
Convictions and Criminal Records

1 What is a conviction?

When you see a reference to a “conviction” it can mean one of two things:

- That you have been found guilty of an offence. Being "convicted" of an offence means that a court has found you guilty, or you have pleaded guilty; or
- That the court has recorded a conviction. A “conviction” is an entry on your criminal record which may be disclosed in certain circumstances to other people and organisations.

This can be confusing because people (and Acts) often use these two meanings of "conviction" interchangeably. For the purposes of this paper, a “conviction” means a recorded conviction.

Usually, if you are found guilty of an offence, a conviction will automatically be recorded. However, in some cases the court will not record a conviction.

2 When will a court record a conviction?

2.1 Adults

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

However, in special circumstances the court may deal with an adult offender under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Under section 10, the court may dismiss the charge without a conviction. Alternatively, it may put the offender on a good behaviour bond, or order that the person participate in an intervention program (eg a traffic offender program). No conviction will be recorded as long as the offender has complied with the bond or the intervention plan.

Section 10 would often be used for someone who has committed a trivial offence, has pleaded guilty and doesn't have a prior criminal record. The offender's age (very young or very old) and health (especially mental health) may also influence the court's decision to deal with a matter under section 10.

A matter that has been dealt with under section 10 does not form part of a person's criminal record, but may be disclosed to a court when it is sentencing with the person for further offences (see s16(1) *Criminal Records Act 1991*(NSW)).

2.2 Children

A Children's Court magistrate has no power to record a conviction against a person *under 16* years of age. The magistrate can choose whether or not to record a conviction against a person aged *16 or over*. This is true regardless of what penalty the young person gets.

A child of any age who is being dealt with for a more serious offence by a higher court (eg the District Court) may have a conviction recorded against them (see section 14 of the *Children (Criminal Proceedings) Act 1987* (NSW)).

Juvenile matters where there has been a finding of guilt, but no conviction, may still be taken into account by a court when sentencing the person for further offences. However, there are some restrictions. An adult court cannot take these matters into account if the person has been out of trouble for two years immediately before committing the adult offence (*Children (Criminal Proceedings) Act 1987* (NSW) s15).

2.3 Children dealt with under the *Young Offenders Act*

A child who is dealt with by warning, caution or conference under the *Young Offenders Act 1997* (NSW) cannot have a conviction recorded against them (except in the rare situation where a child has been found guilty by a court and then referred to a conference).

Records of conferences and cautions may be taken into account by the Children's Court when sentencing the child for another offence, but can't be taken into account by an adult court (see section 68 of the *Young Offenders Act 1997*).

2.4 On-the-spot fines (infringement notices)

When you are given an infringement notice, 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.

If you get an infringement notice for a traffic offence (eg. speeding, not displaying p-plates), this will show up on your RTA traffic record. Although they do not amount to convictions, those matters can be taken into account by a court when sentencing you for a traffic offence.

3 What types of records do police keep?

3.1 Criminal Record

A criminal record is a record of convictions against you. This will be handed up by the prosecutor if you are being sentenced for an offence in court.

3.2 Criminal history

A criminal history includes everything on your criminal record, but also includes details of all court matters, whether you have been convicted or not. It will include matters where you have been found not guilty, details of any failures to appear in court, and matters which have not yet been finalised. A criminal history is often handed up by the prosecutor if you are making a bail application.

3.3 Court alternatives history

This includes details of juvenile police cautions and youth justice conferences. It may be handed up by the prosecutor in the Children's Court if you are being sentenced for an offence, but may not be used in an adult court.

3.4 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, including:

- questioning by police;
- arrests;
- police warnings and formal cautions given to children
- youth justice conferences;
- charges;
- fingerprints and photos taken when you are charged;
- convictions;
- section 10 dismissals and discharges;
- 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.

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 Freedom of Information application.

Generally, there is no way of having these records destroyed. However, the Police Commissioner has discretion to have information destroyed on application, where he is satisfied that:

- the charges were withdrawn or dismissed;
- the person is acquitted or their conviction quashed on appeal;
- a discharge without conviction is more than 15 years old and there have been no other convictions;
- it relates to a juvenile offence which is destructible under statute;
- the information pertains to very old and minor convictions.

Fingerprints and photographs may be destroyed in certain circumstances (see section 8 of this document).

3.5 Traffic records

Traffic convictions and infringements are separately recorded by the Roads and Traffic Authority. Police access the records from the RTA on request.

4 What is the effect of having a conviction on your criminal record?

In addition to the penalty imposed for an offence there are some additional legal disabilities and disadvantages that can arise resulting from a conviction.

4.1 Sentencing for further offences

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

In most cases, courts can take into account previous offences even when no conviction has been recorded (eg the matter was dismissed under section 10) or the conviction has been “spent”. Some juvenile offences can’t be taken into account (see 2.2 and 2.3 above).

4.2 Employment in the public sector

A criminal conviction may affect your ability to obtain or retain employment in the public sector.

If a Commonwealth public service employer discovers that an applicant or employee has a criminal conviction, they may be refused employment or dismissed from employment.

A public servant employed by the NSW Government who is convicted of a serious offence (one punishable by a term of imprisonment of 12 months or more) may be subject to disciplinary or remedial action (see section 48 of the *Public Sector Employment and Management Act 2002* (NSW)). If the employee is dismissed an appeal is generally available to the Government and Related Employees Appeal Tribunal (see ss 23 and 24 of the *Government and Related Employees Appeal Tribunal Act 1980* (NSW)).

The public sector employment guidelines mandate a check of criminal records only once a position has been offered. The check, except for sexual offences, generally only go back 10 years in practice. The guidelines also provide the applicant with an opportunity to discuss any convictions before a final decision is made in regard to employment: the circumstances of the conviction (age, number of convictions, any sentences etc) will be considered, and the applicant may provide character references to offset the record of the convictions.

4.3 Child-related employment

An employer cannot employ a person in child-related employment if that person has been convicted of a serious sex or violent offences (*Child Protection (Prohibited Employment) Act 1998* (NSW) s 8). Screening in this respect began in July 2000. See also *Commission for Children and Young People Act 1998* s38.

[In this instance a “conviction” means a finding that a person is guilty of an offence, even if the court does not record a conviction (*Child Protection (Prohibited Employment) Act 1998* (NSW) section 3).] A serious sex offence includes an offence involving sexual activity or acts of indecency punishable by imprisonment for 12 months or more (*Child Protection (Prohibited Employment) Act 1998* (NSW) section 5(3)).

Child-related employment is any employment that mainly involves unsupervised direct contact with children. It includes employment in such places as: pre-schools and schools; hospitals treating children; as a babysitter; clubs where children are members such as sporting clubs; or on school buses (*Child Protection (Prohibited Employment) Act 1998 (NSW) s 3*).

4.4 Business, trades and professions

A conviction for certain types of offences (generally ones involving fraud or dishonesty) may stop you from getting a licence as an auctioneer, travel agent, tow truck operator, TAB operator, builder, motor dealer, security guard or a private inquiry agent. It may also stop you from being a director of a company.

Medical practitioners nurses, dentists, opticians and optometrists have to be registered and the appropriate registration board may refuse to register a person who has been convicted of an offence (see section 15 of the *Medical Practice Act 1992 (NSW)*).

Other professions may also require applicants to be of good character (which would usually mean having no convictions). For example, section 11 of the *Legal Profession Act* requires a person to be of “good fame and character” in order to be admitted as a legal practitioner.

It is not illegal for an employer to ask whether you have previous charges or convictions, but you may deny any spent convictions (subject to exceptions at 5.7-5.8).

4.5 Other employment

While a conviction does not automatically bar you from other types of employment, it will probably affect your chances of getting a job.

4.6 Insurance

A criminal conviction may also affect a person’s chances of obtaining insurance. For example, you may be refused home and contents insurance if you have been convicted of an offence such as stealing, fraud or arson.

4.7 Voting

While serving a sentence of imprisonment for over 1 year for any state offence, a person loses voting rights only whilst they are serving their sentence. Their voting rights resume after they have served their term (see section 21 of the *Parliamentary Electorates and Elections Act 1912 (NSW)*).

Under Commonwealth legislation, a person loses their voting rights in Federal elections while serving a sentence of imprisonment for over five years for any State, Territory or Commonwealth Offence (see section 93 (8)(b) *Commonwealth Electoral Act 1918*). When the person’s sentence is served, or the person is out on parole or PD they are re-entitled to enrol and vote. A person is not entitled to re-enrol and vote at all if they have been convicted of treason or treachery and have not been pardoned. (section 93 (8)(c) *Electoral Act 1918*)

4.8 Jury Service

A conviction does not automatically disqualify you from jury service.

However, you will be disqualified from jury service if you served part of a term of imprisonment within the last 10 years. You will also be disqualified if within the last 3 years you have been found guilty of an offence and detained in a juvenile detention centre.

You will also be excluded from jury service if you are currently on bail, a bond, parole, an apprehended violence order, or if you are currently disqualified from holding a driver's licence. (See Schedule 1 and section 6(a) of the *Jury Act 1977* (NSW)).

4.9 Deportation

An immigrant who is not an Australian citizen and who has been sentenced to more than 12 months' imprisonment may be deported if they have been an Australian resident for less than 10 years. Visas can also be cancelled (which effectively means deportation) on "character" grounds, which doesn't even require a conviction to have been recorded (see sections 200, 201, 203 and 501 of the *Migration Act 1958* (Cth)).

4.10 Applying for 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 any of the following conditions exist:

- any outstanding warrants for arrest;
- if the person is on Commonwealth parole;
- if a Commonwealth, State or Territory Court has ordered a person to refrain from applying for a passport; or
- any relevant bail conditions.

(see section 7B of the *Passports Act 1938* (Cth))

4.11 Overseas Travel

(a) United States

If you wish to travel in the United States and you have a criminal record, particularly if it is a drug conviction, you will need to apply for a tourist visa. When applying for the tourist visa, you will need to provide details of the conviction and punishment. Whether or not the tourist visa is issued will depend on the nature and severity of the offence and punishment. The visa application will take at least 10 working days to be processed.

(b) United Kingdom

If you are a holiday or business visitor travelling on an Australian passport and you intend to stay in Britain for less than 6 months, you will not normally need a visa (ie entry clearance) unless you have been previously refused entry. Convictions might be grounds for refusal of entry.

(c) Other countries

Similar rules are likely to be applicable when seeking visas for other countries.

5 Can convictions disappear from your criminal record?

5.1 Spent convictions

Most convictions will become “spent” after a certain period of time. This means that, for most purposes, the conviction is no longer part of your criminal record. This means that, in general, you don’t have to disclose it (and the police can’t disclose it) to anyone.

However, just because a conviction may no longer be part of your criminal record, it doesn’t mean that all records of it will completely disappear. It will still be on your criminal history and may be disclosed in some circumstances.

5.2 What convictions can become spent?

A conviction imposed for a NSW offence can become spent *unless*:

- it involved a prison sentence of more than six months (this does not include a juvenile control order or periodic detention);
- it was for a sexual offence;
- it was imposed against bodies corporate (eg a company); or
- it is a conviction prescribed by the regulations (as far as we know, there are none prescribed).

(See section 7 of the *Criminal Records Act 1991 (NSW)*)

5.3 When is a conviction spent?

A conviction is said to be “spent”:

- straight away if the court dismisses the matter without recording a conviction;
- at the end of any bond or probation if a person is released on a bond or probation without a conviction (ie under section 10 *Crimes (Sentencing Procedure Act)*);
- after a 3 year crime-free period from the date of a Children’s Court conviction;
- after a 10 year crime-free period from the date of a conviction by any other court;
- if the conviction was for an offence which is no longer an offence.

(See sections 8, 9 and 10 of the *Criminal Records Act 1991 (NSW)*)

5.4 What is a “crime-free period”?

A “crime-free period” is a period of time when you have not been:

- convicted of an offence punishable by imprisonment (this includes if you are found guilty but no conviction has been recorded, but would not include a police caution or youth justice conference);
- subject to a control order (ie a sentence in a juvenile detention centre) or in prison because of a conviction for an offence; or

- unlawfully at large (on the run).

Traffic offences are treated separately from non-traffic offences. Traffic offences are to be disregarded 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, culpable driving, manslaughter and furious driving causing injury. (See section 11 of the *Criminal Records Act 1991* (NSW)). If such an offence is committed, it can be used to determine the crime-free period for *any* offence.

Medical practitioners who are being investigated for misconduct will have their crime-free period suspended during the investigation (s192B *Medical Practice Act*).

5.5 Can spent convictions be revived?

Spent convictions are not revived by later convictions. Once a conviction is spent, it is spent for good. (See section 8(6) of the *Criminal Records Act 1991* (NSW)).

5.6 Non-disclosure of spent convictions

In general, you are not required to disclose your spent convictions to anybody.

If you are asked on a job application about convictions you do not need to mention spent convictions, unless you are applying for certain jobs (see below). If your 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 (see section 12(c) of the *Criminal Records Act 1991* (NSW)).

Unlawful disclosure of someone's spent convictions is an offence. It is also an offence to unlawfully get information or to try and get information about someone's spent convictions (See sections 12, 13(1) and 14 of the *Criminal Records Act 1991* (NSW)).

5.7 Exception: applications for certain jobs

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

- judge, magistrate or Justice of the Peace (JP);
- police officer;
- prison officer;
- teacher or teacher's aide;
- child care worker;
- fire fighter (only if you have been dealt with for arson);
- member of an agency mentioned in the regulations (eg DPP, ICAC).

(See section 15 of the *Criminal Records Act 1991* (NSW), and the *Criminal Records Regulations 1994* (NSW) cll 4, 5, 5A, and 5B).

There are also some disclosure requirements when applying for a legal practitioner practising certificate (see clause 7 of the *Legal Profession Regulation (2002)* (NSW)).

Crime free periods are not recognised during screening for registration as a nurse (*Nurses and Midwives Act 1991* s42D), and nurses must also disclose on an ongoing basis the institution of any criminal proceedings or any convictions recorded against them (*Nurses and Midwives Act 1991* 42A-42B).

5.8 Exception: applications for certain licences

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

- casino operator or casino employee licences (*Casino Control Act 1992* s158);
- security industry licences (*Security Industry Act 1997* s16);
- tow truck operator licences or driver certificates (*Tow Truck Industry Act 1997* s109);
- TAB licences (*Totalizer Act 1997* s109);
- firearms licences (*Firearms Act 1996* ss11(5) and 29(3));
- prohibited weapons licences (*Weapons Prohibition Act 1998* s9);
- real estate, stock and station, business, strata management or on-site residential property management licences (*Property, Stock and Business Agents Act 2002* s16);
- dangerous occupations regulated by OH&S regulations;

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

5.9 Disclosure to courts and law enforcement agencies

Police can still tell a court about your spent convictions, but only when a court orders them to do so. Spent convictions can be taken into account by the court when sentencing you for other offences. Police can also tell other law enforcement agencies about spent convictions. (See sections 12 and 13(4) of the *Criminal Records Act 1991* (NSW). However, unauthorised disclosures of information on spent convictions – especially for fraudulent or dishonest purposes – are subject to penalties (except if it is recorded in a library or archive).

6 Spent convictions for Commonwealth offences

For Commonwealth offences under the *Crimes Act 1914* (Cth) there are different requirements. Most criminal offences are covered by State law and (at least among young people) prosecutions for Commonwealth offences are comparatively rare. Commonwealth offences include social security fraud, tax and customs matters.

A conviction for a Commonwealth offence will be spent if:

- a person has been granted a pardon for a reason other than that the person was wrongly convicted of the offence; or
- the person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than thirty 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.

(See *Crimes Act 1914* (Cth), ss 85ZL and 85ZM)

As with New South Wales, there are exceptions to the non-disclosure of spent convictions. The main one is if the person is seeking employment with a law enforcement or intelligence agency.

7 Who can get access to my criminal record?

7.1 Government department access

Government departments can obtain access to your criminal record when you apply for a government job or for certain types of licences (eg Real Estate Agent) or registrations (eg Pharmacist).

7.2 What about employers and the general public?

Employers and members of the public who do not come within sections 13 or 15 *Criminal Records Act 1999* cannot legally get access to any criminal records. They commit an offence if they obtain or attempt to obtain a copy of the record (see section 14 of the *Criminal Records Act 1999*).

8 Destruction of fingerprints and other identification material

Identification material includes: prints of a person's hand, fingers, feet or toes, recordings of the person's voice samples, recordings or samples of the person's handwriting, and photographs including video recordings of the person.

Prints and photos are usually taken as a matter of routine when someone is taken to the police station and charged.

If you are under 14, police cannot take your photo or prints unless they have an order from the Children's Court or an authorised justice (see section 353AA *Crimes Act 1900* (NSW)).

8.1 Children - NSW

If the Children's Court finds you not guilty, or dismisses the charge (with or without a caution), the court must order the destruction of your photo and prints. If the court omits to make the order, it will be deemed to have been made anyway. The court may also order their destruction in other circumstances if it considers this to be justified. (See section 38 of the *Children (Criminal Proceedings) Act 1987* (NSW) also section 353AB *Crimes Act*.)

In other cases (for example, if you believe that police took your photo/prints unlawfully or unnecessarily, or if you are let off without being charged, or if you are found not guilty in a court other than the Children's Court) you can apply to the Criminal Records Unit for these records to be destroyed.

We recommend sending a letter to the Criminal Records Unit (see below) requesting destruction of the identification material. This ensures that you will receive a letter confirming that the records have in fact been destroyed. If you leave it to the court to arrange destruction of the records, you will not receive notification.

8.2 Adults - NSW

There is no absolute right to have identification material destroyed if you were 18 or over when it was taken. However, anyone may apply to the Criminal Records Unit to have identification records destroyed. The application is only likely to succeed if the identification material relates to charges or convictions capable of being removed from police records (eg charges that were dismissed or convictions that have been spent).

8.3 Children - Commonwealth

Any identification material taken from a person between the ages of 10 and 17 charged with a Commonwealth offence must be destroyed 12 months after the material was taken if:

- no proceedings were commenced;
- the offence was proven but no conviction was recorded; or
- the person was acquitted.

(See s 3ZK of the *Crimes Act 1914 (Cth)*)

8.4 Adults - Commonwealth

Identification material taken from a person charged with a Commonwealth offence must be destroyed if:

- 12 months or more have elapsed since they were taken and proceedings in respect of the offence have either not been instituted or have been discontinued;
- the person is found guilty but no conviction is recorded; or
- the person is acquitted and no appeal is lodged or any appeal is unsuccessful or withdrawn.

Identification evidence may not be destroyed if it is considered relevant to other offences being investigated.

(See sections 3ZK and 3ZJ of the *Crimes Act 1914 (Cth)*).

9 Destruction of material taken under the Forensic Procedures Act

The police have the power to take forensic samples from people suspected of a crime (eg a saliva sample or hair sample, usually for the purpose of DNA testing) under the *Forensic Procedures Act (NSW)*.

For adults, this can be done with the person's consent. For children, or adults with intellectual disabilities, police must get a court order before taking a sample.

Forensic material taken from a suspect must be destroyed after 12 months if the person has not been charged or the charge has been discontinued. If a person is charged but is found not guilty, or is found guilty but no conviction is recorded, the material must be destroyed as soon as practicable (*Forensic Procedures Act (NSW)* section 88).

Forensic material can also be taken from prisoners who are serving sentences for certain types of offences. This material does not get destroyed.

10 Copies, correction and removal of records

10.1 Applying for a copy of your criminal record

You can apply for a copy of your own criminal record under freedom of information (FOI) by paying a fee (currently \$30). The record you obtain will include all convictions, including spent convictions, and charges which were dismissed unless you had earlier applied to have your fingerprints and photos deleted.

If you are unsure of the state(s) where you have a criminal record, you can apply to the Australian Federal Police to do a nationwide search for a fee (currently \$35).

NSW Police

Manager of FOI Unit
NSW Police
Locked Bag 5102
Parramatta NSW 2124
Telephone: 9339 5199

Application forms are available on the internet. Go to www.police.nsw.gov.au, "services", click on "freedom of information", then click on the "Criminal History Check" form.

Federal Police

Criminal Records Section
Australian Federal Police
Locked Bag 1 Weston ACT 2611
Telephone: 9286 4000

Application forms are available on the internet. Go to www.afp.gov.au and do a search for "criminal records".

10.2 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 the NSW Police Criminal Records Unit at:

The Leader
Criminal Records Branch
NSW Police
Locked Bag 5102
Parramatta 2124
Telephone: (02) 8835 28880

10.3 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 (eg, an incorrect date of birth or spelling, or an erroneous reference to the fact that a person is HIV-positive), you should contact the Criminal Records Unit (contact details above).

An alternative way is to speak to the Intel Officer at the police station which laid the initial charge or created the records.

10.4 Destruction of identification material

All requests for destruction of identification material should be sent to the Criminal Records Unit (contact details above). Requests should include a precise description of what material is requested for destruction and an explanation on why the material should be destroyed.

10.5 Destruction of forensic material

Requests for destruction of forensic material should be directed to:

NSW Police
Forensic Services Group
Forensic Procedures Implementation Team
Level 5, Sydney Police Centre
151-241 Goulburn St
Surry Hills NSW 2010
Tel: 9265 4465

Shopfront Youth Legal Centre Updated September 2004

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

This document was last updated in September 2004 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 by Freehills. The summary should not be relied on as a substitute for legal or other professional advice.

This document may be photocopied and distributed, or forwarded by email, on the condition that the document is reproduced in its entirety and no fee is charged for its distribution.

