

The Shopfront

YOUTH LEGAL CENTRE

Convictions and criminal records

1 Introduction

If you plead guilty or are found guilty of an offence in court, there are a few things you will probably want to know:

- (a) Will I have a criminal record?
- (b) Who can see my criminal record?
- (c) Will my criminal record affect me getting a job?
- (d) Will my criminal record get wiped later on?

These are not easy questions to answer. The answer depends on factors such as your age, the type of offence you committed, and your previous criminal history.

2 What is a conviction?

So what is a conviction? This can be confusing, as a reference to a “conviction” can mean one of two things:

- (a) that you have been **found guilty** of an offence. Being "convicted" of an offence means that a court has found you guilty, or that you have pleaded guilty to an offence; or
- (b) that the court has **recorded a conviction** against you. If you are found guilty the court will usually, but not always, record a conviction. Having a conviction recorded means that you have a **criminal record**.

In this document when it refers to a “conviction”, it means a **recorded conviction**.

3 When will a court record a conviction?

3.1 Adults

If you are found guilty of an offence committed as an adult (i.e. aged 18 or over), a conviction will usually be recorded automatically.

In special circumstances, the court may deal with you under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which means the court may:

- (a) dismiss the charge without a conviction, or
- (b) put you on a good behaviour bond for up to 2 years (a conviction will only be recorded if you breach the bond).

When deciding whether to deal with you under section 10, the court will consider things like your age, background, health, mental condition, any prior criminal record, the seriousness of the offence and any special circumstances. Section 10 will usually only be used if you have committed a minor offence and you don't have much of a criminal record, or if the circumstances are really exceptional.

3.2 Children's Court

A Children's Court magistrate cannot record a conviction against you if you are **under 16 years of age**.

If you are aged 16 or over, the magistrate can decide whether or not to record a conviction against you.

3.3 Children in other courts

If you are a juvenile and your matter is too serious for the Children's Court, you will go to the District or Supreme Court.

These courts may record a conviction against you even if you are under 16.

3.4 Children with traffic matters in Local Courts

If you are old enough to have a licence (16 years old for cars, 16 years and 9 months for motorcycles) and you are charged with a traffic offence, you will go to the Local Court unless you have a related criminal charge that the Children's Court is dealing with.

The Local Court may use adult or children's sentencing options. If it uses children's sentencing options, the rules are the same as in the Children's Court. If it uses adult sentencing options, the rules are the same as for adults.

3.5 Children dealt with under the *Young Offenders Act*

If your criminal matter has been dealt with by warning, caution or youth justice conference under the *Young Offenders Act* 1997 (NSW), a conviction will **not** be recorded against you.

Records of conferences and cautions may be taken into account by the Children's Court in different proceedings (eg in sentencing you if you commit another offence), but they cannot be taken into account by an adult court.

3.6 On-the-spot fines (infringement notices)

When you are given an infringement notice (on-the-spot-fine), no conviction is recorded against you (whether you pay the fine or not).

However, if you elect to take the matter to court, and the court finds you guilty (or you plead guilty) a conviction may be recorded against you.

If you get an infringement notice for a traffic offence (eg speeding, not displaying 'p-plates'), this will show up on your RMS traffic record. Although these infringement notices are not convictions, they can be taken into account by a court when sentencing you for a traffic offence.

4 What is a criminal record? How is it different from a "criminal history" or "police record"?

4.1 Different types of records

There are many different terms used to describe a person's criminal record. These include "criminal record", "criminal history" and "police record". These terms are often used quite imprecisely. Set out below is an explanation of what is included in each of these records and how the particular record can be used.

4.2 Criminal records

A criminal record is **a record of convictions** against you. If you are found guilty of an offence but no conviction was recorded, this matter will **not** form part of your criminal record.

Your criminal record should not list any spent convictions (see part 6 of this document) or non-convictions. If by mistake it does, ask the police or a lawyer to help you fix this. (see part 7 of this document).

4.3 Criminal history

Your criminal history is different from your criminal record.

Your criminal history contains information about all of your previous court matters, even if you were found not guilty, or your charge was dismissed under the *Mental Health (Forensic Provisions) Act 1990*, or you were found guilty but no conviction was recorded.

Courts are usually allowed to see your full criminal history (including matters that were withdrawn or dismissed) when making decisions about bail.

Courts are usually allowed to see details of all findings of guilt against you (including section 10s and spent convictions), when sentencing you for further offences.

4.4 Court alternatives history

A court alternatives history shows police cautions and youth justice conferences that you had as a juvenile.

The Children's Court is allowed to see this when deciding how to deal with you for an offence. Other courts, and the general public, are not allowed to see it.

4.5 Traffic record

Traffic convictions and infringements are separately recorded by Roads and Maritime Services (RMS). Police access the records from the RMS on request.

Infringement notices (on-the-spot fines) for traffic offences will show up on your traffic record. Although these are not convictions, they can be taken into account by a court when sentencing you for a traffic offence.

4.6 Police Charge Management System

The police have several record-keeping systems which have been consolidated into one Charge Management System. This includes a lot of information, in addition to criminal records, such as:

- questioning by police;
- warrants;
- arrests;
- police warnings and formal cautions given to children;
- youth justice conferences;
- charges;
- fingerprints and photos taken when you are charged;
- people who are victims of crime or witnesses;
- convictions;
- section 10 dismissals and discharges; and
- sentences.

Police may also have "intelligence" about people on the COPS system (Computerised Operational Policing System). This information is gathered from a variety of sources and can often be inaccurate. The information can be kept indefinitely.

Police can use all of the above information for their own purposes but would generally not be able to disclose it to employers and the general public. You may be able to get a copy or printout of this information through a GIPA (Government Information Public Access) request.

Generally, there is no way to have these records destroyed. However, the Police Commissioner has discretion to have information destroyed on request in some situations (eg the charges were withdrawn or dismissed, a discharge without conviction is more than 15 years old and there have been no other convictions, or the information relates to very old and minor convictions).

Fingerprints and photographs may also be destroyed in some circumstances (see document on **Police powers and your rights**).

5 What is the effect of having a conviction or a criminal record, and who can get access to my record?

5.1 Generally

A criminal record can affect many parts of your life, including your chance of getting a job, some types of licences you can apply for, visa applications to visit foreign countries, and sentencing outcomes at court.

Sometimes even non-convictions (eg. section 10s) and spent convictions (see part 6 of this document) can affect you.

5.2 Employment

There are some types of jobs which will *not* be open to you if you have certain types of convictions (eg working with children, some government jobs, employment requiring security clearance such as working at an airport).

Most types of jobs *are* open to people with criminal records. However, many employers choose not to employ someone with a criminal record, even if the person's record is quite old and does not affect their ability to do the job. Discrimination based on criminal record is a real problem, and it is possible to complain about it to the Australian Human Rights Commission, but legal rights for people in this situation are very limited.

If you apply for a job, your prospective employer does not automatically get access to your criminal record – first they have to obtain your consent.

In practice, many employers will require you to organise your own criminal record check by obtaining a National Police Certificate (see part 7 of this document). You can apply to the NSW Police Force to release your criminal record directly to a government department.

5.3 Jobs requiring disclosure of spent convictions

You may be required to disclose your full criminal history (including spent convictions or non-convictions) if you are applying for a job as a:

- judge or magistrate;
- Justice of the Peace (JP);
- police officer;
- Corrective Services staff member;
- teacher or teacher's aide;
- fire fighter (only if you have been dealt with for arson).

5.4 Working with children

It is illegal for an employer to employ a person in any child-related employment if that person has been convicted of certain serious sex or violent offences.

If you wish to apply for any child-related work, you must get a **Working With Children Check** clearance. The Working With Children Check involves a national criminal history check and a review of findings of workplace misconduct.

The result of a Working With Children Check is either a clearance to allow you to work with children for 5 years, or a bar against you working with children. Cleared applicants are subject to ongoing monitoring, and relevant new records may lead to the clearance being revoked.

Employers do not get access to your criminal record. All they get to find out is whether or not you have Working With Children Check clearance.

For further information, see document on **The Working With Children Check** or go to <http://www.kidsguardian.nsw.gov.au/working-with-children/working-with-children-check>.

5.5 Licences

You may be required to disclose your criminal record (including spent convictions and non-convictions) if you are applying for certain licences, including:

- security industry licence (see separate document on **Getting a security licence**);
- casino operator or casino employee licence;
- tow truck operator licences or driver certificate;
- firearms or prohibited weapons licence;
- real estate, stock and station, business, strata management or on-site residential property management licence; and
- dangerous occupations regulated by Workplace Health and Safety regulations.

There is usually a right of appeal to the Administrative Decisions Tribunal when a licence is refused on the grounds of a criminal record.

5.6 Insurance

You may also find it hard to get insurance for your home, car or business if you have been convicted of offences such as stealing, fraud or arson.

5.7 Getting an Australian passport

Past convictions are **not** relevant to the issuing of an Australian passport. The Department of Foreign Affairs and Trade is only concerned if you have an outstanding warrant for your arrest; if you are on Commonwealth parole, surety or bond; if there are any relevant bail conditions; or if a court has ordered you not to apply for a passport.

5.8 Citizenship and deportation

If you are not an Australian citizen, you may be deported or your visa may be cancelled on “character” grounds. You will not pass the “character” test if you have a “substantial criminal record” (for example, sentenced to imprisonment for over 12 months).

Visas may also be refused or cancelled on character grounds even where no conviction has been recorded. The Minister for Immigration may decide that you do not pass the character test if you have had an association with a person, group or organisation that the Minister reasonably believes was or is involved in criminal conduct.

5.9 Overseas travel

A criminal conviction may also affect your ability to get a visa to travel overseas to other countries. The granting of visas will be assessed on a case by case basis and will depend on the nature and seriousness of the offence and punishment.

5.10 Voting

Your right to vote will also be affected by a conviction if you are required to serve a prison sentence of over one year (or three years for federal elections). Once your sentence is finished your voting rights will resume.

5.11 Jury service

You will be excluded from jury service for life if you are found guilty or convicted of:

- (a) an offence punishable with life imprisonment if committed in NSW (regardless of where the offence was committed);
- (b) a terrorist act;
- (c) an offence under Part 7 of the *Crimes Act 1900* (public justice offences, eg perverting the course of justice); or
- (d) a sexual offence.

You will also be excluded from jury service if:

- you are currently serving a prison sentence or are being detained in NSW or elsewhere. In many cases you will qualify for jury service a few years after completing your sentence;
- you have done a period of detention for an offence committed when you were under 18, you are excluded from jury service for 3 years after the end of the period of detention;
- you are bound by an order made in NSW or elsewhere following a criminal charge or conviction, eg a good behaviour bond or an AVO;
- you are disqualified by a court from holding a driver's licence for 12 months or more.

5.12 Bail and sentencing for further offences

A court can take into account your previous convictions when sentencing you for an offence. If you already have a criminal record, you will usually be treated more harshly than a first offender.

Courts can also take into account previous offences even when no conviction has been recorded (eg dealt with under section 10) or if the conviction has been spent (see Part 6 of this document) .

If you have been found guilty of a juvenile offence but no conviction was recorded, this matter may be taken into account by the Children's Court if it is sentencing you for other offences. However, other courts cannot take into account juvenile matters if no conviction was recorded and you have been out of trouble for at least two years immediately before being charged with the current offence.

Your full criminal history (including matters that have been dismissed) can also be taken into account by police and courts when deciding whether or not to grant you bail, or dealing with a bail variation application.

6 Does your criminal record ever disappear?

6.1 Does your juvenile record disappear when you turn 18?

No, it's much more complicated than that!

6.2 What does it mean if your conviction is spent?

Most convictions will become "spent" after a certain period of "crime-free" time. This means that, for most purposes, the conviction is no longer part of your criminal record.

In general, you don't have to disclose spent convictions (and the police can't disclose them) to anyone. However, even when a conviction is spent, it still remains part your criminal history and may lawfully be disclosed in some circumstances.

6.3 What convictions can become spent?

Most convictions imposed for offences in NSW can become spent.

Some convictions can *never* become spent, including:

- offences that involved a prison sentence (not a juvenile control order) of more than 6 months; and
- sexual offences.

6.4 When is a conviction spent?

A conviction is spent on completion of the **relevant crime-free period**, which is:

- **3 years**, for **Children's Court** convictions;
- **10 years**, for convictions from **any other court**.

The **crime-free period** is a period after the date of your conviction during which you have *not* been:

- convicted of an offence punishable by imprisonment; and
- in prison because of a conviction for any offence; and
- subject to a juvenile control order; and
- unlawfully at large (eg. having a warrant out for your arrest).

6.5 Traffic offences

Traffic offences are treated separately from non-traffic offences.

Traffic offences are usually not taken into account in calculating the crime-free period for a non-traffic offence (and vice versa). There are some exceptions for serious traffic offences such as dangerous driving causing grievous bodily harm or death.

6.6 Can spent convictions be revived?

Spent convictions are **not** revived by later convictions. Once a conviction is spent, it is spent for good.

6.7 Disclosure of spent convictions

In general, **you are not required to disclose a spent conviction to anyone**.

If you are asked on a job application about prior convictions, you do not need to mention spent convictions, unless you are applying for certain jobs (see part 5 above). If an employer later discovers your spent convictions, they cannot sack you for dishonesty.

Where an Act or Regulation refers to a conviction, it is taken to refer to unspent convictions only. Where an Act allows a person's "fitness" or "character" to be taken into account, spent convictions usually cannot be taken into account.

Unlawful disclosure of someone's spent convictions is an offence. It is also an offence to unlawfully obtain information or to try and obtain information about someone's spent convictions.

6.8 Lawful disclosure of spent convictions

Police can disclose your spent convictions to a court.

Police can inform other law enforcement agencies about spent convictions in some situations.

A law enforcement agency can, in the discharge of its duties, make information relating to a spent conviction available to another law enforcement agency. These agencies include (but are not limited to) the police, Crime Commission, Attorney-General (State, Territory or Commonwealth), the Director of Public Prosecutions and the Crown Prosecutors.

6.9 Commonwealth offences

Most criminal offences are covered by State law, and young people are not often charged with Commonwealth offences. Commonwealth offences include social security fraud, tax and customs matters, and telecommunications offences (eg using a carriage service to menace, harass, or offend).

A conviction for a Commonwealth offence will be spent if you:

- have been granted a pardon for a reason other than that you were wrongly convicted of the offence; or
- were not sentenced to imprisonment for the offence, or were not sentenced to imprisonment for more than 30 months, and the waiting period for the offence has ended. The waiting period is 5 years from the date of a juvenile conviction, or 10 years from the date of an adult conviction.

As with NSW law, there are exceptions to the non-disclosure of spent convictions. The main one is that spent convictions need to be disclosed where a person is seeking employment with a law enforcement or intelligence agency.

7 Copies and corrections of records

7.1 Applying for a National Police Check

You can apply for a National Police Certificate by filling in a form and paying a fee (currently \$52 for national name and date of birth check).

Application forms are available online (go to www.police.nsw.gov.au, "services", "criminal records", then click on the "lodge an application for a national police check" form).

Once you have completed the application form, print the confirmation page, take it with proof of your identity to any NSW Police station, and pay the fee. It will take a minimum of 10 business days for applications to be processed.

The certificate is based upon a check of the National Names Index (NNI) using the name, date of birth (and if applicable) fingerprints supplied by the applicant.

A National Police Certificate contains information relating to "disclosable court outcomes". Convictions considered "spent" under state and federal legislation may not

be included in the National Police Certificate unless the category of employment or purpose of the check is exempt from relevant legislation.

7.2 Applying for a working with Children Check

If you are applying for a job working with children, you must do a Working With Children Check. This is administered by the Office of the Children's Guardian and not the police: <http://www.kidsguardian.nsw.gov.au/working-with-children/working-with-children-check>.

7.3 Applying for a copy of your criminal history

If you do not require a National Police certificate for the purposes of visas, employment, etc, you may wish to apply for a copy of your personal criminal history.

You can apply through the Police Information Access Unit (GIPA), by filling out the "Formal Access Application Form (includes Bail Report)", available online (https://www.police.nsw.gov.au/services/information_access_unit_gipa). The application fee is \$30 (or \$15 if you are currently receiving Centrelink benefits).

Mail the completed form with the fee to:

NSW Police, Information Access and Subpoena Unit
Locked Bag 5102, Parramatta NSW 2124

Or email the form to gipaapp@police.nsw.gov.au, with a credit card authority.

7.4 Removing spent convictions from your criminal record

Spent convictions should be automatically deleted from your criminal record once they become spent. If you want to make sure this happens, you may write to:

Criminal Records Section, NSW Police Force
Locked Bag 5102, Parramatta NSW 2124
Phone: (02) 8835 7888
Email: crs@police.nsw.gov.au

7.5 Changing a mistake on your criminal record or on police computer system

If you believe there is a mistake on your criminal record, or on the police system, you should contact the Criminal Records Section (contact details above).

The Shopfront Youth Legal Centre Updated May 2015

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

This document was last updated in May 2015 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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