

The Shopfront

YOUTH LEGAL CENTRE

Police powers and your rights

1 Powers to demand name & address

In most situations you do not have to tell the police your name and address. However, if they ask, it is usually a good idea to tell the police your name and address, or show them some ID, otherwise they might make trouble for you or even arrest you.

You do have to tell the police your name and address in some situations, including:

- if police suspect on reasonable grounds that you may be able to **assist them to investigate an indictable offence** because you were at or near the scene of the offence (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.11(1));
- if police intend to give you a **direction to leave a place** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.11(2)); or
- if police suspect on reasonable grounds that **an apprehended violence order has been made against you** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.13A); or
- if you are **under 18** and police **suspect you of carrying or consuming alcohol in public** (*Summary Offences Act 1988*, s.11); or
- if you are **suspected of committing an offence on a train** or part of a railway. (*Rail Safety Act 2002*, s.96); or
- if police are trying to serve a **fine default warrant** (*Fines Act 1996*, s.104); or
- if police **have been authorised to use their emergency public disorder powers**, and you are on a **target road** or in a **target area**, and police suspect on reasonable grounds that you have been involved or are likely to be involved in large-scale public disorder (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87L); (see Part 8 – Emergency public disorder powers); or
- in many other situations relating to **vehicles and traffic** (see Part 7 - Powers relating to vehicles and traffic).

In situations involving vehicles and traffic, you usually have to show the police your licence if you have one.

In nearly all other situations, even if you have to tell the police your name and address, **you do not have to show ID.**

2 Questioning

2.1 The right to silence

The police may ask you questions at any time, but:

- in nearly all situations, **you do not have to answer police questions** except by giving your name and address in the circumstances listed above, and

- the police have **no power to stop or detain you just to ask questions.**

If you have been involved in a traffic offence or accident, you may have to give them further details (see section 7: “Powers relating to vehicles and traffic”).

Even if you have been arrested or charged, you still don’t have to say or sign anything. If suspected of a crime, it is usually not in your interest to answer police questions, as your answers could be used as evidence against you.

2.2 Special protection for under-18s

If you are **under 18** there must be a **responsible adult** (eg parent, guardian, youth worker, solicitor) present when you talk to the police. Otherwise whatever you say to police will probably be **inadmissible** in court, which means it can’t be used as evidence against you (*Children (Criminal Proceedings) Act 1987*, s.13). It is important for the adult to protect the young person, eg by taking notes during the interview, making sure the young person knows they do not have to answer questions, and trying to ensure the young person gets legal advice.

Young people under 18 may be eligible for a **police caution or youth justice conference** under the *Young Offenders Act* if they admit to the offence in the presence of a responsible adult and consent to a caution or conference. It may be tempting to admit to an offence in the hope of avoiding court proceedings, but young people should be careful of making admissions without receiving legal advice first.

2.3 Getting legal advice

You should not answer questions or sign statements until you get independent legal advice. Young people can get advice from the **Legal Aid Hotline for Under 18s** on **1800 10 18 10**.

See the separate documents on **Police Interviews** and **The Young Offenders Act**.

3 Searching

3.1 When can the police search you?

The police can stop and search you (including your car or possessions) if:

- **you agree**; or
- **you are under arrest or in custody** (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss.23, 24); or
- they have a **search warrant**, which they must show you if you ask; or
- police **suspect on reasonable grounds** that you are carrying **stolen goods** or something **about to be used in a serious crime (eg weapon)** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.21(1)(a)); or
- police **suspect on reasonable grounds** that you have (on you or in your vehicle) a **prohibited drug** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.21(1)(d) & s.36(1)(e)); or
- police **suspect on reasonable grounds** that you have (on you, or in or your bag or school locker) a **knife or a “dangerous implement”**. In this situation police may request you to undergo a frisk search, or a search of your bag or locker. They can’t forcibly search you, but it is an offence to refuse a search for knives (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.27); or

- if your car belongs to a “**class of vehicle**” that police suspect on reasonable grounds **is, was or may have been used in connection with an indictable offence**, or circumstances exist that might give rise to a **serious risk to public safety** and stopping and searching the car would lessen the risk (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.36(2)).
- if police **have been authorised to use their emergency public disorder powers**, and you/your vehicle are on a **target road** or in a **target area**. The police don’t need any warrant or reasonable suspicion. They are not allowed to strip search you (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87J-K); (see Part 8 – Emergency public disorder powers).

3.2 Reasonable suspicion

In most cases, police can’t search you unless they suspect on reasonable grounds that you have something illegal on you. “Reasonable suspicion” is very difficult to define, and it is often left to a court to decide. **A reasonable suspicion is less than a belief but more than just a possibility. It must have some kind of factual basis**, and it will usually be based on a number of factors.

For example, the mere fact that you are in an area well-known for drug dealing will not usually be sufficient to raise a reasonable suspicion, but if police see you approaching people or handing something over to another person, they would probably have reasonable grounds to suspect that you were carrying drugs.

Simply objecting to being searched or demanding to know why you are being searched does not give police reasonable grounds for suspicion – insisting on your rights does not mean that you have something to hide.

3.3 What the police must tell you

When police search you, they must provide **evidence that they are a police officer** (unless the police officer is in uniform), provide their **name and place of duty**, and tell you the reason for the search.

When searching for knives or dangerous implements, they must give you this information before asking to search you. In other situations they must do it before or during the search, if possible, or otherwise as soon as possible afterwards.

In situations where the law requires you to comply with a police officer’s request or direction (eg requesting you to undergo a knife search), police must tell you that it’s a legal requirement (unless you are already complying). If you still don’t comply, the police must warn you that failure to comply is an offence (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.201).

3.4 Rules for conducting searches

When searching for knives or dangerous implements, police may do a **frisk search** and/or search your **bag or school locker** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.26).

In most other situations, police may do either a **frisk search** or an **ordinary search**, which may include requiring you to remove outer clothing (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.30).

If police suspect on reasonable grounds that you have something in your mouth or hair, they may ask you to open your mouth or to move or shake your hair (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.21A).

When searching you, the police must ask for your co-operation, and they must search as quickly as possible in the least invasive way possible, ensuring reasonable privacy. They must not search you and question you at the same time. Where reasonably practicable in the circumstances, the search must be carried out by a person of the same sex (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.32).

Strip searches must not be performed except when it is necessary and in serious and urgent circumstances (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.31). When conducting a strip search, **police must not touch the person** and must ensure that the person's privacy is respected. A strip search cannot be performed on a child under 10. For a person between 10 and 18, a parent or guardian, or a non-police person acceptable to the person being searched, should be present (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss.33, 34).

4 Sniffer dogs

Police have the power to use **sniffer dogs to find prohibited drugs or plants** but only in **authorised places** such as in or outside a pub or club, sporting event, concert, dance party or other entertainment, on certain public transport vehicles, platforms or stops, or in certain public places if they have a warrant (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss.147-149).

Police must **keep the dog under control** and take all reasonable precautions to ensure the dog does not touch you. They have **no power to detain you while the dog sniffs you** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.150).

If a dog sits down next to you, indicating that it has detected the scent of a drug on you, then the police will have reasonable grounds to suspect that you are in possession of a prohibited drug, and may search you.

5 Entering private property

Police can enter your house and other private premises:

- **if you** (or someone living on, or in control of, the premises) **agree**; or
- if they have a **search warrant**, which they must show if you ask (*Law Enforcement (Powers and Responsibilities) Act 2002*, Part 5); or
- **to arrest someone. They must have reasonable grounds to arrest the person, and reasonable grounds to believe the person is in the house.** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.10) In this case they can only search an arrested person and their belongings, not the whole house; or
- **to prevent domestic violence** (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 81-87); or
- **to prevent a "breach of the peace"** (this usually involves a threat of violence or property damage) or to **prevent serious injury** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.9).

6 Move-on powers

6.1 When can the police move you on?

Police may give a “**reasonable direction**” to a person in a **public place** if they have reasonable grounds to believe that the person's **presence or conduct**:

- is **obstructing** another person or persons or traffic; or
- constitutes **harassment or intimidation** of another person or persons ; or
- is causing or **likely to cause fear** to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of “reasonable firmness”; or
- is for the purpose of **supplying or obtaining any prohibited drug** (*Law Enforcement (Powers and Responsibilities) Act 2002, s.197*).

Police may also give you a direction if:

- you are **intoxicated**, and
- police believe on reasonable grounds that you are likely to cause **injury to any other person(s)** or **damage to property** or **a risk to public safety** or if you are **disorderly** (*Law Enforcement (Powers and Responsibilities) Act 2002, s.198*).

A move-on direction may not be given to anyone taking part in an **industrial dispute**, a **demonstration** or **protest**, a procession or an organised assembly (*Law Enforcement (Powers and Responsibilities) Act 2002, s.200*).

6.2 What sort of direction can the police give you?

If police are using their **general direction-giving power**, the direction must be **reasonable in the circumstances** to reduce or eliminate the obstruction, harassment, intimidation or fear, or to stop the drug sale/purchase (*Law Enforcement (Powers and Responsibilities) Act 2002, s.197 (2)*).

Examples of reasonable directions include telling people to stop fighting or to move away from a doorway they are blocking. It is probably not reasonable to tell a person to leave the area and not to come back for 24 hours, 7 days, forever, etc.

If the police are giving you a direction because you are **intoxicated**, the direction must be **reasonable in the circumstances** for the purpose of preventing injury or damage, reducing or eliminating the risk you may cause, or preventing you from continuing with disorderly behaviour in a public place. The police can direct you to leave a public place and not return for up to 6 hours (*Law Enforcement (Powers and Responsibilities) Act 2002, s.198 (2) and (3)*).

6.3 Disobeying a direction

It is an offence to disobey a reasonable direction, but only after the police have identified themselves, told you the reason for the direction and warned you that failure to comply is an offence (*Law Enforcement (Powers and Responsibilities) Act 2002, ss.199, 201*). Until 12 December 2006, police were required to give two warnings, but now they only have to give one.

If the person does not obey the direction, but stops the problem behaviour, they are not guilty of an offence (*Law Enforcement (Powers and Responsibilities) Act 2002, s.199*).

The **maximum penalty** for disobeying a direction is \$220, and police usually give people a \$220 infringement notice (on the spot fine). If you think you are not guilty (eg

because the direction was not reasonable), or can't pay such a heavy fine, you can choose to take the matter to court.

6.4 Being intoxicated and disorderly in a public place after being given a direction

If you've been given a move-on direction because you are intoxicated and disorderly, then it is an offence for you to be **found in any public place while still intoxicated and disorderly, for up to 6 hours** after you were directed to move on. This applies even if the public place is not near the place where you given the direction.

The maximum penalty for this offence is \$660 (*Summary Offences Act 1988* s.9).

It is not an offence if you have a reasonable excuse (eg. you are still on your way home).

6.5 Emergency powers to break up groups

Police also have the power to direct groups to break up, if police are authorised to use emergency public disorder powers (see Part 8 – Emergency public disorder powers).

7 Powers relating to vehicles and traffic

7.1 Power to stop vehicles

Police can stop your car:

- for a **random breath test**. Police do not have to suspect that you have been drinking, and you don't have to be driving badly. They only need to show you were driving a car (or were sitting in the driver's seat and about to start the car) (*Road Transport (Safety and Management) Act 1999* s.13).
- (since 15 December 2006), for a **random "oral fluid" drug test**. The rules are similar to random breath tests (*Road Transport (Safety and Management) Act 1999* s.18B).
- if they suspect on reasonable grounds that they have a right to **search or arrest someone in the car** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.36A).
- if your car belongs to a "**class of vehicle**" that police suspect on reasonable grounds **is, was or may have been used in connection with an indictable offence** or circumstances exist that might give rise to a **serious risk to public safety** and stopping and searching the car would lessen the risk (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.36(2)). Police can set up road blocks to help them do this (s.37).
- if police **have been authorised to use their emergency public disorder powers**, and you/your vehicle are on a **target road** or in a **target area** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87J-K); (see Part 8 – Emergency public disorder powers).

7.2 Power to search your vehicle

See section 3 of this document (Searching)

7.3 Power to demand identity and other information

- You have to give the police your name and address, and show your licence, on request if you are **driving a car or accompanying a learner driver** (*Road Transport (General) Act 2005* ss.171, 172). It is an offence to refuse to disclose your identity or show your licence, or to give false or misleading details.
- If a driver is alleged to have committed a **traffic offence**, the owner or person responsible for the vehicle must provide the name and address of the driver. It is an offence not to provide these details (unless you really don't know) (*Road Transport (General) Act 2005* s.173).
- **Drivers and passengers must provide their own (and each other's) name and address** if police suspect on reasonable grounds that a **vehicle is being (or was, or may have been) used in connection with an indictable offence**. It is an offence to refuse to provide information, or to provide false or misleading information, but you don't have to show your licence or any other form of ID (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss.14-18).
- If you are **involved in an accident**, you must give your name and contact details to the other driver. You must also tell police your name and address, the name and address of the vehicle's owner, the vehicle's registration number, any other information necessary to identify the vehicle, and a brief explanation of what happened (*Australian Road Rules* r.287, *Road Transport (Road Rules) Regulation 1999* r.30).

7.4 Power to give directions

- Police can **give directions** to drivers when they exercise their powers (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss.39, 40).
- A police officer may give **reasonable directions for the safe and efficient regulation of traffic** to any person driving a motor vehicle or riding a motorcycle on or near a road (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.185). They may also close roads (s.186).

Refusing or failing to obey these directions is an offence.

7.5 Power to impound or confiscate vehicles

- If you have committed a drink driving offence, police can **take away your key or immobilise or detain your car** (*Law Enforcement (Powers and Responsibilities) Act 2002* s.189, *Road Transport (Safety and Management) Act 1999* s.31).
- If police **have been authorised to use their emergency public disorder powers**, and your vehicle is on a **target road** or in a **target area**, police may **confiscate it for up to 7 days** (or longer if extended by a court order) if this will help prevent or control a public disorder (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87M); (see Part 8 – Emergency public disorder powers).
- Police can **seize any unregistered registrable vehicle** used on a road (*Road Transport (Vehicle Registration) Act 1997* s.27).
- Police can **remove your vehicle** if your **vehicle, that has been involved in an accident** or has broken down, or **anything that has fallen from your vehicle**, causes a **danger or obstruction to traffic on a road** (*Road Transport (Safety and Traffic Management) Act 1999* s.75).

- Police can also **seize your vehicle that has been abandoned on a road** where there is a “**tow away area**” or “**vehicles impounded**” sign (*Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999*) r.145).
- If you have been caught **drag racing, doing wheelies, burnouts, donuts**, etc, police can impound your vehicle for up to **3 months for a first offence**, or **forever for a second or subsequent offence! You can apply to the Local Court to get it back.** (*Road Transport (Safety and Traffic Management) Act 1999* ss.40, 41, *Road Transport (General) Act 2005* ss.218, 219, 224).

7.6 Power to search for stolen vehicles or parts

A police officer authorised by the Commissioner of Police may enter panel beating shops to **trace stolen motor vehicles or trailers or their parts**. It is an offence to wilfully delay or obstruct a police officer in the exercise of this power (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.188).

8 Emergency public disorder powers

8.1 Introduction

After the “Cronulla riots” in December 2005, the NSW Parliament enacted emergency legislation giving police special powers to deal with “large-scale public disorder”.

These powers are in Part 6A of the *Law Enforcement (Powers and Responsibilities) Act 2002*. The new powers came into force on 15 December 2005. These powers were supposed to lapse on 15 December 2007, but have been extended indefinitely.

8.2 Authorisation

To use the emergency powers, the Commissioner of Police (or a Deputy or Assistant Commissioner) must issue an **authorisation** for a certain **target area**. The authorisation can only last for 48 hours unless it is extended by the Supreme Court (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss.87D-H).

A **target area** could consist of a few blocks, a whole suburb or maybe an even larger area. A **target road** means a road leading to a target area.

Police may use the special powers **without authorisation** if they suspect on reasonable grounds that the occupants of a vehicle are (or are about to be) involved in a large-scale public disorder, and they are satisfied that the situation is urgent enough to require the special powers to be used without authorisation (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss.87N).

8.3 Special powers

- Police may cordon off a target area or any part of it, or put up a road block on a target road (including any road in a target area). Police must not refuse permission for a person to leave the area unless it is reasonably necessary to do so to avoid a risk to public safety or to the person’s own safety (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87I).
- Police may 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 the search (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87J). **No warrant or reasonable suspicion is required.**

- Police may 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 the search (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87K). **No warrant or reasonable suspicion is required. Police are not allowed to do a strip search, and all the other rules relating to searches apply.**
- Police may request a person in a target area, or in or on a vehicle on a target road, to disclose their identity and to produce proof of identity (but only if the person's identity is unknown to the police officer, and if the police officer reasonably suspects that the person has been involved or is likely to be involved in a public disorder). It is an offence not to disclose your identity, or to provide false details (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87L), but only if the police have first identified themselves, told you the reason for the request, and warned you that failure to comply may be an offence (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.201).
- Police may confiscate a vehicle, mobile phone or any other item if this will assist in preventing or controlling a public disorder. Police may keep these items for up to 7 days, but this can be extended by the Local Court for up to 14 days at a time. (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87M).
- From 15 December 2006, police also have the power to direct a group in a target area to break up. Police must give information and warnings similar to those required for ordinary move-on directions. Failure to follow one of these directions, without a reasonable excuse, is an offence. The maximum penalty is 50 penalty units (\$5,500) which is 25 times the maximum penalty for disobeying an ordinary move-on direction (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.87MA).

8.4 Liquor restrictions

Police also have the power to close licensed premises, to stop the sale of alcohol or to impose alcohol-free zones for up to 48 hours (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss.87B-C).

9 Arrest

9.1 When can the police arrest you?

The police may arrest you if:

- they **know** or **suspect on reasonable grounds** that you have **committed an offence** (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.99) or **breached your bail conditions** (*Bail Act*, s.50); or
- they think you are about to commit a "**breach of the peace**", or
- there is a **warrant** out for your arrest (eg for failing to appear at court, breaching your parole).

9.2 When must the police not arrest you?

For many years the courts have said that arrest should be a last resort. Where possible, police should use alternatives such as a court attendance notice, *Young Offenders Act* caution or youth justice conference, without the need to arrest you.

Police must not arrest you for an offence unless they suspect on reasonable grounds that arrest is necessary to:

- ensure you appear at court;
- stop you repeating or continuing the offence, or committing another offence;
- prevent the concealment, loss or destruction of evidence;
- prevent harassment of, or interference with, any potential witness;
- prevent the fabrication of evidence; or
- preserve your safety or welfare.

(*Law Enforcement (Powers and Responsibilities) Act s.99(3)*).

9.3 What the police must tell you

Police must tell you why they are arresting you. They must also tell you their name and place of duty. They should tell you this before or during the arrest, unless it's not reasonably practicable to do this. In this case, they must tell you as soon as possible after they arrest you (*Law Enforcement (Powers and Responsibilities) Act 2002, s.201*).

9.4 Use of force

Police may use **reasonable force** to arrest you. Unreasonable force is **assault**.

The more you struggle, the more force they may use and you could be charged with **resisting** or even **assaulting** police. Try not to swear, or you might be charged with **offensive language**.

9.5 Citizen's arrest

Everyone has the right to make a "citizen's arrest" if they see a crime being committed. This is what security guards do when they catch people shoplifting. **A citizen has no power to arrest a person on mere suspicion.**

10 After arrest

10.1 At the police station

After arrest, you will probably be taken to a police station.

When you are arrested **police must allow you to speak with a relative or a friend, and a lawyer, and to ask them to come to be with you** (*Law Enforcement (Powers and Responsibilities) Act 2002, s.123*).

10.2 Special rights for vulnerable persons

"**Vulnerable persons**" are defined as **children (under 18)**, Aboriginal or Torres Strait Islanders, persons from non-English speaking backgrounds, or those with impaired physical or intellectual functioning (*Crimes (Detention After Arrest) Regulation 1998, clause 5*).

Vulnerable persons, including children, have the **right to have a support person present at police station** (*Law Enforcement (Powers and Responsibilities) Regulations, cl.27*). The **custody manager at the police station must help a vulnerable person exercise these rights** (*Law Enforcement (Powers and Responsibilities) Regulations, cl.25*).

If a **child** is in police custody, police must notify the child's parent or guardian (*Law Enforcement (Powers and Responsibilities) Regulations*, cl. 27). If the person in police custody is **Aboriginal**, police must contact the closest Aboriginal legal aid organisation (*Law Enforcement (Powers and Responsibilities) Regulations*, cl. 33).

10.3 How long can the police detain you?

Police can **detain you for up to four hours** after arrest for investigation and questioning. **You maintain your right to refuse to answer questions.**

These four hours may be extended by “**time out**” periods, eg waiting for people to arrive, for phone calls, or for talking with your lawyer. Most people are in fact held by police for much longer than four hours. Further, police can apply for a court order to extend the four hours by up to eight hours, to a total of twelve hours (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss.115-120).

At the end of this period, police must let you go (with or without charging you) or take you to court to apply for bail.

11 Fingerprints and photos

11.1 Taking of fingerprints and photos when arrested

Fingerprints and photographs may be taken for identification only (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.133). This includes ensuring that the police have a correct, up-to-date criminal record to hand up in court. In practice, this seems to be a routine police procedure carried out when a person is arrested.

11.2 Children under 14

If you are **under 14**, the police must have an order from the Children's Court to take fingerprints and photographs (*Law Enforcement (Powers and Responsibilities) Act 2002*, s. 136).

11.3 Destruction of fingerprints and photos

You may later be able to have fingerprints and photographs destroyed if you are let off without being charged or if you are found not guilty (*Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 137, 37A).

If you are dealt with by the Children's Court and found not guilty, or if you are found guilty but your charge is dismissed without a conviction under (*Children (Criminal Proceedings) Act 1987*, s.33(1)(a)(i)), the court must order any fingerprints, palm prints and photos to be destroyed (*Children (Criminal Proceedings) Act 1987*, s.38).

12 Forensic procedures

12.1 Power to take forensic samples

The *Crimes (Forensic Procedures) Act 2000* allows police to take **forensic samples** (eg a strand of hair, a swab from inside the mouth, a blood test). These are usually used for **DNA testing**, to match against DNA found at the crime scene or on victims.

A forensic procedure may be carried out on a **suspect**, a **convicted indictable offender** (someone serving a prison sentence for an offence carrying a maximum

penalty of 5 years or more), or a **volunteer** (eg someone who is not a suspect but wants to take a DNA test to establish their innocence).

12.2 Suspects

To carry out a forensic procedure on a suspect aged **over 18** who is capable of understanding the procedure, police must have the person's **informed consent** or else must get an **order from either a court or a senior police officer** (depending on the type of offence alleged and the invasiveness of the forensic procedure).

Suspects who are children or incapable persons (eg people with intellectual disabilities who cannot understand the procedure or its implications) are deemed to be unable to give informed consent. To carry out a forensic procedure on a suspect who is a child or incapable person, there must be a **court order**.

12.3 Victims

Police can also take DNA samples from **victims** with their consent. If the victim is a child under 14, police will instead need a parent or guardian's consent.

12.4 Volunteers

Police can conduct forensic procedures on from **volunteers**, eg. people who agree to provide their DNA to eliminate them from suspicion. If the volunteer is a child, the police will need a parent or guardian's consent.

13 Other powers

13.1 Children and Young Persons (Care and Protection) Act

Section 43 of the *Children and Young Persons (Care and Protection) Act* 1999 enables an authorised DOCS officer or a police officer to:

- enter in, search and remove a child (under 16) or young person (16 or 17) from any premises when satisfied on reasonable grounds that the child or young person is at **immediate risk of serious harm** and that the making of an **apprehended violence order would amount to insufficient protection**.
- remove a child (under 16) from any public place where it is suspected on reasonable grounds that the child is **in need of care and protection** and that they are **not subject to the supervision or control of a responsible adult** and that they are **living in or habitually frequenting a public place**; or
- remove a child (under 16) or young person (16 or 17) from any premises if it is suspected on reasonable grounds that the **child is in need of care and protection** and is or has recently been on any **premises where prostitution or pornography takes place** or if the child or young person **has been participating in an act of child prostitution or pornography**.

Police officers may also enter any adjacent place (ie next door) if they suspect on reasonable grounds that the person is there.

See also the separate document on **Child Welfare**.

13.2 Children (Protection and Parental Responsibility) Act

The *Children (Protection and Parental Responsibility) Act 1997* allows police to ‘**safely escort**’ a young person from a public place, if police reasonably believe the young person is:

- under 16 years of age; and
- not supervised by a responsible adult; and
- in danger of being abused or injured, or about to break the law.

Police can then take the young person home, or to the home of a relative or an “approved person”.

This law, however, only applies in certain areas declared “operational” by the Attorney-General (after an application from the local council). The Act was only ever operational in a few parts of NSW, and currently it seems that there are no longer any operational areas.

13.3 Mental Health Act

Under section 22 of the *Mental Health Act 2007*, a police officer may **apprehend someone and take them to a hospital**, if the officer has “reasonable grounds” for believing:

- that the person is committing or has recently committed an offence and that it would be beneficial to the welfare of the person that s/he be dealt with according to the *Mental Health Act* rather than in accordance with law; or
- that the person has recently attempted suicide, or that it is probable that they person will attempt to kill or seriously harm themselves.

13.4 Intoxicated Persons

Police have the power to pick up people who are **intoxicated** (on alcohol or any other drug) and who are **behaving in a disorderly manner** or who **need physical protection** because of their intoxication.

Police may take an intoxicated person home or place them in the care of a **responsible person** (eg friend, relative, welfare worker, refuge). If necessary, police may **detain the intoxicated person in a police station** while finding a responsible person. If no responsible person can be found, police may detain the intoxicated person until they cease to be intoxicated (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.206(4)).

Reasonable restraint may be used to ensure that the intoxicated person does not injure anyone (including himself or herself) or damage property (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.206(5)).

Intoxicated persons **are not charged** with an offence, nor are they fingerprinted. They should be **kept separate from people detained for criminal offences**, and juveniles must be kept separate from adults (*Law Enforcement (Powers and Responsibilities) Act 2002*, s.207).

14 Mistreatment by police

Remember that the police have the right to **search you** or move you on (with reasonable grounds), to **touch** you when arresting you, and to use **reasonable force** to arrest you if necessary.

They **do not** have the right to use **excessive force**, to **intimidate** you, to **assault** you or to **vilify** you because of your race, gender, sexuality, etc.

If a police officer mistreats you, try to get his or her **name** and/or **badge number**.

If you feel you have a justified complaint against the police, you can write to the **Ombudsman**, the **Local Area Commander** of your local police station, or the **Commissioner of Police**.

It usually takes a long time to process a complaint and it often gets nowhere, but sometimes it does result in action (eg usually a warning, but sometimes dismissal or even criminal charges) against police officers. In any case, it's good to have it on record that you've complained in case similar things happen again.

If you have been unlawfully arrested or assaulted by police, you may be entitled to **compensation**, either through the government victims' compensation scheme or through a private civil action. You should see a lawyer about this.

The **New South Wales Ombudsman** can be contacted at:

Level 24, 580 George Street, Sydney NSW 2000

Ph: 02 9286 1000 (general inquiries), 1800 451 524 (outside Sydney metro)

Fax: 02 9283 2911

Website: www.nswombudsman.nsw.gov.au

Email: nswombo@ombo.nsw.gov.au

Contact the '**Police Customer Assistance Unit**' on **1800 622 571** to make police inquiries, concerns, compliments and complaints.

Shopfront Youth Legal Centre Updated December 2011

The Shopfront Youth Legal Centre

356 Victoria Street

Darlinghurst NSW 2010

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Fax: 02 9331 3287

www.theshopfront.org

shopfront@freehills.com

The Shopfront Youth Legal Centre is a service provided by Freehills, in association with Mission Australia and the Salvation Army.

This document was last updated in December 2011 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

This document provides a summary only of the subject matter covered, without the assumption of a duty of care. It should not be relied on as a substitute for legal or other professional advice.

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