Breaking**

In the context of burglary, breaking need not involve smashing anything; it can be as little as opening a screen or internal door or an unlocked window.

**Breaking in**

Breaking into a dwelling, school, shop, warehouse, garage, factory or some such place and committing a crime, or intending to commit a crime, such as assault or property damage is also an offence (ss 112–113).

**Proving the intention to steal**

A theft does not have to be completed for an offence to be committed (if theft is intended).

**For example**

A person who is disturbed inside a house before grabbing the loot and who runs into the arms of a waiting off-duty police officer has committed the offence of breaking and entering with intent to commit a serious indictable offence (s 113).

The prosecution must prove from the circumstances (and/or any admission by the accused) that there was an intention to commit a particular crime. It might, for example, prove that the accused was dressed in dark clothes, broke a lock, entered the house and then fled. There might be evidence that drawers were disturbed.

This evidence, together with any admissions made by the accused, would probably be enough to prove that the accused intended to steal while in the house.

**Offences involving intent**

Section 114 specifies a number of offences involving intent, which means that a burglar can be apprehended before actually breaking, entering or stealing. This section covers anyone who:

- is armed with a weapon or instrument with intent to commit an indictable offence
- has with them implements for housebreaking or safebreaking, or implements that could be used to enter and/or drive a vehicle
- has their face blackened or disguised (or who has the materials to disguise themselves) with the intention of committing an offence.

The maximum penalty is seven years’ jail.

Where a person previously found guilty of any indictable offence is found guilty under s 114, that person is liable for up to 10 years’ jail (s 115).

**What are housebreaking and safebreaking implements?**

Housebreaking and safebreaking implements need not be marked “Acme Burglary Tools”. Ordinary household items like screwdrivers, pliers, knives and chisels can be used as evidence. The prosecution must prove that the items were in the possession of the accused for an illegal rather than an innocent purpose.

**Penalties**

The penalties referred to above are maximum penalties. All other sentencing options such as fines, bonds, community service orders, periodic detention and home detention remain open (see chapter 14, Court).

**The attitude of the courts**

It is quite clear, however, from decisions by the Court of Criminal Appeal (for example, *R v Harris* (2007) 171 A Crim R 267; *R v Ponfield* (1999) 48 NSWLR 327) that the courts take a hard line when sentencing offenders of this sort. Jail is frequently seen as the appropriate punishment. Those with records of such offences, or committing multiple offences, can expect long jail terms.

**Penalties for less serious offences**

Offences where the property involved is less than $15,000 may be dealt with by a magistrate in the Local Court, where the maximum penalty is limited to two years’ jail and/or $11,000.
[16.150] Offences in public places

Thousands of people are charged each year with so-called public order offences under the Summary Offences Act 1988 (NSW). Most are fined or given bonds, but some are directed to perform community service work or imprisoned. Police powers with regard to public order offences are specified under the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) (LEPRA).

Public order legislation is extensively used against young people, vandals and demonstrators. Many of the offences involved are fairly trivial, victimless crimes, but the impact on the lives of the people convicted may not be trivial. These matters are noted in police records and count as convictions, which are often required to be disclosed on employment applications.

As summary offences, these offences are dealt with by a magistrate in the Local Court.

Questions of law are rarely raised in relation to street offences. Most cases depend on the facts and circumstances.

Offensive conduct or language

Under s 4(1) and 4A of the Summary Offences Act, a person must not conduct themselves in an offensive manner near or within view or hearing of a public place or school, or use offensive language in or near or within hearing of such a place.

What must be proved?
The prosecution must prove, beyond reasonable doubt (the standard of proof required in all criminal cases), that:

- the conduct occurred near or within view of a public place or school, and
- the conduct was offensive.

To establish the offence, it is not necessary that a member of the public has actually been offended by the language. Further, it is not necessary that a member of the public be present when the language is used (Jolly v The Queen (2009) 9 DCLR (NSW) 225).

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Offences in private places

Some conduct that is an offence in a public place will be an offence even if it occurs in a private place; for example, certain prostitution offences (see Sex work at [16.200]), and the offence of public disorder.

The defence of reasonable excuse

Even if the formal elements of an offence are proved beyond reasonable doubt, the accused can still be acquitted if they can show, on the balance of probabilities, that they had a reasonable excuse for the conduct.

What constitutes a reasonable excuse is not entirely clear, but it may extend to a mistake of fact or law based on reasonable grounds (see for example He Kau Teh v The Queen (1985) 157 CLR 523).

Penalty

The penalty for offensive conduct is a fine of up to six penalty units or three months’ imprisonment. The penalty for offensive language is a fine of up to six penalty units.

Penalty units

If the amounts of fines were specified in Acts, they would have to be amended every time fines were increased. To avoid this, a system is used that specifies penalty units for an offence.

The value of one penalty unit is found in the Crimes (Sentencing Procedure) Act 1999 (NSW), s 17, and is currently $110. Thus the value of six penalty units is currently $660.

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What it means

What is a public place?

Public place means a place (land, water or building) to which the public (even a limited section) has access (Summary Offences Act, s 3). It does not matter whether entry is free or not, or whether the place is usually open to the public or not.

Schools are not included in this definition. They are defined separately.

What is offensive?

The NSW Court of Appeal, using the Oxford Dictionary, noted in Smith’s case [1974] 2 NSWLR 586 that offensive means displeasing, annoying or insulting, though none of those words is a precise alternative to “offensive”, which has its own meaning drawn from the context. The word “fucking” has been held by some Supreme Court
judges to be of itself offensive, although some magistrates have taken a more realistic view.

**What is conduct?**

Conduct has not been specifically defined, but is usually taken to mean behaviour.

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**Other summary offences**

Other summary offences include obscene exposure and being in possession of a knife (see Offences involving knives below) and annoying or harassing behaviour.

Police can move people on and give them directions if they see them in public engaging in such behaviour (LEFRA, s 198). Under s 9 of the Summary Offences Act it is an offence where a move on order is given for being drunk or disorderly and within six hours the same person is drunk and disorderly in another place.

Some summary offences (such as possession of an offensive implement) carry penalties of up to 50 penalty units or two years’ imprisonment (s 11B). Defacing property using a spray can could put serious and persistent culprits in jail for up to 12 months: *Graffiti Control Act 2008 (NSW)*, s 4.

**Lesser summary offences**

Lesser offences under the Summary Offences Act include:

- obstructing traffic (maximum penalty – four penalty units)
- damaging fountains, shrines, monuments and statues (maximum penalty for wilfully damaging or defacing any protected place – 40 penalty units; maximum penalty for committing nuisance or offensive/indecent act in or on any war memorial – 20 penalty units).

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**Offences involving knives**

It is an offence to be in possession of a knife in public without reasonable excuse: *Summary Offences Act*, s 11C. Police have the power to search for knives if they suspect on reasonable grounds that the person has a dangerous implement on them (LEFRA, s 26). A police officer may request a person who is in a public place or a school to submit to a frisk search if the police officer suspects on reasonable grounds that the person has a dangerous implement in their custody. The fact that a person is in a location with a high incidence of violence may be taken into account in determining whether there are reasonable grounds to suspect the person has a dangerous implement.

The Summary Offences Act gives police the power to search anyone they reasonably suspect of having a knife in a public place or school (s 11C).

Maximum penalties for knife-related offences are:

- in the case of possession of an offensive implement in a public place or school, 50 penalty units or two years’ imprisonment;
- in the case of custody of a knife in a public place or school, 20 penalty units or two years’ imprisonment, or both;
- in the case of a parent who knowingly authorised or permitted their child to commit an offence under s 11C, five penalty units;
- in the case of sales of knives to children under 16 years of age, 50 penalty units.

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**Public assemblies**

The Summary Offences Act requires that the Police Commissioner be notified of an intention to hold a public assembly. There is a form for the purpose in Sch 1 of the Summary Offences Regulation 2010.

**Information required**

The form asks for details such as:

- the date, time, place and purpose of the assembly (or route for a procession)
- the number of people expected to attend
- the name and address of a person willing to take responsibility for organising the assembly (*Summary Offences Act*, s 23).

**What the Police Commissioner may do**

Where the commissioner is notified (at least seven days in advance), they may either:

- authorise the assembly, or
- apply to the District Court or Supreme Court for an order prohibiting it (s 25).

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**Before the commissioner applies to the court**

Before applying to the court, the commissioner must invite the organisers to:

- confer with a specified police representative, at a specified time and place, or
- make written representations within a fixed time: s 25(2).

**Application for court orders by the organiser**

If notification prohibiting the assembly is received less than seven days before it is to
be held, the organiser can apply to the District Court or Supreme Court for an order to authorise it (s 26).
The court’s decision is final and not subject to appeal.

**Participation**
Taking part in an authorised public assembly is not an offence, and the offence of obstructing traffic does not apply (s 24).

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### Unauthorised assemblies
An unauthorised public assembly may take place, but participants do not have any immunity from prosecution for obstructing traffic or unlawful assembly (Crimes Act, s 545C).

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### Violent disorder
Section 11A of the Summary Offences Act deals with violent disorder. This offence occurs when:
- there are three or more people “present together”, and
- any of them intentionally uses or threatens violence, or carries on so that a hypothetical “person of reasonable firmness” (there need not be any person present at the scene) would be afraid for their personal safety.

All members of the group will be guilty of the offence, which carries a maximum penalty of 10 penalty units or six months’ imprisonment.

This offence can be committed in private as well as in public.

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### What is violence?
Violence is defined to include threats to property as well as people, and can include acts which are intended to be harmful but do not in fact result in any harm.

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### [16.160] Criminal trespass

**Entering or remaining on “enclosed lands”**
It is an offence, without lawful excuse, to:
- enter enclosed lands without the consent of the owner, occupier or person apparently in charge
- remain on enclosed lands after being requested to leave by that person (Inclosed Lands Protection Act 1901 (NSW), s 4).

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### What are enclosed lands?
Enclosed lands means any land, either public or private, surrounded by a fence or wall, or by a fence or wall and a canal or some natural feature such as a river or cliff that provides recognisable boundaries. It includes any part of a building or structure and any land occupied or used in connection with a building or structure (s 3).

### Prescribed premises
Some premises including schools, childcare centres, hospitals and nursing homes are specially prescribed, and unlawful entry to them carries a double penalty.

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### The defence of lawful excuse
The accused is required to establish that they had a lawful excuse for being on the land.

It is not necessary to show a legal right to be there, and an accused can rely on a mistaken and genuine belief that, if true, would justify their being there; for example, they were invited to visit a friend and mistakenly entered the wrong house (Darcy v Preterm Foundation [1983] 2 NSWLR 49; Minkley v Munro (unreported, Supreme Court of NSW, August 1986, per Grove J)).

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### Penalty
The maximum penalty is 10 penalty units in the case of prescribed premises and five penalty units in any other case.

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### Failing to leave and behaving offensively
A person is guilty of a further offence if they:
- commit an offence by failing to leave when asked by an appropriate person (the owner, occupier or person apparently in charge), and
- behave in an offensive manner (s 4A).

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### Penalty
The maximum penalty is 10 penalty units, or 20 penalty units for prescribed premises.
Powers of the owner, occupier or person apparently in charge

Section 6 of the Inclosed Lands Protection Act 1901 gives powers of arrest to the owner, occupier or person in charge, and it is an offence for the trespasser to give them a false name or address.

Prosecution under both Acts

Section 4 of the Summary Offences Act applies to offensive conduct in a private place or school. For example, a squatter or demonstrator involved in offensive language may well be convicted of both trespass and offensive behaviour.

The likelihood of conviction for offensive language is, of course, subject to the court’s attitude to the words used.

If a person is charged under the Summary Offences Act

The right to be given details of charges

A person charged with an offence under the Summary Offences Act may ask police for further details of the charges. They are entitled to know where, when and how the police claim the offence occurred.

If someone requests these details and the police do not supply them, the court must either adjourn the charge until they are supplied, or dismiss it (s 13(1)).

A request for particulars should be made in writing at least 14 days before the date of the hearing.

If the accused pleads not guilty the police are obliged to serve them with a copy of all witnesses’ statements on which the police rely, and a copy of any exhibits or details of where they can be inspected (Criminal Procedure Act, ss 183, 184). The brief of evidence must be served at least 14 days before the hearing (s 183).

Liability to pay compensation if convicted

Anyone convicted of an offence under the Summary Offences Act is liable to pay up to 20 penalty units for the repair or restoration of anything damaged (s 33).

[16.170] Drunkenness

An intoxicated person may be guilty of offensive conduct, but public drunkenness is not an offence.

Power to detain an intoxicated person

There are significant powers of detention under the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW). A person who is intoxicated in a public place may be detained by a police officer if they are found to be:

- behaving in a disorderly manner
- behaving in a manner likely to cause injury to themselves or someone else, or damage to property
- in need of physical protection because of their intoxication (s 206(1)).

The power extends to juveniles. The person must be released if they cease to be intoxicated (s 207(2)(f)).

Who is an intoxicated person?

A person is considered to be intoxicated if they are seriously affected by alcohol and/or another drug. This leaves a wide area for police discretion.

Police protection from liability

Police and other people authorised to detain intoxicated persons are protected from liability for legal action (such as an action for false imprisonment), provided they act in good faith (s 210).

Release into the care of a responsible person

The person must be released if:

- a responsible person is willing to undertake their immediate care, and
- there is no sufficient reason for not releasing them into that person’s care (s 206).

A person who is detained has the right to be informed about this, and given a reasonable opportunity to contact a friend or relative who can look after them.

Police search powers

Police and authorised people have the power to search intoxicated people in detention (s 208), but anything taken under this power must be returned when the person is released.

Offences committed while intoxicated

Where an intoxicated person commits a criminal offence the provisions of the Law Enforcement (Powers and Responsibilities) Act
2002 do not apply (s 206(2)), and the person is dealt with in the same way as any other arrested person.

Is the intoxicated person a prisoner?
A person detained under this Law Enforcement (Powers and Responsibilities) Act 2002 is not a prisoner. Only someone arrested for a criminal offence, whether intoxicated or not, is a prisoner.

The Inebriates Act
The Inebriates Act 1912 (NSW) deals with persons who habitually use intoxicating or narcotic drugs to excess. People falling within this definition may be subject to special court orders, including detention in hospitals or other institutions.

Prohibition of alcohol consumption
Some local councils have ordinances prohibiting the consumption of alcohol in certain areas, with fines for transgressors.

[16.180] Summary offences in the Crimes Act
A number of summary offences can be found in the Crimes Act, in the part which deals with offences to be tried summarily.

Resisting police
Resisting or hindering police in the execution of their duty or inciting someone else to resist, hinder or assault police is a summary offence under the Crimes Act (s 546C). The maximum penalty is 10 penalty units and/or 12 months' imprisonment.

Police powers in relation to vessels and vehicle searches
There are a number of sections relating to the powers of police officers to board vessels, stop and detain vessels, and stop and search people and vehicles: Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 36, 36A, 42.

Other offences
Other summary offences under the Crimes Act include:
- being habitually with someone known to have been convicted of an indictable offence (s 546A)
- being found in or near a public place with intent to commit an indictable offence, having already been convicted of an indictable offence (s 546B)
- “peeping or prying” on another person without reasonable cause (s 547C).

Maximum penalties for these offences range from two to four penalty units or three to six months' imprisonment.

[16.190] Penalties
Sentencing in the Local Court
Although magistrates have the power to impose a sentence of imprisonment for most summary offences (see chapter 14, Court), a prison sentence should not be imposed unless the magistrate has considered all possible alternatives and decided that none of them is appropriate (Crimes (Sentencing Procedure) Act 1999 (NSW), s 5).

The most common penalty is a fine or good behaviour bond. In more serious matters, where a prison sentence is available, a magistrate can require a person to serve up to 500 hours of community service, or to serve a jail term by way of periodic detention (for example, by spending weekends in jail), or home detention.

When a convicted person can be discharged without penalty
First offenders or those convicted of relatively trivial offences who are found guilty may seek leniency from the court under s 10 of the Crimes (Sentencing Procedure) Act 1999 (see chapter 14, Court), which allows the magistrate a discretion to discharge them without penalty and without a conviction being recorded against their name.
Complaints about police

If you are mistreated by a police officer or denied your legal rights when being questioned or arrested, you should make a complaint to the patrol commander at the police station, the Police Commissioner or the relevant Ombudsman. Complaints about NSW police officers are referred to the NSW Ombudsman and complaints about Australian Federal Police are referred to the Commonwealth Ombudsman (see chapter 10, Complaints). If the matter is serious, legal action may also be appropriate. You should contact your nearest community legal centre for advice about this (see Contact points for chapter 5, Assistance with legal problems for a list of community legal centres).

Remember, complaining about the police may require persistence, and may not seem worth the effort at times. However, it is important that people who have been mistreated or denied their rights by police take the opportunity to use the complaint mechanisms available.

[16.200] Sex work

It is not illegal to work as a sex worker in NSW if you are over 18 (Crimes Act, s 91C).

It is not an offence to operate or live off the earnings of a brothel in NSW (Restricted Premises Act 1943 (NSW)), and brothels are regulated by local councils (Environmental Planning and Assessment Act 1979 (NSW)).

What is a sexual service?

A sexual service is sexual intercourse – the introduction into the vagina, anus or mouth of a person any part of another person’s body or an object controlled by them – or masturbation for payment (defined in the Crimes Act, s 61H). The courts have extended the definition to include any act of offering the body that involves physical contact with another person for sexual gratification in exchange for money, regardless of whether or not sexual intercourse is provided (Summary Offences Act, s 3).

[16.210] Offences

Inducement to an act of prostitution

Section 15A of the Summary Offences Act and the federal Criminal Code Act 1995 make it an offence to induce someone to commit an act of prostitution. A person can be charged with an offence if they put pressure on someone or offer money or any other inducement to influence them to commit an act of prostitution with someone else.

Keeping a person in sexual servitude

Under the NSW Crimes Act (s 80D) and the federal Criminal Code Act 1995 it is an offence to keep someone in sexual servitude, where the person is not free to:
- stop sex work due to force or threat to themselves or others, or
- leave premises where sexual services are provided.

Recruiting a sex worker by deception

It is an offence to recruit a sex worker by the deception that sexual services will not be expected of them.

Advertising for sex workers

Under ss 18 and 18A of the Summary Offences Act it is an offence to advertise a sex industry business or to advertise for sex workers.

Living off the earnings of a sex worker

Living off the earnings of a sex worker is not a crime unless the worker is a street sex worker (s 15).

Children and sex work

It is illegal to involve children (people under 18) in prostitution (Crimes Act), and children can be seen to be at risk if they are on premises that are used for prostitution (Children and Young Persons (Care and Protection) Act 1998 (NSW)).

Premises used for live adult entertainment, where there is no legal prohibition on minors entering the premises, may be deemed by the minister (upon application by a senior police officer) to be sex clubs in which minors are prohibited (Summary Offences Act, ss 21B, 21C).
[16.220] **Sex industry workplaces**

There are a number of workplaces in the sex industry:
- sex services premises, including brothels and home occupation sex service premises
- street-based sex works.

### What is a brothel?

The Restricted Premises Act 1943, s 2 defines brothels as places used habitually for the purposes of prostitution and premises that have been and are likely to be used for prostitution, or that have been advertised or represented as being used for prostitution and that are likely to be used for the purposes of prostitution. Premises may constitute a brothel even though they are used by only one sex worker for the purposes of prostitution. The definition of brothel in s 4(1) of the Environmental Planning and Assessment Act 1979, differs in that it excludes premises used by only one sex worker from the definition.

### Brothels

In NSW, brothels are able to operate as legitimate businesses. Brothels are regulated by councils as legal land uses requiring development consent, with provisions regulating their location, design and operation.

If a brothel operates without, or contrary to, their development consent or with adverse impact on the community, the council may fine the operators (Environmental Planning and Assessment Act 1979). Brothel closure orders against the operator or staff of unlawful brothels and related sex service premises can be made (s 121ZR(1)). If a brothel closure order is not complied with, the court can make a Utilities Order directing a provider of water, electricity or gas to cease providing those services (s 121ZS). A Utilities Order cannot be made for premises used for residential purposes.

Councils can seek an order to stop the owner or occupier of premises from using or allowing the use of premises as a brothel (Restricted Premises Act 1943, s 17(2A)) due to a complaint(s) against premises with “two or more prostitutes” because of the adverse impacts caused by the location and operation of the premises on people who live or work, or who use, or whose children use, facilities in the vicinity of the brothel.

It is an offence for businesses to provide sexual services in premises that pretend to be for massage, sauna/steam baths, photo/health studios or services of a like nature (Summary Offences Act, s 16). Workers, clients (s 16) and management (s 17) all commit offences in such circumstances.

### Private workers

Home occupation sex service premises, where a person provides sexual services from their residence, are defined as brothels by some local councils and by NSW legislation (Restricted Premises Act 1943). Council planning policies may restrict or prohibit home occupation sex service premises from operating in specific zones or building types, constrain the maximum number of sex workers in a complying use, or require the operator to seek consent as a brothel.

Home occupation sex service premises operating in strata title apartment buildings may require the consent of the owners’ corporation and those in public or community housing may require the consent of the letting agency. Premises with a residential tenancy agreement must comply with the requirements of the agreement.

### Street-based sex workers

Soliciting in the public domain is legal in NSW. It is, however, an offence for street workers to solicit near or within view from a dwelling, school, church, hospital or public place, or in a school, church or hospital.

A worker who harasses someone while soliciting near or within view from a dwelling, school, church, hospital or public place is committing an offence (Summary Offences Act, s 19).

A client (kerb crawler) on or near a road which is near or within view from a dwelling, school, church or hospital who solicits someone for prostitution is committing an offence (s 19A).

Anyone involved in an act of prostitution in or within view from a church, hospital, school or public place or in a car or within view from a dwelling is committing an offence (s 20).
Anyone involved in an act of indecency in a public place is committing an offence (Crimes Act, s 61N).

[16.230] Health and safety

The operators of premises providing sexual services must ensure the health and safety of employees, clients and visitors to the workplace (Work Health and Safety Act 2011 (NSW); Workplace Injury Management and Workers Compensation Act 1998 (NSW); Workers Compensation Act 1987 (NSW)).

Anyone with a transmissible infection must obtain the other person’s informed consent before having sex with them in any circumstances (Public Health Act 2010 (NSW), s 79).

For further information and assistance in relation to sex work and the law, contact the Sex Workers Outreach Project (SWOP) or your local community legal centre.
[16.240] Contact points

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 (local and chargeable calls) or 1800 555 677 (free calls) or 1300 555 727 (Speak and Listen calls). For more information, see www.relayservice.com.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS) 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.

Courts
A list of courts is in Contact points for chapter 14, Court.

Government bodies
Director of Public Prosecutions, Office of
www.odpp.nsw.gov.au
ph: 9285 8606

Domestic Violence Line
www.community.nsw.gov.au
Dept of Community Services
ph: 1800 656 463

A complete list of contacts relevant to domestic violence is in Contact points for chapter 21, Domestic violence.

Independent Commission Against Corruption (ICAC)
www.icac.nsw.gov.au
ph: 1800 463 909 or 8281 5999

Juvenile Justice, Department of
www.dj.nsw.gov.au
ph: 9219 9400

For a list of Juvenile Justice Centres, see Contact points for chapter 8, Children and young people.

Ombudsman, Commonwealth
www.ombudsman.gov.au
ph: 1300 362 072

Ombudsman, NSW
www.ombo.nsw.gov.au
ph: 1800 451 524 or 9286 1000

Public Defender’s Office
www.publicdefenders.lawlink.nsw.gov.au
ph: 9268 3111

Witness Assistance Service
Office of the Director of Public Prosecutions
ph: 1800 814 534

Police
Australian Federal Police
www.afp.gov.au
ph: 9286 4000

Immigration and Citizenship, Department of
www.immi.gov.au
ph: 131 881

NSW Police
(including Witness Assistance Program)
www.police.nsw.gov.au
Customer assistance unit
ph: 1800 725 631
General enquiries
ph: 131 444
Crimestoppers
www.crimestoppers.com.au
ph: 1800 333 000

Support, legal aid and advice
A list of community legal centres and Legal Aid Commission offices is in Contact points for chapter 5, Assistance with legal problems.

Bar Association, NSW
www.nswbar.asn.au
ph: 9232 4055

Council for Civil Liberties, NSW
www.nswcll.org.au
ph: 8090 2952

LawAccess NSW
www.lawaccess.nsw.gov.au
ph: 1300 888 529

Law Society of NSW
www.lawsociety.com.au
ph: 9926 0333

Legal Aid NSW
www.legalaid.nsw.gov.au
ph: 1300 888 529
Legal aid youth hotline
ph: 1800 101 810


SWOP (Sex Workers Outreach Project)
www.swop.org.au
ph: 1800 622 902 or 9206 2166

Victims of crime
A list of contacts relevant to victims of crime is in Contact points for chapter 42, Victims support.

Other useful links
Australasian Legal Information Institute (AustLII)
www.austlii.edu.au
Justice Action
www.justiceaction.org.au