

CHILDREN'S CONVICTIONS AND CRIMINAL RECORDS

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Jane Sanders and Aaron Tang

INTRODUCTION

The principle that people should not be punished beyond their sentence is important, especially for children where rehabilitation is a paramount consideration. However, a conviction and a criminal record has far reaching effects on a child, long after their sentence.

Convictions and criminal records affect future court appearances, employment, opportunities for volunteer work, obtaining certain licenses, visa applications, civic duties/rights, insurance and credit, inter alia. Often, these consequences are not even noticed and/or understood until well after a child's court proceedings are finished. It is thus incumbent on legal practitioners to be aware of the laws and policies surrounding convictions and records, and to incorporate such understanding into the advice given to clients and the submissions that are made to court.

It is especially and increasingly important to understand children's convictions and records because their access and use is becoming more widespread and because they affect children at a time when they are commencing their career.

The legislative instruments that create, collate, define and disseminate information on the criminal history of a young person are 'complex, piecemeal and inconsistent'² especially in the context of the different stakeholders who each have their own role to play. Existing legislation continues to be expanded, new legislation introduced and there continues to be a failure to provide protections for people with a criminal record. Several of the relevant statutes referred to within this paper have been or are currently subject to reviews, so this paper needs to be read keeping in mind that there are possible impending changes.

² Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) MULR 6.

The main areas that this paper will address include:

- 1) Children's sentencing options
- 2) What is a conviction and the discretion to convict
- 3) The use of children's convictions in courts
- 4) Traffic records
- 5) Penalty notices
- 6) The Criminal Records Act and spent convictions
- 7) Crimes Act 1900, s 579
- 8) Commonwealth spent convictions
- 9) Destruction of fingerprints and identification material
- 10) The Young Offenders Act
- 11) Mental Health (Forensic Provisions) Act
- 12) Apprehended Violence Orders
- 13) The Child Protection Register
- 14) Working with Children Checks
- 15) The National Police Check
- 16) Discrimination in employment
- 17) Australian Defence Force recruitment
- 18) Other effects of a criminal record

1. CHILDREN'S SENTENCING OPTIONS

Before embarking on a discussion of children's convictions and records, it is helpful to summarise/explain the various sentencing options available for children:

- A) Children who are sentenced for a serious children's indictable offence³ must be sentenced "according to law" (ie under the adult sentencing regime in the Crimes (Sentencing Procedure) Act 1999 (CSPA)).
- B) A District Court that deals with a child for an indictable offence which is not a serious children's indictable offence has a discretion to:
 - a. Sentence according to law or under s 33 of the Children's (Criminal Proceedings) Act 1987 (CCPA)⁴; or
 - b. Remit the matter to the Children's Court for sentencing⁵.
- C) A Children's Court can divert a child under the Young Offenders Act 1997 (YOA)⁶ or sentence under s 33 of the CCPA.
- D) A Local Court dealing with child's traffic matter can sentence under the CSPA or under s 33 of the CCPA⁷.

Young Offenders Act

Warning: s 15

Given by police on the spot and without needing any admissions.

Cautions: ss 21 and 31

Upon an admission to the offence, a caution can be given by police or by the court.

Youth Justice Conference: ss 37 and 40

Upon an admission to the offence, the police or the court can refer to conference. The child attends a conference with the victim and agrees to complete an outcome plan to make reparations⁸. The court can approve the outcome plan and dismisses the matter upon satisfactory completion of the outcome plan.

³ Defined in s 3 of the Children (Criminal Proceedings) Act 1987.

⁴ Section 18(1) CCPA. The court would also be able to divert a child for eligible offences under the Young Offenders Act 1997.

⁵ s 20 of the CCPA.

⁶ See s 8 of the YOA for eligible offences.

⁷ s 210 of the Criminal Procedure Act 1986.

⁸ A typical outcome plan involves a written apology and either doing some counselling or community service work. There are specific outcome plans for arson/bushfire offences and graffiti offence: Young Offenders Regulation 2016, regs 8 and 9.

Children (Criminal Proceedings) Act 1987

Dismissal (with or without caution): s33(1)(a)(i)

This option never carries a conviction.

Non-conviction bond: s33(1)(a)(ii)

This option does not carry a conviction and is similar to an adult s10 bond. Maximum term 2 years.

Bond: s33(1)(b)

This option may be with or without a conviction and is therefore similar to either a s9 or s10 bond. Maximum term 2 years.

Fine: s33(1)(c)

Maximum 10 penalty units (\$1,100) or the maximum penalty for the offence (whichever is the lesser).

Release on condition to comply with youth justice conference outcome plan:

s33(1)(c1)

This applies if the matter has been sent to conference after a finding of guilt. Most matters that are referred to a conference will be dismissed under the *Young Offenders Act* (after an admission by the child) and not dealt with under this subsection.

Fine and bond: s33(1)(d)

Adjournment for rehabilitation: s33(1)(c2)

Similar to an adult s11 bond or the common law Griffiths Remand. Maximum 12 months.

Probation: s33(1)(e)

Similar to a bond, but usually with a higher level of supervision. Maximum 2 years.

Probation and fine: s33(1)(ei)

Community service order: s33(1)(f)

Maximum hours depend on age of child and maximum penalty for offence; upper limit is 250 hours.

Probation and community service order: s33(1)(fi)

Suspended control order: s33(1B)

Similar to an adult s12 bond. Maximum 2 years.

Control order: s33(1)(g)

This is a custodial sentence in a juvenile justice centre. Maximum term 2 years (or 3 years for cumulative sentences).

2. CONVICTIONS

There can be several meanings of the word “conviction”. For the purposes of this paper, the most relevant meanings are:

- 1) When a person pleads guilty or is found guilty they are “convicted” of the offence
- 2) A conviction that affects whether the offence can be disclosed to a court
- 3) A conviction that affects whether the offence can be disclosed to others such as employers/prosecutive employers.

This paper will focus mainly on the last two.

If a person pleads guilty or is found guilty then the court may “convict” the person of the crime⁹. The conviction may come upon the finding of guilt by the court and/or the subsequent sentence¹⁰. However, there are several ways that a child offender may be diverted from a sentence and thus, arguably, avoid a “conviction” completely. For example, a child is not convicted if they are dealt with under the:

- Young Offenders Act 1997 (YOA)
the child does not need to plead guilty/be found guilty in order to be dealt with under the YOA. They only need to admit the offence: ss19, 36. See below for a further discussion of the Young Offenders Act.
- Mental Health (Forensic Provisions) Act 1990
ss 32 and 33 orders may be granted at any stage of proceedings and can occur without a guilty plea/finding of guilt. An order under s 32(3) dismisses the charge and discharges the defendant¹¹. Similarly, the court can make various orders under s 33, including an order discharging the defendant under s 33(1)(c). The charge is dismissed if the matter is not brought back to court within 6 months of the s 33 order: s 33(2)¹². See below for further discussion.
- Children (Protection and Parental Responsibility) Act 1997
if the court finds the child guilty of an offence it may release the child and/or parent on condition that they give an undertaking¹³.
- Youth Conduct Orders¹⁴
if a child pleaded not guilty and substantially completed a Youth Conduct Order the court may have ordered that the charge for the offence be dismissed¹⁵.

⁹ For example, for summary matters, see Criminal Procedure Act 1986, ss 193 and 202.

¹⁰ See below for a further discussion on the meaning of conviction and the timing of a conviction.

¹¹ A decision under s 32 to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise: s 32(4).

¹² If a matter is dismissed under s 33(2) it does not constitute a finding that the charges against the defendant were proven or otherwise: s 33(4).

¹³ It is arguable whether this undertaking is an order to enter a recognizance as per s 5(b) Criminal Records Act 1991.

¹⁴ I note that Youth Conduct Orders are now no longer available. Their legislative provisions have not been repealed but there is no mechanism (eg the various inter agency cooperation) to administer a Youth Conduct Order. Nevertheless, if your client was previously dealt with under a YCO it is helpful to know that they may not have been convicted.

¹⁵ s 48R(2) of the CCPA..

Where appropriate, it may be beneficial to seek to deal with a child in the above mentioned ways in order to avoid a conviction and the consequences that flow from a conviction.

The Young Offenders Act and the Mental Health (Forensic Provisions) Act are discussed in more detail below.

2.1 Section 14 of the CCPA

Another way to avoid a conviction is via the operation of s 14 of the CCPA¹⁶.

14 Recording of conviction

- (1) Without limiting any other power of a court to deal with a child who has pleaded guilty to, or has been found guilty of, an offence, a court:
 - (a) shall not, in respect of any offence, proceed to, or record such a finding as, a conviction in relation to a child who is under the age of 16 years, and
 - (b) may, in respect of an offence which is disposed of summarily, refuse to proceed to, or record such a finding as, a conviction in relation to a child who is of or above the age of 16 years.
- (2) Subsection (1) does not limit any power of a court to proceed to, or record such a finding as, a conviction in respect of a child who is charged with an indictable offence that is not disposed of summarily.

Section 14 deals with the recording of convictions for children in the Children's Court and also in other jurisdictions.

Notably, s 14 is not located within Div 4 Pt 3 CCPA (penalties). The court's determinations about the recording of a conviction under s 14 can occur at any time after the finding of guilt/guilty plea: ie it may occur before, during or after sentence. Ordinarily though, considerations of s 14 would occur at the time of sentencing. Indeed, in practice, whether a conviction is recorded may impact upon sentencing and the material before the sentencing court may assist a court in relation to the exercise of any discretion it may have under s 14(1)(b).

I note that whether a conviction is recorded will affect the operation of s 15 of the CCPA (see further discussion below). However, contrary to popular belief, whether a conviction is recorded under s 14 currently may have no impact upon whether the offence can or cannot be disclosed under the Criminal Records Act (see further discussion below).

2.1.1. Section 14 (1) – The child's age

When a court is considering s 14(1) does it consider the child's present age or the age at the time of the offence?

¹⁶ However, see the below discussion in the section on spent convictions about the practical effect of s 14.

A literal reading of the section would indicate that the relevant age is the age at the time that the court is considering whether to record a conviction: ie usually the sentence date. If the child is 16 or over at the time of the finding of guilt/sentencing then s 14(1)(b) applies. This interpretation is supported by the fact that the section reads “a child who *is* of or above the age of 16 years”.

However, this interpretation could lead to unfairness if there is a delay between the date of the offence and the sentence date. A child may have been under 16 at the date of the offence but over 16 at the date of sentence and the delay may not have been their fault.

Furthermore, s 14(1)(b) applies to a “conviction in relation to a *child* who is of or above the age of 16 years”. It could be argued that even if an offender had been over 16 at the time of the offence, the discretion in s 14(1)(b) is not applicable to them if they are no longer a *child* at the time of sentence. That is, if the delay in sentencing causes them to be an adult at the time of sentence, then arguably s 14(1)(b) doesn’t apply at all.

If the relevant time is the date of sentence then practitioners will need to be careful to advise their 15 year old or 17 year old clients that it may be in their interest to get sentenced quickly before their 16th or 18th birthday.

The alternative, and preferable, interpretation is that the relevant age is the child’s age at the time of the offence. There are a number of arguments that support this interpretation:

- 1) s 14(1) refers to the conviction being “in respect of an offence”: the conviction relates to the offence and therefore the relevant age should be the child’s age at the time of the offence;
- 2) s 6 CCPA principles about rehabilitation;
- 3) Any ambiguity in statutory interpretation should be read in the child’s favor.

In my experience, most Magistrates and Judges have taken the view that the relevant age is the child’s age at the time of the offence¹⁸. Nevertheless, there may still be some difficulties with this interpretation, particularly where the child’s age at the time of the offence is unknown. There are many offences (eg child sexual offences) which are charged with no specific offence date but rather a date range. Where the date range spans the child’s 16th birthday, the court may need to make a finding about whether the child was under 16 or 16 and over at the time of the offence, in order to properly apply s 14(1)(a) or (b).

¹⁸ However, in *R v Jasper* [2014] NSWDC 116 the offender was 15 at the time of the offence and 16 at the time of sentencing. It was not argued that the relevant age was the age at the time of the offence. Rather the court was invited to exercise its discretion to not convict. Ultimately, the court did not convict. See further discussion about this case below.

Because *Jasper* did not deal with the issue of what is the relevant age, it cannot be said to be authority for the proposition that the relevant age is the age at the time of sentencing.

2.1.2 The applicability of s 14(1) in the summary and indictable jurisdictions

Section 14(1) provides the power to not record a conviction

- s 14(1)(a) – mandates that a court *shall* not record a conviction for any child under 16
- s 14(1)(b) – a court *may* refuse to record a conviction
 - for an offence which is disposed of summarily; and
 - where the child is 16 or over.

Section 14(2) provides that s 14(1) does not limit any power of a court to proceed to record a conviction for:

- any child;
- for an indictable offence not disposed of summarily.

Summary courts

Section 14(1)(a) and (b) applies to matters dealt with summarily in summary courts (ie the Children's Court and the Local Court¹⁹).

If a child was under 16 then no conviction is recorded.

If a child was 16 or over then the court has a discretion.

Superior Courts dealing with indictable matters

If an offence is a serious children's indictable offence it is dealt with according to law: s 17 CCPA.

If a superior court deals with an indictable matter that is not a serious children's indictable offence, it may decide to deal with the matter according to law or in accordance with Div 4 Pt 3 CCPA - ie under s 33 CCPA: s 18(1) CCPA.

According to law

If the court deals with a child according to law, the matter is not dealt with summarily. Section 14(2) applies. Also, s 14(1)(b) cannot apply because s 14(1)(b) only applies to matters dealt with summarily.

Hence, it would seem that a child over 16 who is dealt with according to law must be convicted unless they receive a s 10 CSPA.

I note in *R v Jasper* [2014] NSWDC 116 the court sentenced a child (over 16 at the time of sentence) according to law. However, the court nevertheless exercised a discretion to not convict. The decision in *Jasper* was delivered ex tempore, His Honour being guided

¹⁹ Traffic matters in the Local Court dealt with under s 33 of the CCPA, pursuant to s 210 of the Criminal Procedure Act.

by the practitioners. I suspect that many courts and practitioners have not yet fully grappled with the issues raised here in this paper about the applicability of s 14(1).

And what about children under 16 sentenced according to law?

On the one hand, s 14(1)(a) states that a court shall not convict a child under 16. Unlike s 14(1)(b), s 14(1)(a) is not restricted to matters dealt with summarily. However, s 14(2) clearly states that s 14(1) does not limit any power of a court to convict a child (presumably including children under 16) for an indictable offence which is not dealt with summarily. The court certainly has the power to convict (it is certainly not fettered by s 14(1)(a)). However, does the court *have* to convict? A novel argument could be run that the interaction between s 14(1)(a) and s 14(2) leads to the conclusion that the court has a discretion on whether to convict a child who is under 16 and dealt with according to law.

If this interpretation is incorrect then all children dealt with according to law must be convicted unless they receive a s 10 CSPA.

This may be a reason to persuade a court considering s 18(1) CCPA to not deal with a child according to law but rather under the CCPA.

Indictable matters dealt with under the CCPA

If, pursuant to s 18(1) CCPA, a superior court deals with an indictable matter under the CCPA is it “disposing of the matter summarily” such that s 14(2) does not apply?

“Summarily” is not defined in the CCPA nor is it defined in the Interpretation Act 1987. Is the term restricted to matters dealt with in the Children’s Court in a strictly summary jurisdiction or does it include matters dealt with in the District Court but being dealt with under Div 4 Pt 3 CCPA?

Section 32 CCPA provides for the application of Div 4 Pt 3 CCPA.

32 Application

This Division applies to any offence for which proceedings are being dealt with summarily or in respect of which a person has been remitted to the Children’s Court under section 20.

The term “summarily” is used but without definition.

Section 18 CCPA gives power for the District Court to deal with indictable offences (which are not serious children’s indictable offences) either according to law or under Div 4 Pt 3.

18 Other indictable offences

- (1) A person to whom this Division applies shall, in relation to an indictable offence other than a serious children’s indictable offence, be dealt with:
 - (a) according to law, or
 - (b) in accordance with Division 4 of Part 3.

- (1A) In determining whether a person is to be dealt with according to law or in accordance with Division 4 of Part 3, a court must have regard to the following matters:
- (a) the seriousness of the indictable offence concerned,
 - (b) the nature of the indictable offence concerned,
 - (c) the age and maturity of the person at the time of the offence and at the time of sentencing,
 - (d) the seriousness, nature and number of any prior offences committed by the person,
 - (e) such other matters as the court considers relevant.
- (2) For the purpose of dealing with a person in accordance with Division 4 of Part 3, a court shall have and may exercise the functions of the Children's Court under that Division in the same way as if:
- (a) the court were the Children's Court, and
 - (b) the offence were an offence to which that Division applies.
- (3) If a court, in exercising the functions of the Children's Court under subsection (2), makes an order under section 33 that provides for a person to enter into a good behaviour bond or that releases a person on probation, the court may, on referral from the Children's Court under section 40 (1A), deal with the order in the same way as the Children's Court may deal with it under section 40.

Because of s 32 and the emphasized portion of s 18(2) above, it would appear that a superior court dealing with a child under Div 4 Pt 3 CCPA is disposing of the matter summarily. Thus, s 14(2) is not applicable; s 14(1) is applicable.

A child under 16 cannot be convicted.

There is a discretion whether to convict a child 16 or older.

2.1.3 Section 14(1)(b)- to convict or not to convict?

If the child was 16 or older then (subject to the abovementioned jurisdictional issues) the court has a discretion whether to record a conviction or not, pursuant to s 14(1)(b).

An assumption of conviction?

There is arguably no obligation on a court to consider s 14(1)(b) or to make a decision under s 14(1)(b). If no submissions are made about the issue and the court remains silent about the issue then it has *not* made an order under s 14(1)(b) refusing to proceed to or record a finding as a conviction. Whilst there is no legislative *presumption* of conviction, the practical effect of a court not making a finding to deal with a matter "without conviction" is that there will be a conviction recorded.

In *Stranges v Commissioner of Police, NSW Police Service* [2004] NSWADT 221, Mr Stranges was a 26 year old man who was training to be a security guard. His current employer had offered him full time employment if he obtained a security licence. However, the Commissioner of Police refused him a licence on the ground that the Children's Court had convicted him of "obtaining a benefit by deception": when he was 17 years old he had used a stolen cab charge docket for a \$29.10 taxi ride. When Mr Strange challenged the Commissioner's decision, the ADT said (at 6):

The Magistrate did not tick either the "convicted" or the "without conviction" box on the court papers. Unless the Magistrate makes a decision not to convict, the assumption is that a defendant has been convicted...

The Registrar at Parramatta Children’s Court²¹ has indicated there is only one tick box on the court papers, which says “convicted (over 16 years)”. If the box is not ticked then no conviction is noted when the Registry record the result. The Specialist Children’s Magistrates are aware of this procedure and, if they intend on recording a conviction, will often also write “convicted” on the papers as well. If a new or visiting Magistrate has dealt with a matter involving a child 16 years or older and the box is not ticked, the Registry will clarify with the Magistrate before recording the outcome.

Despite this procedure at Parramatta Children’s Court, given the result in *Stranges*, it is still necessary for a prudent practitioner to address the court about s 14(1)(b) and seek specific orders to have the matter dealt without conviction.

Also, it is worth noting again that an order under s 14(1)(b) can be made at any time. If the sentencing court is silent about whether it recorded a conviction, you can still relist the matter later to seek a finding of no conviction.

Is there a need for s 14(1)(b) if a child is sentenced under s 33(1)(a)?

Section 33(1)(a) of the CCPA provides:

- (1) If the Children’s Court finds a person guilty of an offence to which this Division applies, it shall do one of the following things:
 - (a) it may make an order:
 - (i) directing that the charge be dismissed (in which case the Court may also, if it thinks fit, administer a caution to the person), or
 - (ii) discharging the person on condition that the person enters into a good behaviour bond for such period of time, not exceeding 2 years, as it thinks fit,

Section 33(1)(a) is the children’s equivalent of s 10 of the CSPA.

10 Dismissal of charges and conditional discharge of offender

- (1) Without proceeding to conviction, a court that finds a person guilty of an offence may make any one of the following orders:
 - (a) an order directing that the relevant charge be dismissed,
 - (b) an order discharging the person on condition that the person enter into a good behaviour bond for a term not exceeding 2 years,
 - (c) an order discharging the person on condition that the person enter into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program.

However, unlike s 10 which explicitly says that the sentence is ordered “without proceeding to conviction”, s 33(1)(a) does not explicitly state “without proceeding to conviction”. In practice, courts do not impose a conviction if a matter is dealt with under

²¹ I cannot confirm whether it applies to all other Children’s Courts.

s 33(1)(a)(i) or (ii). Nevertheless, it may still be prudent to seek a finding of “without conviction” under s 14(1)(b) as well.

Reasons to exercise the discretion under s 14(1)(b) to not record a conviction

Principles of sentencing

The exercise of the s 14(1)(b) discretion may be intimately tied up with sentencing proceedings. Whether the court records a conviction or not may depend on the material presented at sentencing and also may impact upon the sentence. A court that is fully aware of the consequences of a conviction for a young person may choose to not record a conviction or, if it nevertheless records a conviction, it may adjust its sentence. Given this nexus between sentencing and the recording of a conviction, the principles that apply to sentencing are also relevant to the determination of whether to record a conviction.

These principles include those expressed in s 3A CSPA:

The purposes for which a court may impose a sentence on an offender are as follows:

- a) to ensure that the offender is adequately punished for the offence,
- b) to prevent crime by deterring the offender and other persons from committing similar offences,
- c) to protect the community from the offender,
- d) to promote the rehabilitation of the offender,
- e) to make the offender accountable for his or her actions,
- f) to denounce the conduct of the offender,
- g) to recognise the harm done to the victim of the crime and the community.

In *R v McGaffin* [2010] SASCF 22 at 78-89 the South Australian Supreme Court noted at 78-89 that the recording of a conviction serves many purposes:

First and foremost, it is the formal record of the adjudication of the offender’s guilt and thus comprises a formal and public declaration that the person engaged in the charged criminal conduct. As such it forms part of the community’s denunciation and censure of the conduct. Secondly, the prospect that a conviction will be recorded forms part of the deterrent effect of a sentence. This is because the recording of a conviction can have a significant deleterious effect on an offender and can act as a form of continual punishment.

Hence, the recording of a conviction could serve the following s 3A CSPA purposes of sentencing: a), b), c), e), f) and g).

On the other hand, a court needs to balance the effect that a conviction will have upon an offender and needs to promote the rehabilitation of the offender : s 3A(d) CSPA.

Where the consequences of a conviction are great, the court may find that they outweigh the benefits of a conviction and that the sentence has already met the purposes of sentencing (eg the courts sentence has already provided adequate punishment for the offence and it is not necessary to impose a conviction that has a life long effect upon the offender).

Principles when dealing with children

For children in particular, *rehabilitation* is the paramount principle in sentencing (*R v GDP* (1991) 53 A Crim R 112). Hence, much greater emphasis should be given to not recording a conviction so that there are no impediments to a child's rehabilitation. Furthermore, convictions have the potential to impact upon children much more than upon adults. For example, children are often at the start of their careers and will face greater disadvantage if their employment prospects are affected by a conviction.

The following s 6 CCPA principles can also be cited to support submissions for a non conviction:

- (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
- (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
- (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
- (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,
- (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

Paragraphs (c) and (d), (f) are most relevant.

Whilst there are a wide range of effects of a conviction (discussed below) the three most common and significant effects are upon:

- 1) education and employment
- 2) citizenship
- 3) travel.

These effects often form the basis for submissions for a non conviction under s 14. Even though it is now questionable whether s 14 has any relevance to these matters at all²², it may still be worthwhile to examine how courts have dealt with such matters.

Where possible, submissions should be supported by specific evidence of the effect of a conviction. However, the absence of evidence of the particular effect of a conviction does not necessarily mean that the court should disregard the *potential* effect of a

²² See below discussion under Criminal Records Act.

conviction. See below discussion on this point in *R v Maugher* [2012] NSWCCA 51 and *R v Sanders* [2007] QCA 165.

Some magistrates have also not recorded convictions because the child offender pleaded guilty. As far as I am aware, there is no legal principle connecting the (utilitarian) discount for the plea of guilty to the non recording of a conviction. However, the contrition demonstrated by a plea of guilty could indicate good prospects of rehabilitation such that a conviction should not be recorded in order to facilitate such rehabilitation.

Some courts and practitioners have assumed that a conviction follows where a control order is imposed. The seriousness of a matter that warrants a control order may lead a court to decide that a conviction is also warranted but nevertheless, a conviction does not automatically follow a control order. There may still be compelling reasons why a conviction should not be recorded.

Case law

Unfortunately, there are not many reported NSW cases on the exercise of the s 14 discretion.

In *R v Jasper* [2014] NSWDC 116 the court sentenced Darin Jasper (a pseudonym) for wounding with intent to cause grievous bodily harm – stabbing a victim at school. Darin was 15 at the time of the offence and only just 16 at the time of sentence. Because the offence was a serious children’s indictable offence, His Honour Cogswell SC DCJ sentenced him according to law. He then considered whether to impose a conviction. He considered the following:

- a) The seriousness of the offence
- b) The principle of non stigmatization
- c) the fact that Darin was only just 16
- d) he was suffering from a psychiatric condition at the time of the offence

Ultimately, he did not convict²³.

In *HL v Regina; YG v Regina* [2014] NSWCCA 43 the court considered whether disparity in the recording of no conviction for one offender gave rise to a justifiable sense of grievance in the applicants for whom convictions were recorded. It was submitted that a recorded conviction could have serious consequences for their careers. The court decided that any disparity was justified.

Appeal of VPS [2007] NSWDC 320 did not directly deal with the exercise of the s 14(1)(b) discretion but did make some general comments about the discretion. In *Appeal of VPS*, the adult appellant received a custodial term for traffic matters from the Local Court. He was assessed as unsuitable for home detention on the basis that he had been

²³ See further discussion below about s 14(2) and whether the court has a discretion to not convict when dealing with a matter according to law.

convicted of carnal knowledge in 1970 when he was a child²⁴. However, the District Court questioned whether he had been “convicted”²⁵. Goldring DCJ noted at 17-18

The whole policy of the criminal law, in relation to young people, is to support and encourage the the rehabilitation of young offenders.

Section 14, which I have just read, gives the Court a discretion. My understanding is that the discretion is rarely exercised. The general discussion in *Ceissman v Donovan* [1983] 2 NSWLR 491, though not directly in point, is still relevant.

Goldring DCJ speaks of rehabilitation and notes s 14 gives a discretion. Whilst he says “my understanding is that the discretion is rarely exercised” it is not clear whether he is referring to the discretion to convict or the discretion to not convict. It is my understanding that most children are dealt with “without conviction”.

Other jurisdictions

Guidance about the exercising of the s 14(1)(b) discretion can also be obtained from other jurisdictions dealing with young offenders. For example, in Queensland, the Penalties and Sentencing Act 1992 (Qld) gives a discretion on whether to record a conviction and lists criteria to be considered. Section 12(2) provides:

In considering whether or not to record a conviction, a court must have regard to all circumstances of the case, including –

- (a) the nature of the offence; and
- (b) the offender’s character and age; and
- (c) the impact that recording a conviction will have on the offender’s –
 - (i) economic or social wellbeing; or
 - (ii) chances of finding employment.

In Queensland, *R v Sanders* [2007] QCA 165 involved an appeal against the recording of a conviction for a 17 year offender for assault. The Court of Appeal cited a number of preceding Queensland Court of Appeal cases about the interpretation of s 12:

[12] In *R v Brown; ex parte Attorney-General* [1993] QCA 271, [1994] 2 Qd R 182 at 185, Macrossan CJ explained the correct approach to the exercise of the discretion conferred by s 12 as follows:

“Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s 12(2) of the Act say so and then there follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of

²⁴ s 77(1)(a)(i) of the Crimes (Sentencing Procedure) Act 1995.

²⁵ See at 19-21.

those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight.”

...

[22] In our view exercising the discretion in s 12(2) by ordering that a conviction not be recorded would best facilitate the applicant’s rehabilitation. The observations of Thomas J (as he then was) and White J in *R v Briese; ex parte Attorney-General* [1997] QCA 10; [1998] 1 Qd R 487 at 491 are particularly apposite:

“It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression.”

See also *The Queen v B* [1995] QCA 213, *R v JO* [2008] QCA 260.

Similarly, Youth Justice Act 1992 (Qld), s 183 allows for a discretion on whether to record a conviction against a child found guilty of an offence. Criteria similar to s 12 of the Penalties and Sentencing Act is found within Youth Justice Act 1992, s 184:

184 Considerations whether or not to record conviction

- (1) In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including—
- (a) the nature of the offence; and
 - (b) the child's age and any previous convictions; and
 - (c) the impact the recording of a conviction will have on the child's chances of—
 - (i) rehabilitation generally; or
 - (ii) finding or retaining employment.

Several cases deal with the s 183 discretion: see *R v HBE* [2011] QCA 378; *R v B* [2003] QCA 24; *R v SBY* [2013] QCA 50.

SBY concerned sexual offences by a 14 year old against a 12 year old half sister. The appeal dealt with, inter alia, whether a conviction should have been recorded under s 184. Helpfully, the court considered a number of similar cases (at 66-76). Ultimately, the court of Appeal upheld the recording of a conviction.

In Tasmania, the Youth Justice Act 1997 (Tas), s 49 provides for the recording of convictions against children. Relevantly, s 49(4) requires the court to taken into account:

- a) the nature of the offence; and
- b) the youth's age; and
- c) any sentences or sanctions previously imposed on the youth by any court or community conference and any formal cautions previously administered to the youth; and

- d) the impact the recording of a conviction will have on the youth's chances of rehabilitation generally or finding or retaining employment.

Rehabilitation is to be given more weight than any other individual factor²⁶.

See the following cases concerning the discretion under s 49: *ZXY v Tasmania Police* [2008] TASSC 55 and *DPP v NOP* [2011] TASC 15 in relation to a sexual offence.

For other jurisdictions where courts have a discretion to not record a conviction, see Young Offenders Act 1993 (SA), s 21²⁷ and Young Offenders Act 1994 (WA), s 55.

Cases on s 10 CSPA

Finally, guidance can also be obtained by considering case law about s 10 Crimes (Sentencing Procedure) Act 1999 (CSPA). However, there are two important distinctions between s 14 CCPA and s 10 CSPA:

- 1) section 14 relates to children and rehabilitation is a more important feature of sentencing for children;
- 2) the recording of no conviction under s 14 is separate from the actual sentence. A section 10 is the most lenient sentence for adults. Hence, there may be certain situations which do not warrant a s 10 (eg serious offences) but may, nevertheless, still be appropriate for a s 14(1)(b).

There are numerous cases on s 10. See *R v Mauger* [2012] NSWCCA 51, *Hoffenburg v District Court of NSW* [2010] NSWCA 142; *Application by the Attorney General under s 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgement Concerning the Offence of High Range Prescribed Concentration of Alcohol under s 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303.

A few relevant points are made in *Maugher*. Harrison J explained at 19 (Beazley JA and McCallum J agreeing) that where the offence is an objectively serious one and where general deterrence and denunciation are important factors in sentencing for that offence, the scope of the operation of s 10 decreases. The penalty imposed for any offence should reflect the objective seriousness of the offence²⁸.

²⁶ s 49(4A).

²⁷ *O, C v Police* [2007] SASC 346; *R v Police* [2002] SASC 403; *S, JC v Police* [2007] SASC 27; *Police v G, PA* [2007] SASC 78.

²⁸ See also Howie J in *Re Attorney General's Application under s 37* at 132. Also note that considerations of extra curial punishment may be relevant to the exercise of the discretion. However, it is not proper to dismiss a charge without conviction merely to avoid the operation of some other legislative provision which is otherwise applicable (eg child protection registration).

Evidence of the effect of a conviction

Maugher highlighted the difficulties that can sometimes arise when the prosecution or court require evidence of the effect of a conviction. Objections are sometimes taken to mere speculations about the effect of a conviction. In *Maugher*, there was evidence that a conviction *might* lead to the respondent losing his job and being prevented from travelling overseas.

Employment

The Crown contended that it was the fact of his being charged with a criminal offence that attracted the prospect of termination of employment rather than the conviction itself. The court did not agree. Harrison J said (at 28):

The obligation to reveal the existence of a conviction arises in common experience from time to time. It is not to the point that the respondent's employer in this case reserved to itself a discretion to take certain steps concerning the respondent if he had been "charged" with an offence. That reservation logically suggests that the employer treated the fact of being charged as a serious matter, so that in all likelihood it would consider a conviction for an offence to be more serious. ..The *prospect* that a conviction for this offence could have possibly detrimental consequences for the respondent's employment was definitively something that her Honour was entitled to take into account and that was proper for the court to consider pursuant to s 10(3)(d)... (my emphasis)

Similarly, in the above mentioned case of *R v Sanders* several cases were examined dealing with the ability of a court to consider prospective impact upon employment:

[13] As was recognised in *R v Ndizeye* [2006] QCA 537 at [17], this Court has not yet specified the extent to which information or evidence should be put before a sentencing judge to raise for consideration the matters in s 12(2)(c). It has been said that a bare possibility that a conviction may affect an offender's economic or social wellbeing or chances of finding employment is insufficient (see *R v Bain* [1997] QCA 35 ; *R v Cay, Gersch and Schell; ex parte A-G* (Qld) [2005] QCA 467 at [7] per de Jersey CJ.)

[14] In *Cay, Gersch and Schell*, de Jersey CJ at [5] observed that s 12(2)(c)(ii) requires a consideration as to what would, or would be likely to ensue in the particular case at hand, were a conviction recorded and at [8] stated:

"Prudence dictates that where this issue is to arise, Counsel should properly inform the court of the offender's interests in relation to employment, and his relevant educational qualifications and past work experience, etc, so that a conclusion may be drawn as to the fields of endeavour realistically open to him; and provide a proper foundation for any contention a conviction would foreclose or jeopardize a particular avenue of employment. Compare *R v Fullalove* (1993) 68 A Crim R 486, 492."

[15] In the same case Keane JA at [43] expressed the view, which the Chief Justice did not demur from, that:

"... the existence of a criminal record is, as a general rule, likely to impair a person's employment prospects, and the sound exercise of the discretion conferred by s 12 of the Act has never been said to require the identification of specific employment opportunities which will be lost to an offender if a conviction is recorded. While a specific employment opportunity or opportunities should usually be identified if the discretion is to be exercised in favour of an offender, it is not an essential requirement. Such a strict requirement would not, in my respectful opinion, sit well with the discretionary nature of the decision to be made under s 12, nor with the express reference in s 12(2)(c) to "the impact that recording a conviction will have on the offender's *chances of finding*

employment” (emphasis added). In this latter regard, s 12(2)(c) does not refer to the offender’s prospects of obtaining employment with a particular employer or even in a particular field of endeavour.”

[16] Mackenzie J stated at [74]:

“Section 12(2)(c) speaks of the impact a conviction “will” have on the offender’s economic or social wellbeing or chances of finding employment. This involves an element of predicting the future. Ordinarily, the word “will” in that context would imply that at least it must be able to be demonstrated with a reasonable degree of confidence that those elements of an offender’s life would be impacted on by the recording of a conviction. The notion of impact on the offender’s “chances of finding employment” is another way of describing the impact of a conviction on the opportunity to find employment in the future or the potentiality of finding employment in the future.”

[17] His Honour also observed at [75] the particular considerations that arise with young offenders:

“In cases involving young offenders, there is often uncertainty about their future direction in life. Perhaps, because of this, the concept may, in practice, often be less rigidly applied than in the case of a person whose lifestyle and probable employment opportunities are more predictable.

Travel

In relation to travel the Crown in *Maugher* pointed out that there was authority for the proposition that the existence and terms of entry restrictions imposed by foreign countries on international visitors was not an appropriate matter for judicial notice: *United States Surgical Corporation v Hospital Products International* [1982] 2 NSWLR 766 at 801. The Crown contended that there was little or no evidence to support the nature and extent of restrictions upon the respondent’s travel to the United States. Harrison J agreed stating:

it does not seem to me that generalised prognostications about the respondent’s ability to travel overseas unsupported by clear evidence could properly be matters that fell within [s 10(3)(d)]. It may be different if the sentencing judge were confronted with evidence to suggest that a particular offender faced the loss of his livelihood as the result of travel restrictions...or that he faced the prospect of the loss of the ability to visit, or return to, family overseas, in which circumstances some definite and enduring hardship or disruption could be demonstrated or confidently predicted.

Finally, the court balanced the benefits of a conviction against the disadvantages.

In terms of the relative criminological and social consequences for the respondent on the one hand and society on the other hand, the recording of a conviction for the offence...is of little or no practical or theoretical consequence to the good order of the community but is by way of contrast potentially of great importance to the respondent (at 39)

The court further noted that “a bond pursuant to s 10 operates in fact, and will be perceived by the community as operating, in the same way as a bond imposed pursuant to s 9. Hence “the particular legal and social consequences for the respondent of recording a conviction against him..far outweigh the requirements of punishment, denunciation or special or general deterrence” (at 40).

Lastly, there are several cases which deal with whether it is appropriate to give a s 10 for sexual offences. Whilst sexual offences are, of course, serious, each case must be dealt

with on its own merits. See *TC v R* [2016] NSWCCA 3; *R v KNL* [2005] NSWCCA 260; *R v DJS* [2001] NSWCCA 189²⁹.

See also cases on the Commonwealth Crimes Act 1914, s 19B (the Commonwealth equivalent of s 10 CSPa): *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92; *R v Luscombe* [1999] NSWCCA 365.

2.3 Youth Drug and Alcohol Court³⁰

Whilst there was nothing prescribed within the Youth Drug and Alcohol Court (YDAC) Practice Note (Practice Note 1), the YDAC sometimes indicated to participants that successful completion of the YDAC program would result in no convictions being recorded.

The YDAC also often dealt with breaches of bonds/probation/community service order. When re-sentencing the child the YDAC sometimes recorded no convictions, even where the Children's Court that initially imposed the bond/probation/CSO recorded a conviction. The YDAC (and indeed the Children's Court proper) could do this because s 41(4) CCPA and s 21A Children (Community Service Orders) Act 1987 allows the court dealing with revoked bonds/probations/CSOs to deal with the child "in any manner in which the person could have been dealt with for that offence by the Children's Court", ie including decisions under s 14 CCPA.

3. THE USE OF CHILDREN'S CONVICTIONS IN COURT

3.1 Section 15 CCPA

15 Evidence of prior offences and other matters not admissible in certain criminal proceedings

- (1) The fact that a person has pleaded guilty to an offence in, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if:
 - (a) a conviction was not recorded against the person in respect of the first mentioned offence, and
 - (b) the person has not, within the period of 2 years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.
- (2) Subsection (1) or (3) does not apply to any criminal proceedings before the Children's Court.

²⁹ This case concerned a 14 year old boy (20 years prior) who removed his 8 year old sister's underwear and momentarily touched her on the vagina whilst hiding in a wardrobe, and was caught by their mother who chastised him and took it no further. The sentencing judge described the incident as "at its highest, soe form of a child experimenting in sexual activity". The appellate court did not record a conviction.

³⁰ The Youth Drug and Alcohol Court (YDAC) now no longer exists. Nevertheless, it is useful to note what occurred during its operation in order to give advice to any client who was previously dealt with by the YDAC.

- (3) The fact that a person has been dealt with by a warning, caution or youth justice conference under the Young Offenders Act 1997 (being in respect of an alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence.

A child's record will always be able to be used in the Children's Court regardless of whether they were given a conviction or not under s 14 and regardless of whether any conviction is spent : s 15(2) CCPA; s 16 Criminal Records Act 1991 (CRA).

However, in any other jurisdiction – the Local Court, District Court, Supreme Court – s 15(1) applies whether the person is an adult or is still a child. The record will not be admissible in any criminal proceedings if the criteria in both s 15(1)(a) and (b) are met.

In *Tapueluelu v R* [2006] NSWCCA 113, the applicant was sentenced by the District Court for robbery offences charged in December 2003 and May 2004. In sentencing him the District Court took into account his juvenile record, including a 1995 offence. On appeal to the CCA, the applicant provided evidence of his New Zealand birth certificate showing that he was 15 at the time of sentence for the 1995 offence. Hence, no conviction should have been recorded for that matter because he was under 16.

The applicant had also been sentenced for driving offences which occurred within 2003 prior to the commencement of proceedings for the robbery matters.

He nevertheless argued that the 1995 offence should not be admissible as evidence because it was without conviction and committed outside the 2 year date range in s 15 CCPA. That is, he argued that s 15 should be construed as excluding evidence of an offence where there was no conviction and *that* offence occurred outside the 2 year time frame. This interpretation was rejected by the Court of Criminal Appeal; Simpson J (with Howie and Grove JJ concurring) stated (at [30]):

In my opinion it is inescapable that s 15 is intended to protect a person who has remained crime free for a period of two years from suffering the admission of evidence of offences committed outside of that period, but once it is established that the crime free period has not existed, then evidence of any other offences, whenever committed, does become admissible, or at least they are not subject to the prohibition otherwise contained in s 15. That is the only logical way of reading s 15.

By way of further illustration:

If a child commits a shoplifting in 2000 when 15 years old, then commits a robbery in 2003 when 18 years old, the shoplifting will not be admissible.

However, if the child commits a break and enter in 2004, both the shoplifting and the robbery will be admissible. The robbery occurred within two years before the break and enter and hence it and the shoplifting will be admissible records.

When dealing with a client in the Local, District or Supreme Court, it is important to check their record to see whether juvenile records should be excluded due to s 15. This includes dealing with appeals in the District Court. Hence, a District Court dealing with an appeal against a Children's Court sentence could consider a different criminal record from the record considered by the original Children's Court.

3.1.1 Section 15(1)(a) – was a conviction recorded for the earlier offence?

It may not be easy to determine if convictions were recorded for earlier offences. The criminal record may not show whether or not sentences were dealt with without conviction. The record will show the date of sentence but will not show the date of offences. If the child was under 16 at the date of sentence (in a summary court) then no conviction would have been recorded. However, where the child was 16 or older at the time of sentence the record may not show whether the sentence was with or without conviction. You may need to consult the court papers to see whether a conviction was recorded.

3.1.2 Section 15(1)(b)

With regards to s 15(1)(b), the person must not have been subjected in the past 2 years to any judgment, sentence or order of a court whereby they were punished for any other offence. I note that this would arguably include sentences under s 10 CSPA and s 33(1)(a) CCPA. It could also arguably include court referrals under the Young Offenders Act. It would not include orders under ss 32 and 33 Mental Health (Forensic Provisions) Act.

3.1.3 Prohibition on use of the record

If s 15(1)(a) and (b) are satisfied then the court shall not admit evidence of the fact that the person has pleaded guilty or been found guilty of offences excluded by s 15. Such evidence is excluded not only as evidence for sentence proceedings but also as evidence relevant to guilt. For example, the fact that a person pleaded guilty/was found guilty of offences excluded under s 15 cannot be used by the Local, District or Supreme Court as tendency or coincidence evidence, character evidence, or evidence rebutting *doli incapax*.

See below under the section on Young Offenders Act for a further discussion of s 15(3).

3.2 Use of a prior “conviction” as an aggravating factor

In *R v Cordell*; *R v Petersen* [2014] NSWDC 74 it was argued that Children's Court matters should not be included amongst the aggravating factors for sentence because of s 14 CCPA. His Honour Cogswell SC DCJ (at 28) agreed:

there is some force in that submission because s 21A of the Crimes (Sentencing Procedure) Act describes the relevant aggravating factors as the offender having “a record of previous *convictions*”. (my emphasis)

Also see *HMP v R* [2010] NSWCCA 63 at 49-51 where this argument was also advanced and *Glover v R* [2015] NSWCCA 293 where the argument was not.

Similarly, in *R v Price* [2005] NSWCCA 285, an offence dealt with under s 10 CSPA was not considered to be a conviction for the purposes of s 21A CSPA.

3.3 Convictions must be tendered to court in the correct form

Incidentally, even if convictions are admissible in court proceedings they must be tendered in the correct form. In *R v GW* [2015] NSWDC 52 the prosecution sought to rely on a child's record to rebut *doli incapax*; it sought to tender a bail report. Lerve DJC took no issue with the use of a record of prior offences to rebut *doli* but it was the manner in which the material was presented that led to his reluctant rejection of the evidence.

Section 178 of the Evidence Act relevantly provides:

178 Convictions, acquittals and other judicial proceedings

- (1) This section applies to the following facts:
 - (a) the conviction or acquittal before or by an applicable court of a person charged with an offence,
 - (b) the sentencing of a person to any punishment or pecuniary penalty by an applicable court,
 - (c) an order by an applicable court,
 - (d) the pendency or existence at any time before an applicable court of a civil or criminal proceeding.
- (2) Evidence of a fact to which this section applies may be given by a certificate signed by a judge, a magistrate or registrar or other proper officer of the applicable court:
 - (a) showing the fact, or purporting to contain particulars, of the record, indictment, conviction, acquittal, sentence, order or proceeding in question, and
 - (b) stating the time and place of the conviction, acquittal, sentence, order or proceeding, and
 - (c) stating the title of the applicable court.

The evidence of prior offences had not been presented via s 178 certificate but rather via a bail report. Even if the bail report was a business record it needed to comply with the provisions of s 171 of the Evidence Act- ie evidence given by affidavit or written statement.

3.4 Use of interstate juvenile records in courts

How does a court determine whether a juvenile record from another State/Territory is admissible for proceedings in a NSW court? There seems to be some inconsistency in approach but I think the correct approach is as follows:

When considering whether an interstate juvenile record is admissible in a NSW court, the court should look to NSW legislation, for example s 15 CCPA, to determine the parameters for admissibility. Consideration will then also need to be given to the other

State/Territory's legislation to inform the application of NSW legislation: for example, to understand whether a conviction would have been recorded for a juvenile offence in the other State/Territory.

The reverse applies when considering the use of NSW juvenile records in interstate courts.

Whilst I could not locate any relevant NSW caselaw on the use of interstate juvenile records, Northern Territory and Queensland cases provide guidance, although they take different approaches.

In *Brokus v Eaton* [2010] NTSC 20 the appellant normally resided with his family in South Australia. He committed an offence after he had just turned 18, whilst on holidays in the Northern Territory. On sentence, the prosecutor, tendered his South Australian "Offender history report". This contained matters which were referred to a "family conference". On appeal, the appellant alleged the Magistrate had erred in admitting the report. The Supreme Court noted that section 58 of the Young Offenders Act 1993 (SA) specifically directs that offences for which a youth was dealt with by way of family conference must be disregarded when that person is later dealt with for offending as an adult. There was no identical provision in the Northern Territory Youth Justice Act. Nevertheless, the court noted that s 136 of the Youth Justice Act prevented the use of juvenile records where no conviction was recorded. It was noted that no conviction would have been recorded for a SA family conference. Hence, it was appropriate to treat the appellant as someone who had no prior record.

In *R v Duncombe* [2005] QCA 142, a Tasmanian juvenile record was considered by the Queensland court. The Juvenile Justice Act 1992 (Qld), s 148(1) provided that:
"in proceedings against an adult for an offence, there must not be admitted against the adult evidence that the adult was found guilty as a child of an offence if a conviction was not recorded"

However the court found that s 148(1) applied to proceedings for adult offences in Queensland and therefore also referred only to offences committed in Queensland as a child. That is, the section was not concerned with whether the Tasmanian juvenile offences were without conviction.

In any event, the Youth Justice Act 1997 (Tas) provided a discretion to record a conviction and the DPP researched whether a conviction had been recorded in Tasmania – it appeared that it had been.

Nevertheless, the court said (at 19) "it does not follow, of course, that the inapplicability of s 148(1) of the Queensland legislation means that a sentencing court in this State should ignore similarly worded restrictions in the laws of other State and Territories of the Commonwealth making provision for juvenile offenders. Respect for judicial comity requires otherwise". The court queried whether s 49(5) of the Tasmanian statute had similar result or effect as s 148(1) but ultimately did not need to draw any conclusions because reference to his juvenile record (whether conviction or non conviction) did not ultimately affect his sentence because he had other records.

The following legislation may be of relevance when considering interstate juvenile records:

- Youth Justice Act 1992 (Qld), s 148
- Young Offenders Act 1993 (SA), s 58
- Children, Youth and Families Act (Vic) s 584
- Youth Justice Act 2005 (NT), s 136
- Young Offenders Act 1994 (WA), s 189, 190
- Youth Justice Act 1997 (Tas), s 49
- Children and Young People Act 2008 (ACT)

3.5 Use of “convictions” in other statutes – the meaning of conviction

Asides from s 21A CSPA referred to above, there are several other statutes which refer to convictions for previous offences. Some offences require proof of prior convictions as an element of the offence/provision. For example:

- Summary Offences Act, s 11G: loitering by convicted child sex offender
- Crimes Act, s 546B: convicted person found with intent to commit an offence.
- Crimes Act, s 115: being convicted offender armed with intent to commit indictable offence.
- Bail Act 2013, s 16B(c): a serious personal violence offence or wounding/grievous bodily harm is a show cause offence if a person has previously been convicted of a serious personal violence offence³¹.

Where a child has not received a “conviction” under s 14 it is arguable whether these statutory provisions are applicable.

3.5.1 HA and SB v DPP [2003] NSWSC 347

In *HA and SB v The Director of Public Prosecutions* [2003] NSWSC 347, HA and SB were sentenced for traffic offences. They were both given disqualifications pursuant to ss 24 and 25 Road Transport (General) Act 1999 (RTG) which states that disqualification may follow a conviction for a traffic offence. At the time of sentence, both HA and SB were under 16 years old. They appealed to the Supreme Court on the question of law contending that the disqualification provisions were triggered by a “conviction” and that they had not been “convicted”.

The Supreme Court reviewed the case law about the meaning of “conviction”.

³¹ *R v Magrin* [2004] NSWCA 354 dealt with Bail Act 1978, s 9D, which was the precursor to Bail Act 2013, s 16B(c). The Court of Appeal considered the meaning of conviction with reference to the spent convictions scheme.

In *Maxwell v The Queen* (1996) 184 CLR 501, the High Court held that the words “convict” and “conviction” are not words of constant meaning with universal application. Dawson and McHugh JJ said, at 507:

“The question of what amounts to a conviction admits of no single, comprehensive answer. Indeed the answer to the question rather depends upon the context in which it is asked. On the one hand, a verdict of guilty by a jury or a plea of guilty upon arraignment has been said to amount to a conviction. On the other hand, it has been said that there can be no conviction until there is a judgment of the court, ordinarily in the form of a sentence, following upon the verdict or plea”.

In *Maxwell*, the accused had been charged with murder but had pleaded guilty to manslaughter on the basis of diminished responsibility. The trial judge adjourned the matter for sentence but then did not accept the plea and the DPP also withdrew their acceptance of the plea. The accused argued that he had already been convicted and thus could plead *autrefois convict*. The High Court held that the entering of the plea *per se* was insufficient to constitute a conviction, especially where pleas could be withdrawn. What was necessary was a conviction “by judgment” – a determination of guilt by the court, which often was signified by the passing of a sentence or imposition of penalty.

Following *Maxwell*, the Supreme Court in *HA and SB* found that:

Under the legislation applicable to children the finding of guilt followed by imposition of a penalty is the equivalent of a finding of guilt followed by imposition of a penalty in the case of adults and, in the absence of specific provision to the contrary or a context which requires a different meaning, constitutes a “conviction” for the purposes of other legislation, including s 24 RTG Act. (at [14])

The court noted that this was consistent with the intention of the RTG Act and confirmed by s 33(5) CCPA which stated that nothing within the section affects the power of the Children’s Court to impose disqualifications on a person it has found guilty of an offence.

Section 10 and s 33(1)(a) for traffic offences

HA and SB referred to *Re Stubbs* (1947) 47 SR 329 as being distinguishable. In that case it was held that there was no power to impose disqualification where a person had been discharged under s 556A Crimes Act (now s 10). One reason was that s 556A (and now s 10) contain the express words “without proceeding to conviction”. Section 33(1)(a) is meant to mirror s 10, but unfortunately s 33(1)(a) does not contain the express words “without proceeding to conviction”. Nevertheless, a child should not be penalized more than an adult: s 6(e) CCPA. Thus, there is a forceful argument that a Children’s Court does not need to impose disqualification periods if a child receives a s 33(1)(a)(i) caution or s 33(1)(a)(ii) bond.

Form 1 offences

HA and SB also referred to *R v Felton* [2002] NSWCCA 443 where offences taken into account on a Form 1 authorised the making of disqualifications but could not ground a declaration of habitual traffic offender. Arguably, a person is not “convicted” for Form 1 offences but *Felton* considered various express provisions within the road transport legislation that affected this issue.

3.5.2 Other cases

Despite the finding in *HA and SB*, each piece of legislation should be looked at in its own context, bearing in mind that the decision in *HA and SB* was supported by the existence of s 33(5) CCPA. Thus, there have been other cases where the court has decided that where a child has not been “convicted”, other legislative provisions are not triggered:

As mentioned above, in *Appeal of VPS*, the decision that the applicant was not eligible for home detention because they had been convicted of a sexual offence as a child was found to be in error³².

In *R v Justin Moroney [2007] NSWDC 154*, in order for Mr Moroney to be eligible for entry into the compulsory drug treatment program he needed to have been convicted of two relevant offences within a 5 year period. His juvenile record was not taken into account because he was not convicted for his juvenile offences. The District Court noted:

14 The common law position in regard to convictions was reviewed at length in *Griffiths v The Queen* (1976-77) 137 CLR 293. Convictions have a particular significance and stigma in the criminal law. There is no warrant to imply a conviction if the statutory or common law does not mandate it. While it is true the compulsory drug treatment program is a statutory provision relating to enforced rehabilitation, that concept as best I can determine it, was first referred to by Barwick CJ in *Griffiths* (ante). Enforced rehabilitation is, in a sense, beneficial to a prisoner. Thus one would expect, when interpreting the statute creating an entitlement to it, that one would seek to make it "inclusive" rather "exclusive".

15 But to do so in this case would fly in the face of the meaning given to "conviction" in the Children (Criminal Proceedings) Act 1987 (see sections 14 and 15).

16 Section 14 of that Act gives or recognises a power of a court to deal with a child who has pleaded guilty to, or been found guilty of, an offence which is disposed of summarily, by refusing to record a conviction in relation to a child who is above the age of sixteen. Section 15 of the Act provides that such a person - who does not have a conviction, and has not within a period of two years prior to the commencement of other proceedings with which he is being dealt - can not have that matter of the prior offence led in those proceedings, say by way of bad character evidence, or by way of sentencing in relation to an appropriate penalty for prior offending [in a court other than the Children's Court]. My view is that the offender does not qualify [as an "eligible convicted person"] on the basis of his convictions.

Several other cases have also examined the meaning of the word “conviction” in various different contexts: see *Keys v West* [2006] NSWSC 136, *Griffiths v The Queen* (1977) 137 CLR 293, *Kinney v Green* (1992) 29 NSWLR 137, *R v Tonks* [1963] VR 121, *DPPP v McCoid* [1988] VR 982, *DPP v Helou* (2003) 58 NSWLR 574, *Dixon v McCarthy* [1975] NSWLR 617, *R v Holton* (2004) 41 MVR 89, *R v Stone* (2005) 64 NSWLR 413.

³² Nevertheless the court did not ultimately place the applicant on home detention but rather backdated his sentence.

4. TRAFFIC CONVICTIONS

4.1 Jurisdiction over children's traffic offences

Traffic offences allegedly committed by children are dealt with in the Local Court if the child is old enough to have a licence (including a learner's permit) and does not have any related criminal charges.

A child is old enough to have a learner's permit for a car at 16, or for a motorcycle at 16 and 9 months (cl12, Road Transport (Driver Licensing) Regulations 2008).

The Children's Court has exclusive jurisdiction over traffic offences if the child is under the licensable age, or if the child is of licensable age but has been charged with a criminal offence arising from the same circumstances (eg. steal motor vehicle). (*Children (Criminal Proceedings) Act* s28(2), and see s3 for definition of "traffic offence")

Children below licensable age who commit traffic offences are eligible to be dealt with under the *Young Offenders Act* (see *Young Offenders Act* section 8).

4.2 Sentencing options in Local Court

A Local Court dealing with a child for a traffic matter may sentence the child:

- under s33 of the *Children (Criminal Proceedings) Act*; or
- according to law (ie using adult sentencing options), but may not impose a sentence of imprisonment.

(*Criminal Procedure Act* s 210)

4.3 Meaning of "conviction" and court's power to disqualify child

The *Road Transport Act* provides for disqualification upon conviction. Some offences carry an automatic or mandatory disqualification; for others the court has a discretion to disqualify (see *Road Transport Act* s204-207, also ss53, 54).

There is no provision in the Act to deem a "conviction" to include a finding of guilt without a conviction being recorded (except for the purpose of the Habitual Traffic Offender provisions). It is well-settled that no disqualification can be imposed for an offence dealt with under s10 of the *Crimes (Sentencing Procedure) Act* or s33(1)(a) of the *Children (Criminal Proceedings) Act*.

The position is less clear with respect to juveniles dealt with under other paragraphs of s33(1)(a).

The case of *HA & SB v DPP* (referred to elsewhere in this paper) held that the Children's Court has *power* to disqualify a child even if no conviction is recorded. This has since been enacted in s33(6), which provides:

(6) For the purposes of any provision of the road transport legislation that confers power on a court with respect to a person who has been convicted of an offence, a finding of guilt by the Children's Court for an offence is taken to be a conviction for the offence. Accordingly, following a finding of guilt, the Children's Court may exercise any power it could exercise under that legislation if the person had been convicted of the offence, unless the Court makes an order in respect of the person under section 33 (1) (a).

However, it is arguable that the *automatic* or *mandatory* periods prescribed by the *Road Transport Act* do not apply unless a conviction is formally recorded.

4.4 First offences v second/subsequent offences

For many traffic offences, the maximum penalties and the relevant disqualification periods depend on whether the offence is a "first offence" or a "second or subsequent offence".

"Second or subsequent offence" is defined in *Road Transport Act* s9(2).

As mentioned above, there is no provision which deems a "conviction" to include a finding of guilt without a conviction being recorded (except for the purpose of the Habitual Traffic Offender provisions).

Therefore a section 10 or s33(1)(a) outcome means that a further offence may still be treated as a "first offence".

I would argue that a disposition under s33(1)(b)-(g), without a conviction being recorded, should have the same effect. This argument has been accepted by some Local Court magistrates although, to my knowledge, there is no authority on the subject.

4.5 Traffic records v criminal records

A traffic record is a separate record of traffic convictions and infringements recorded by the Roads and Maritime Services (RMS).

Criminal Records Act s11 provides that most traffic offences are treated separately from non-traffic offences. Traffic offences are, generally, to be disregarded in calculating the crime-free period for a non-traffic offence (and vice versa).

However, s11(4) provides some exceptions for serious traffic offences such as manslaughter, dangerous driving causing grievous bodily harm or death, or injury by

furious driving (all of which are offences under the *Crimes Act*). If such an offence is committed, it is relevant in determining the crime-free period for *any* earlier offence

5. PENALTY NOTICES

Infringement notice/penalty notices³³ may be given for a variety of offences, including traffic matters or criminal infringement notices for (mostly) summary offences. If the fine is paid or otherwise dealt with via the State Debt Recovery Office, it will not constitute a criminal record³⁴. However, if there is a court election and the court imposes a sentence (eg a lesser fine, a bond) it will constitute a criminal record under the Criminal Record Act 1991. Therefore, careful consideration needs to be given about whether it is better to pay the fine or to go to court and risk getting a criminal record that may last for up to 10 years or even longer.

³³ The terms infringement notices and penalty notices are often used interchangeably although there are some differences between the two.

³⁴ See Fines Act 1996, s 45.

6. CRIMINAL RECORDS ACT 1991

The Criminal Records Act 1991 (CRA) prescribes what constitutes a criminal record, in particular what record may be seen by future employers and other agencies that may affect a child's future.

The NSW Police Criminal Records Section (CRS) forms part of the Forensic Services Group, Identification Services Branch, and is responsible for the collection, integrity and release of criminal information in NSW. It is responsible for the conduct of some National Police Checks³⁵. In its functions it administers the Criminal Records Act.

6.1 Meaning of “conviction” in the Act

4 Definitions

"conviction" means a conviction, whether summary or on indictment, for an offence and includes a finding or order which, under section 5, is treated as a conviction for the purposes of this Act.

5 Findings and orders treated as convictions for the purposes of this Act

The following findings or orders of a court are treated as convictions for the purposes of this Act:

- (a) a finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction,
- (b) a finding that an offence has been proved, or that a person is guilty of an offence, and the discharging of, or the making of an order releasing, the offender conditionally on entering into a recognizance to be of good behaviour for a specified period or on other conditions determined by the court,
- (c) in the case of the Children's Court, an order under section 33 of the Children (Criminal Proceedings) Act 1987, other than an order dismissing a charge.

Section 5 is a definition of “conviction” for the purposes of the CRA. Even if no conviction has been recorded (eg under s 10 CSP), a finding that an offence has been proved or that a person is guilty of an offence still constitutes a conviction for the purposes of the Act.

Section 5(c) is noteworthy. Section 33 CCPA orders are CRA convictions “other than an order dismissing a charge”. I cannot think of any other s 33 order that involves dismissing a charge except s 33(1)(a)(i)³⁶.

³⁵ See further discussion below.

³⁶ It is uncertain whether a s 33(1)(a)(ii) constitutes a dismissal of the charge. I think not. Section 33(1)(a)(ii) refers to “*discharging* a person on condition that the person enter a good behaviour bond..”. There is no reference to dismissal of the charge. There is a difference between a “dismissal” and a “conditional discharge”. The same distinction is present in s 10 CSP and in Crimes Act 1914 (Cth) s 19B. See *R v Nicholl and Van der Voorden; ex parte Webster* (1980) 26 ACTR 19 which dealt with a “dismissal” and a “discharge” within a committal proceeding. See also *Nadilo v DPP* (1995) 35 NSWLR 738.

s 33

- (1) If the Children’s Court finds a person guilty of an offence to which this Division applies, it shall do one of the following things:
 - (a) it may make an order:
 - (i) directing that the charge be dismissed (in which case the Court may also, if it thinks fit, administer a caution to the person)

Hence, one arguable interpretation is that a s 33(1)(a)(i) is not a conviction for the purposes of the Criminal Records Act³⁷.

Section 5 defines “convictions” for the purposes of the whole Criminal Records Act. Thus, if s 33(1)(a)(i) is excluded from the definition then any references to convictions within the Act do not include dealings under s 33(1)(a)(i). For example, when s 7 of the CRA states that convictions for sexual offences cannot be spent, it would not include a s 33(1)(a)(i) received for sexual offences. The Criminal Records Section have rejected this argument as too broad an interpretation of the effect of s 5(c), stating that s 7 should be read alone – sexual offences will always never be spent. This view would perhaps be supported by the existence of s 8(3) CRA which states:

s 8 (3) An order of the Children’s Court dismissing a charge and administering a caution is spent immediately after the caution is administered.

Section 5(c) suggests that a s 33(1)(a)(i) is never a “conviction” for which the spent conviction provisions of the CRA applies. Yet, s 8(3) appears to deal with when an order under s 33(1)(a)(i) is spent. Specifically, s 8(3) may deal with when an order under s 33(1)(a)(i) that involves the administration of a caution is spent³⁸.

The interaction of s 5(c) with the rest of the CRA appears to be inconsistent and confusing and indeed the NSW Police Criminal Records Section acknowledges this.

Indeed, I am uncertain of the effect or utility of the phrase “other than an order dismissing a charge” within s 5(c) of the CRA and my inquiries with the NSW Police Criminal Records Section have not provided any clarification.

6.1.1 Outcomes which are not convictions

Dealings under the Young Offenders Act or the Mental Health (Forensic Provisions) Act may not constitute convictions for the purposes of the Criminal Records Act. See below for further discussion of these two Acts.

³⁷ Against this interpretation, is the fact that s 5 provides an *inclusive* definition of “conviction”. A s 33(1)(a)(i) would still fall under s 5(a) of the definition.

³⁸ The legislation is poorly drafted in many respects. Here, it is silent on what happens when the court deals with the matter under s 33(1)(a)(i) without administering a caution.

6.2 Spent convictions

Convictions under the CRA can be “spent”. Once spent, the conviction does not need to be disclosed, subject to some exceptions which are discussed below. The CRA provides for when different convictions are spent.

6.2.1 Section 7 - Convictions that cannot be spent

7 Which convictions are capable of becoming spent?

- (1) All convictions are capable of becoming spent in accordance with this Act, except the following:
 - (a) convictions for which a prison sentence of more than 6 months has been imposed,
 - (b) convictions for sexual offences,
 - (c) convictions imposed against bodies corporate,
 - (d) convictions prescribed by the regulations.
- (2) A conviction may become spent in accordance with this Act whether it is a conviction for an offence against a law of New South Wales or a conviction for an offence against any other law.
- (3) A conviction may become spent in accordance with this Act whether it is a conviction imposed before, on or after the date of commencement of this section.
- (4) In this section:

"prison sentence" does not include a sentence the subject of an intensive correction order or the detaining of a person under a control order

"sexual offences" [are defined]...(see below)

There are some convictions which can never be spent, most relevantly for children:

- 1) convictions where there is a prison sentence (not a control order) of longer than 6 months;
- 2) convictions for certain sexual offences

Below is the list of defined sexual offences prescribed by s 7 and Reg 5.

Legislation	Offence
<i>Crimes Act, section</i>	
61B-61F	Repealed
61I	sexual assault
61J	aggravated sexual assault
61JA	aggravated sexual assault in company
61K	Assault with intent to have sexual intercourse
61L	Indecent assault
61M	Aggravated indecent assault
61N	Act of indecency
61O	Aggravated act of indecency
61P	Attempt to commit offence under ss 61I-61O
65A-66	Repealed
66A	Sexual intercourse with child under 10

66B	Attempting, or assaulting with intent to have sexual intercourse with child under 10
66C	Sexual intercourse – child 10-16 yo
66D	Attempting or assault with intent to have sexual intercourse with child 10-16 yo
66EA	Persistent sexual abuse of a child
66EB	Procuring or grooming a child under 16 for unlawful sexual activity
66F	Sexual intercourse – intellectual disability
73	Sexual intercourse with child 16-18 under special care
74	Repealed
78A and 78B	Incest and attempts
78H, 78I, 78K, 78L, 78N, 78O, 78Q	Repealed offences re homosexual intercourse
79 and 80	Bestiality and attempts
80A	Sexual assault by forced self manipulation
80D	Causing sexual servitude
91A and 91B	Various forms of procuring for prostitution
91D-91F	Various forms of promoting, engaging in, benefiting from child prostitution
91G	Using child for child pornography
91H	Production, dissemination or possession of child pornography
91J	Voyeurism
91K	Filming a person engaged in private act
91L	Filming a person's private parts
91M	Installing device to facilitate observation or filming
<i>Summary Offences Act</i> 5	Obscene exposure
11G	Loitering by convicted child sexual offenders near premises frequented by children
An offence (such as 37(2) – choking/suffocation/strangulation- or s 112 – breaking into house and committing serious indictable offence) which includes the commission of or intention to commit one of the above prescribed sexual offences	
An attempt, conspiracy or incitement to commit one of the above prescribed sexual offences	

If a child is sentenced for any of the offences listed in s 7 then their conviction can never be spent, even if they receive a s 33(1)(a) CCPA or s 10 CSPA and even if no conviction is recorded under s 14 CCPA. The offences will be disclosed on a National Police Check. This fact should be taken into account in sentencing proceedings.

This can lead to fairly onerous consequences for children who are convicted of certain sexual offences against peers. For example:

- Section 66C captures “consensual” under age sex between children under 16;
- Sections 91G and 91H can capture “consensual” sexting between children under 16³⁹;
- Section 5 of the Summary Offences Act encompasses behaviour such as “flashing” or “mooning”.

A unspent conviction will only be avoided if the offence is withdrawn/dismissed etc or dealt with under the Young Offenders Act⁴⁰ or the Mental Health (Forensic Provisions) Act. There are several of the above mentioned offences that are eligible to be dealt with under the Young Offenders Act, eg:

- Crimes Act, ss 61O(2A), 66EB(2), (2A), (3), 91H(2), 91J(1), (3), 91K(3), 91L(1), (3)
- Summary Offences Act, ss 5, 11G.

6.2.2 Section 8 – when is a conviction spent ?

8 When is a conviction spent?

- (1) A conviction is spent on completion of the relevant crime-free period, except as provided by this section.
- (2) A finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction is spent immediately after the finding is made.
- (3) An order of the Children’s Court dismissing a charge and administering a caution is spent immediately after the caution is administered.
- (4) A finding that an offence has been proved, or that a person is guilty of an offence, and:
 - (a) the discharging of, or the making of an order releasing, the offender conditionally on entering into a good behaviour bond for a specified period, on participating in an intervention program or on other conditions determined by the court, or
 - (b) the releasing of the offender on probation on such conditions as the court may determine, for such period of time as it thinks fit,
 - (a) is spent on satisfactory completion of the period or satisfactory compliance with the program (including any intervention plan arising out of the program) or conditions, as the case may require.
- (5) A conviction in respect of an offence of a kind which has ceased, by operation of law, to be an offence is spent immediately the offence ceased to be an offence, if the offence is prescribed by the regulations to be an offence to which this subsection applies.
- (6) A conviction which is spent is not revived by a subsequent conviction.

³⁹ Section 7(4)(g) CRA provides that sexual offences in other jurisdictions which are of a similar nature to the NSW offences will still be captured by s 7. There are similar provisions within the Crimes Act 1914 (Cth) which deal with child abuse material possessed/disseminated/used via a carriage service: eg ss 474.19(1), 474.20(1), 474.22, 474.23(1). These provisions relate to any children under 18 rather than under 16. Hence, children above the age of consent (which is 16 for all States/Territories, except in Queensland where it is 18 for anal sex) can still be charged with an offence for consensual sexting. The Commonwealth offences are not eligible to be dealt with under Young Offenders Act: cf YOA, s 8 and Crimes Act 1914 (Cth), ss 4G, 4H and 4J.

⁴⁰ Subject to some possible exceptions – see further discussion under section on Young Offenders Act.

- (7) A reference in subsection (4) (a) (as substituted by the Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002) to a good behaviour bond includes a reference to a recognizance to be of good behaviour made before the commencement of the Crimes (Sentencing Procedure) Act 1999 .

There is currently uncertainty about what sentences relate to each subsection within s 8. The following is a discussion of what I think is the CRS interpretation of the Act⁴¹.

s 8(1)

Sections 9 and 10 set out the relevant crime free periods but both sections are subject to the provisions in s 8. See further discussion of the interaction between ss 8, 9 and 10 below.

s 8(2)

A s 10(1)(a) CSPA is spent immediately.

However, even though all orders under s 10- including s 10 bonds pursuant to s 10(1)(b) or (c) – are made “without proceeding to conviction”, the CRS do not apply s 8(2) to s 10 bonds. According to the CRS, s 10 bonds are not spent immediately but only upon expiry of the bond.

In *Commissioner of Police, NSW Police v Soreh* [2007] NSWADTAP 40⁴² the Appeal Panel of the NSW Administrative Decisions Tribunal held that a s 9 CSPA bond was not spent upon the expiry of the bond (as per s 8(4)) but at the expiry of the crime free period (ie 10 years). It stated that s 8 related to “lower order dispositions” such as s 10 CSPA and s 9 dealt with higher order dispositions. In particular, the Tribunal said at 12:

It is clear, we think, that at s 8 the legislature was dealing with the lower-order dispositions made by criminal courts. It will be seen that protections are given to non-conviction outcomes at sub-s (2) and sub-s (4).

The Tribunal went on to say (at 19) that a s 10 [bond] was the type of order to which s 8(4) was addressed.

However, with respect, it is questionable whether this decision is correct. Section 8(4) does not refer to a non conviction order. If it had been intended to only apply to non conviction orders then it would have included the phrase “without proceeding to conviction” just like s 8(2). Also, the decision did not deal directly with the question of whether s 10 bonds fall under s 8(4) as opposed to s 8(2).

I note that s 33(1)(a)(ii) is the child equivalent of s 10 bonds even though s 33(1)(a)(ii) does not include the words “without proceeding to conviction”. Hence, any arguments

⁴¹ Unfortunately, despite numerous inquiries, the CRS declined to provide a written response to specific questions about their application of the Criminal Records Act.

⁴² The Appeal Panel upheld an appeal against the decision in *Soreh v Commissioner of Police, NSW Police* [2007] NSWADT 139.

about when s 10 bonds are spent would have some application to when s 3(1)(a)(ii) bonds are spent.

Whilst the CRS hold the view that s 10 bonds (and probably s 33(1)(a)(ii) bonds) are not spent until the expiry of the bond, if the client needs to apply for jobs, practitioners will either need to:

- challenge the CRS decision and/or
- ask sentencing courts to impose a s 10(1)(a) or s 33(1)(a)(i) instead or a griffiths remand followed by a s 10(1)(a)/s 33(1)(a)(i).

See also the section below for discussion about the interaction between s 8(2) CRA and s 14 CCPA.

s 8(3) – s 33(1)(a)(i) CCPA

If a child receives a s 33(1)(a)(i) caution, the “conviction” is spent after the caution is administered. Unfortunately, the section is silent about what happens when a child receives a s 33(1)(a)(i) and the court decides not to give a caution. There would be a strong argument that the “conviction” would be spent immediately too either due to s 8(2) or 8(3).

s 8(4)- Convictions spent upon completion of bond/probation.

As explained above under commentary on s 8(2), the CRS do not consider s 10 bonds (and probably s 33(1)(a)(ii) bonds) to have been spent immediately but only upon expiration of the bond.

I note that s 8(4) refers to probation. There are no other orders for probation other than under s 33(1)(e) CCPA. Nevertheless, it is not clear whether the CRS regard probation orders to be spent upon expiration of the probation. In correspondence with the CRS, I have received two inconsistent responses: one stating that a conviction would be spent upon expiration of a probation order; the other stating that their “in house” table which they reference indicates that a s 33(1)(e) is spent only at the end of the crime free period – ie 3 years or 10 years. According to their in house table only s 33(1)(a)(i), 33(1)(a)(ii) and 33(1)(b) are spent under s 8 CRA (as indicated above). All other children’s sentences are spent at the end of the crime free period in either ss 9 or 10.

I note in particular that fines are spent at the end of the crime free period⁴³. Even though they are arguably a lesser penalty than a bond they can remain unspent for significantly longer.

Also a combination of a bond and fine under s 33(1)(d) CCPA will still be spent at the end of the crime free period rather than under s 8(4) at the expiry of the bond. Similarly, a

⁴³ However, the CRS may consider fines to be spent immediately if they are imposed without conviction under s 14 CCPA. Recently, the CRS amended a National Police Certificate in response to a dispute about the disclosure of fines imposed by a court upon a 15 year old, where it was argued that the fines should be spent immediately under s 8(2) CRA. Whilst heartening, this response further illustrates the uncertainty about whether and how the CRS apply s 14 CCPA. See further discussion of s 14 CCPA below.

combination of probation and fine – s 33(1)(e1) CCPA – and probation and community service order- s 33(1)(f1) CCPA - will be spent at the end of the crime free period.

Furthermore, I understand that the CRS do not regard a suspended sentence bond under s 33(1B) as a bond, such that s 8(4) CRA applies. They are spent upon expiration of the crime free period. However, even though a suspended sentence is a custodial sentence, it is nevertheless still a bond and the language of s 8(4) clearly refers to bonds.

Practitioners may consider asking any client who is sentenced to a:

- Probation
- Bond and fine
- Probation and fine
- Probation and CSO
- Suspended sentence

to enquire with the CRS about when their matter will be spent and/or conduct a National Police Check to see if the matter is still disclosed after the expiration of the bond/probation/suspended sentence.

If it is not spent then consideration could be given to challenging the CRS decision.

6.2.3 Section 10- crime free period for Children's Court orders

10 What is the crime-free period for orders of the Children's Court?

- (1) The crime-free period in the case of an order of the Children's Court under section 33 of the Children (Criminal Proceedings) Act 1987 (other than a finding or order referred to in section 8 (2) or (3) of this Act) in respect of a person is any period of not less than 3 consecutive years after the date of the order during which:
 - (a) the person has not been subject to a control order, and
 - (b) the person has not been convicted of an offence punishable by imprisonment, and
 - (c) the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.
- (2) The crime-free period may commence before the date of commencement of section 7.

Subject to s 8 CRA, a Children's Court conviction is spent after a crime free period of 3 years. However, it should be noted that if a District Court sentences a person under s 33 CCPA, s 10 CRA does not apply because s 10 only applies to orders of the Children's Court. Instead, s 9 CRA applies and the crime free period is 10 years.

If a District Court imposes a sentence upon an appeal from the Children's Court, the CRS has indicated that it will consider that sentence as an order of the Children's Court for the purposes of s 10 CRA. That is, a District Court sentence on a Children's Court appeal will attract a 3 year crime free period and not 10 years.

Does the crime free period apply for bonds/probations?

Section 10 CRA states that the 3 year crime free period applies to s 33 orders of the Children's Court other than an order referred to in s 8(2) and (3) CRA: ie a finding of

guilt without proceeding to conviction and an order dismissing the charge and administering a caution.

Notably, s 10 CRA does not exclude orders under s 8(4) from the crime free period: ie bonds/probations.

Reading s 10 alone it would appear that a child sentenced to a bond/probation with conviction has to wait for three years before it can be spent. Yet, s 8(4) states that a conviction is spent on the expiry of a bond/probation and s 8(1) says that a conviction is spent on the completion of the relevant crime free period, *except as provided by this section*.

Despite the confusion, it appears that s 8(4) takes precedence over s 10 and a bond/probation is spent on its expiry. The CRS has previously confirmed that they interpret the CRA this way.

6.2.4 The three year crime free period

The crime free period starts with the making of a s 33 CCPA order. The period is *any* period of three consecutive years after the sentence, during which all the three requirements in s 10(1)(a)-(c) CRA are satisfied:

- (a) The offender is not subject to a control order; and
- (b) not convicted of an offence punishable by imprisonment ; and
- (c) has not been in prison because of a conviction for any offence and has not been unlawfully at large.

If there is a breach of (a)-(c) then the three year period starts again.

s 10(1)(a) - Not be subject to control order

If the child is given a control order than the three year period does not start until the end of that control order⁴⁵.

s 10(1)(b) - Not convicted of offence punishable by imprisonment

The crime free period is broken if a person is “convicted for an offence punishable by imprisonment”. The offence has to carry imprisonment as a penalty. It is not necessary that the offender was *sentenced* to imprisonment.

When considering whether someone has been “*convicted* for an offence punishable by imprisonment”, the s 5 CRA definition of conviction must be used. Hence, even if the offence was dealt with without conviction under s 14 CCPA or under s 10 CSPA it would still constitute a conviction for the purposes of s 10(1)(b) CRA and break the crime free period.

It would seem that the legislature intended for the crime free period to be broken if the child committed subsequent offences. However, on a literal reading of s 10 CRA, the

⁴⁵ Note: not just the end of the non parole period.

crime free period could also be broken even by a subsequent conviction for an offence that *predates* the offence for which the crime free period relates.

s 10(1)(c) - Not been in prison because of conviction for offence and not been unlawfully at large

Section 10(1)(c) refers to the offender “not having been in prison because of a conviction for an offence”. I note that this does not include being in a juvenile justice centre and does not include being in prison on remand.

6.2.5 Section 9 - crime free period for sentences from courts other than the Children’s Court

9 What is the crime-free period for convictions of courts (other than the Children’s Court)?

- 1) The crime-free period in the case of a conviction of a court (other than the Children’s Court) is any period of not less than 10 consecutive years after the date of the person’s conviction during which:
 - a. the person has not been convicted of an offence punishable by imprisonment, and
 - b. the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.
- 2) The crime-free period may commence before the date of commencement of section 7.

As mentioned above, even if a child is sentenced under s 33 CCPA by the District Court, they nevertheless face a 10 year crime free period, rather than a 3 year crime free period. Thus, consideration should be given about whether to ask for the matter to be remitted to the Children’s Court instead: s 20 CCPA.

6.2.6 Summary

I wrote to the CRS enquiring about when they considered each children's sentence would be spent. However, the CRS declined to provide a written response to that enquiry. Nevertheless, the following table is my current understanding of how the CRS interpret the CRA and when each sentence for children and adults are spent.

Children's Sentences

Sentence in the CCPA	When spent	Criminal Records Act
s 33(1)(a)(i) – caution	Upon administration of caution (if caution is administered)	s 8(3)
s 33(1)(a)(i) – no caution	Immediately	s 8(2)
s 33(1)(a)(ii) bond	Upon completion of the bond	s 8(4)
s 33(1)(b) bond	Upon completion of the bond	s 8(4)
s 33(1)(c) fine ⁴⁶	After crime free period of 3 years if sentenced by Children's Court After crime free period of 10 years if sentenced by other court	ss 9 and 10
s 33(1)(d) – a fine and a good behaviour bond	After crime free period of 3 years if sentenced by Children's Court After crime free period of 10 years if sentenced by other court	ss 9 and 10
s 33(1)(e) probation order	Upon completion of probation order	s 8(4) ⁴⁷
s 33(1)(e1) – fine and probation order	After crime free period of 3 years if sentenced by Children's Court After crime free period of 10 years if sentenced by other court	ss 9 and 10
s 33(1)(f) community service order	After crime free period of 3 years if sentenced by Children's Court After crime free period of 10 years if sentenced by other court	ss 9 and 10
s 33(1)(f1) probation/CSO	After crime free period of 3 years if sentenced by Children's Court After crime free period of 10 years if sentenced by other court	ss 9 and 10
s 33(1B) suspended sentence bond	After crime free period of 3 years if sentenced by Children's Court After crime free period of 10 years if sentenced by other court	ss 9 and 10
s 33(1)(g) control order	After crime free period of 3 years if sentenced by Children's Court	ss 9 and 10

⁴⁶ Although see above comments about whether fines without conviction are spent immediately.

⁴⁷ Although the CRS has also said that it is after the crime free period (3 years or 10 years).

	After crime free period of 10 years if sentenced by other court	
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Adult sentences

Sentence in the CSPA	When spent	Criminal Records Act
s 10(1)(a)	Immediately	s 8(2)
s 10(b) and (c) bond	Upon expiry of the bond	s 8(4)
s 10A	After crime free period of 10 years	s 9
s 9 bond	After crime free period of 10 years	s 9
s 14 - fine as an additional penalty to a bond	After crime free period of 10 years	s 9
s 15 – fine as additional or alternative penalty to imprisonment	After crime free period of 10 years	s 9
s 8 – community service	After crime free period of 10 years	s 9
s 12 suspended sentence	After crime free period of 10 years	s 9
s 5 imprisonment	After crime free period of 10 years	s 9

6.3 Offences for which no conviction is recorded under s 14 CCPA

A court may impose a sentence and not record a conviction pursuant to s 14(1) CCPA. There is an argument that, in these circumstances, s 8(2) CRA applies and the matter is spent immediately:

Section 8.

- (2) A finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction is spent immediately after the finding is made.

However, in several correspondence with the CRS it is clear that the CRS do not take s 14 CCPA into account when deciding when a conviction is spent. If no conviction is recorded under s 14 CCPA the CRS do not regard the sentence as spent immediately under s 8(2) CRA.

I have had several clients dealt with in the Children's Court or the District Court where the courts have exercised their discretion under s 14 CCPA and not recorded a conviction⁴⁸. The basis of the findings under s 14 CCPA were to enable the young people to apply for jobs without the matters appearing on their criminal history checks. However, when they applied for standard National Police Checks (which should not show spent convictions) their matters were disclosed on the checks. Upon disputing the record with the CRS, the CRS responded that there was no error.

If this CRS interpretation is correct then s 14 CCPA has no utility at all in assisting children to avoid disclosure to employers etc!

Legal Aid NSW has obtained counsel's advice on the issue.

Meanwhile, it may be prudent to continue to seek s 14 non convictions but to also advise clients to apply for a National Police Check to see whether their matters are disclosed.

Moreover, courts should be made aware of the fact that s 14 non convictions do not prevent disclosure of criminal records and (where appropriate) should be asked to adjust sentences accordingly. For example, a court may be more inclined to impose a bond/probation or a griffith's remand rather than a community service order if it will mean that the conviction is spent earlier and improve the child's employment prospects.

6.4 Section 11 – traffic offences

Traffic offences for children are dealt with in the Local Court if the child is of licensable age and the offence is not connected with another Children's Court charge: s 28(2) CCPA. Section 210 Criminal Procedure Act allows the Local Court to deal with

⁴⁸ The matters were not offences under s 7 CRA (see below).

children under s 33 CCPA. However, because s 9 CRA only relates to the Children's Court, it would seem that s 10 CRA applies as the relevant crime free period.

Section 11 is also relevant for traffic offences.

11 How are traffic offences to be dealt with?

- 1) In this section, "traffic offence" means an offence arising out of the use of a motor vehicle or trailer (within the meaning of the road transport legislation referred to in section 5 of the Road Transport (General) Act 2005) and "non-traffic offence" means any other offence.
- 2) A conviction for a traffic offence and any period of imprisonment imposed as a consequence of such a conviction are to be disregarded in calculating the crime-free period for a conviction for a non-traffic offence. A conviction for a traffic offence is of relevance only in calculating the crime-free period for a conviction for an earlier traffic offence.
- 3) A conviction for a non-traffic offence and any period of imprisonment imposed as a consequence of such a conviction are to be disregarded in calculating the crime-free period for a conviction for a traffic offence. A conviction for a non-traffic offence is of relevance only in calculating the crime-free period for an earlier non-traffic offence.
- 4) Despite subsections (2) and (3), regard is to be had to a conviction for any of the following offences in calculating the crime-free period for any conviction (whether for a traffic offence or a non-traffic offence). A conviction for any of the following offences is of relevance in determining the crime-free period for any earlier offence. The offences are:
 - a) culpable driving (section 52A of the Crimes Act 1900 as in force immediately before the commencement of Schedule 1 to the Crimes (Dangerous Driving Offences) Amendment Act 1994),
 - (a1) dangerous driving occasioning death (section 52A (1) of the Crimes Act 1900),
 - (a2) aggravated dangerous driving occasioning death (section 52A (2) of the Crimes Act 1900),
 - (a3) dangerous driving occasioning grievous bodily harm (section 52A (3) of the Crimes Act 1900),
 - (a4) aggravated dangerous driving occasioning grievous bodily harm (section 52A (4) of the Crimes Act 1900),
 - b) injury by furious driving (section 53 of the Crimes Act 1900),
 - c) manslaughter (section 24 of the Crimes Act 1900) or causing grievous bodily harm (section 54 of the Crimes Act 1900) where, in either case, the offence arises out of the use of a motor vehicle or trailer (within the meaning of the road transport legislation referred to in section 5 of the Road Transport (General) Act 2005).

Except for the exceptions listed in s 11(4) CRA, convictions for traffic offences only break the crime free period for traffic offences and non traffic offences only break the crime free period for non traffic offences.

6.5 Section 12 – consequence of spent convictions

12 What are the consequences of a conviction becoming spent?

If a conviction of a person is spent:

- (a) the person is not required to disclose to any other person for any purpose information concerning the spent conviction, and
- (b) a question concerning the person's criminal history is taken to refer only to any convictions of the person which are not spent, and
- (c) in the application to the person of a provision of an Act or statutory instrument:
 - (i) a reference in the provision to a conviction is taken to be a reference only to any convictions of the person which are not spent, and

- (ii) a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of spent convictions.

Once a conviction is spent, it does not need to be disclosed (subject to some exceptions – see below) for any purpose.

Unlawful disclosure of spent convictions is an offence: s 13(1) CRA. Conversely, it is also an offence to fraudulently/dishonestly obtain or attempt to obtain information about a spent conviction: s 14 CRA.

However, spent convictions may be disclosed:

- by law enforcement agencies to other law enforcement agencies or to a court in compliance with a court order (eg subpoena): s 13(2) and (4) CRA
- by an archive or library to the public
- to the Office of the Children's Guardian.

Sections 12-14 apply to convictions which are quashed or subject to a pardon: ss 18, 19 CRA.

Section 12 does not apply to proceedings before a court and does not affect s 15 CCPA: s 16 CRA. For example, a court can still consider spent convictions when dealing with bail applications, sentencing, evidence of character etc.

6.6 Use of spent convictions in court

16 Proceedings before courts

- (1) Section 12 does not apply to proceedings before a court (including the giving of evidence) or the making of a decision by a court (including a decision concerning sentencing).
- (2) However, a court before which evidence of a spent conviction is admitted must, in appropriate circumstances, take such steps as are reasonably available to it to prevent or minimise publication of that evidence.
- (3) This Act does not affect any of the following provisions:
 - a) section 15 of the Children (Criminal Proceedings) Act 1987
 - b) section 152 of the Criminal Procedure Act 1986
 - c) Part 3.8 (Character) of Chapter 3 and section 178 (Convictions, acquittals and other judicial proceedings) of the Evidence Act 1995 .

In *Nakhl Nasr v State of New South Wales; George Nasr v State of New South Wales* [2007] NSWCA 101, the Crown obtained papers from Waverley Local Court where George Nasr was alleged to have been convicted of various offences. These court papers were used in cross examination of George Nasr. The papers related to offences which had been spent.

Whilst s 16 CRA allowed for disclosure of the spent convictions to the court, the applicant objected to the form of disclosure. Section 13 CRA provides for who may disclose records. It was argued that s 13 did not make provision for disclosure by Waverley Local Court to the prosecution. There would have been no objection if the papers had been produced to the court via subpoenae but there was an objection that the papers had been illegally obtained, contrary to s 13 CRA.

The Court of Appeal found that there had been no disclosure of information. It said (at 127) that the “essence of disclosure of information is making known to a person information that the person to whom the disclosure is made did not previously know”. When the papers were provided by Waverley Court to the Crown Solicitor’s Office there was no disclosure unless there was proof of how much the solicitor knew or didn’t know about the convictions beforehand⁵⁰. There being no disclosure there was no breach of the CRA.

6.7 Employment which will consider spent convictions

15 Employment in certain occupations

- 1) Section 12 does not apply in relation to an application by a person for appointment or employment as a judge, magistrate, justice of the peace, police officer, member of staff of Corrective Services NSW (within the meaning of the Crimes (Administration of Sentences) Act 1999), teacher, teachers aide or a provider of child care services under Part 3 of the Children (Care and Protection) Act 1987 .
(1A) Section 12 does not apply in relation to an application by a person for employment in child-related employment within the meaning of Part 7 of the Commission for Children and Young People Act 1998 .
- 2) Section 12 does not apply in relation to a conviction of a person for arson or attempted arson if the person seeks to be appointed or employed in fire fighting or fire prevention.

Applications for certain occupations will always be able to take into account spent convictions. They will also be able to see YOA cautions/conferences: s 68 YOA. These occupations are:

s 15 CRA, s 68 YOA

- Judge/magistrate
- Justice of the peace
- Police office
- Corrective Services staff⁵¹
- Teacher
- Teachers aide
- work requiring a working with children check clearance
- Fire fighting or prevention can consider convictions for arson (or attempted arson).

⁵⁰ Similarly, there was no breach of the Privacy and Personal Information Protection Act 1998 because there was no disclosure.

⁵¹ I note that s 15 does not include Juvenile Justice staff

Criminal Records Regulations 2014, Regs 6 also provides that spent convictions can be disclosed for:

- an application for admission as a lawyer under the *Legal Profession Act 2004*;
- an application for engagement as a consultant to the Inspector of the Police Integrity Commission;
- an application for appointment to, or employment in, a role as:
 - officer of the Crime Commission
 - a Crown Prosecutor
 - an officer of the Director of Public Prosecutions
 - an officer of the Inspector or Independent Commission Against Corruption
 - an officer of the Inspector or Police Integrity Commission.

Spent convictions can also be considered when considering whether someone is disqualified from holding civic office: s 17 CRA; cf ss 274, 275 Local Government Act 1993.

6.9 Law reform⁵²

In 2009, The Standing Committee of Attorneys general (SCAG) considered a Model Spent Convictions Bill with plans to create uniform federal legislation for spent convictions.

Under the Model Bill, offences eligible to be spent included those where no sentence of imprisonment was imposed or where the prison sentence is less than 12 months for an adult and 24 months for a juvenile.⁵³ It was proposed that convictions would be spent after a good behaviour period of 10 years for adults and 5 years for juveniles⁵⁴.

Each jurisdiction was asked to consider whether sexual offences should be included in the spent convictions scheme and in particular juvenile sexual offences. The Model Bill provided a mechanism for sexual offences to be spent via a court application rather than lapse of time⁵⁵.

The NSW Legislative Council Standing Committee on Law and Justice held an inquiry and heard evidence and submissions from various individuals and groups. The Committee produced a report *Spent convictions for juvenile offenders*, Report 42 – July 2010. The Report made nine recommendations including that the NSW legislation to implement the Model Spent Convictions Bill provide:

⁵² See Bronwyn Naylor and Moira Paterson, *Australian Spent Convictions Reform: A Contextual Analysis*, UNSW Law Journal, Vol 34(3) at 938 for further discussion.

⁵³ Model Spent Convictions Bill 2009, cl 3(1).

⁵⁴ Model Spent Convictions Bill 2009, cl 7(1)

⁵⁵ Model Spent Convictions Bill 2009, cl 9.

- Recommendation 3: that where a court finds a person guilty of an offence without proceeding to a conviction under s 10 CSPA, including for a sexual offence, the finding is spent immediately after it is made;
- Recommendation 4: convictions for juvenile sexual offences, as with convictions for other juvenile offences, are capable of being spent where the sentence imposed was less than 24 months imprisonment;
- Recommendation 5: convictions for juvenile offences, including convictions for juvenile sexual offences, are capable of being spent after a good behaviour period of three years has elapsed.

Unfortunately, despite all of the work of SCAG and the NSW Parliamentary Committee there has been no implementation of the Model Spent Convictions Bill and no implementation of the Committee's recommendations⁵⁶.

6.10 Application to extinguish records for historical homosexual offences

Until 1984 the Crimes Act 1900 contained a number of so called "unnatural" offences prohibiting male homosexual activity. These offences applied to both consensual and non consensual conduct. Some people engaging in homosexual activity were convicted of these offences or other offences such as indecent or offensive behaviour. In 1984, the Crimes (Amendment) Act 1984 decriminalised consensual male homosexual activity for people over the age of 18.

The Criminal Records Amendment (Historical Homosexual Offences) Act 2014 introduced Pt 4A into the CRA. It provides for applications to the Secretary of the Department of Justice to extinguish historical criminal records for certain eligible homosexual offences (which have now been repealed) and which were committed consensually. It includes offences committed as/with a child 16 years or over.

7. CRIMES ACT 1900, s 579

Separate from the spent convictions scheme within the Criminal Records Act, Crimes Act 1900, s 579 also provides for non disclosure of certain records. Where a person is convicted of an offence⁵⁷ and they are:

⁵⁶ I note that the Australian Law Reform Commission Report *Seen and heard: priority for children in the legal process*, Report 84 made even stronger recommendations including that children's criminal convictions should be expunged/spent after a period of 2 years or on the child's 18th birthday, whichever is earlier (except for some serious offences and some sexual offences): recommendation 253.

Recommendation 254 also recommended that police records should be retained for five years and then destroyed.

⁵⁷ or the offence is found proved against them

- a) sentenced to a recognizance; and
 - b) a period of 15 years has passed since the recognizance was entered into, without:
 - ii) a finding that there was a breach of any condition of the recognizance and
 - iii) the person being convicted⁵⁸ of an indictable offence or any other offence punishable by imprisonment.
- the conviction or finding is to be “disregarded for all purposes whatsoever” and is “inadmissible in any criminal, civil or other legal proceedings as being no longer of any legal force or effect”.

Legal proceedings include any application for a licence, registration, authority, permit or the like under any statute.

8. COMMONWEALTH SPENT CONVICTIONS SCHEME

Although prosecutions for Commonwealth offences are comparatively rare for young people (the most common being “use carriage service” type offences) it is worth noting that Commonwealth offences are subject to a different spent convictions regime.

The Commonwealth spent convictions scheme is set out in Part VIIC of the *Crimes Act 1914* (Cth). It also applies to state offences if the person is required to disclose their convictions to a Commonwealth agency, or is located in certain Commonwealth or external territories.

A “conviction” is defined in s85ZM(1) as follows:

- (1) For the purposes of this Part, a person shall be taken to have been convicted of an offence if:
 - a) the person has been convicted, whether summarily or on indictment, of the offence;
 - b) the person has been charged with, and found guilty of, the offence but discharged without conviction; or
 - c) the person has not been found guilty of the offence, but a court has taken it into account in passing sentence on the person for another offence.

Leaving aside pardons, quashed convictions and the like, s85ZM(2) provides that a conviction is spent if a person:

- was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than 30 months; and
- the waiting period for the offence has ended.

The “waiting period” is defined in s85ZL as:

⁵⁸ or the offence being proven against them.

- (a) if the person convicted of the offence was dealt with as a minor in relation to the conviction—the period of 5 years beginning on the day on which the person was convicted of the offence; or
- (b) in any other case—the period of 10 years beginning on the day on which the person was convicted of the offence.

There is no definition of “minor” but it presumably means “juvenile”. Unlike the NSW regimes, it is not confined to matters dealt with in a Children’s Court, but query whether it would apply to a child dealt with “according to law” in a superior court?

Unlike in NSW, non-convictions (ie s10, s33(1)(a) ad similar outcomes) are *not* spent immediately, but are subject to the waiting period.

Importantly, s85ZP(3) provides:

- (3) Nothing in this Part authorises a person or body to disclose or take into account a conviction of an offence if to do so would contravene any Commonwealth law, State law, Territory law or foreign law.

This effectively means that a person will ordinarily get the benefit of whichever is the most favourable scheme.

In many cases the NSW scheme will be more beneficial: for example, non-convictions are spent immediately (or at least after completion of a bond), and there is a shorter waiting period for juveniles.

However, the Commonwealth scheme is in some respects more favourable: for example, the 5-year waiting period for juvenile convictions is not limited to offences dealt with by a Children’s Court. Also a person may be sentenced to imprisonment for up to 30 months and still have their conviction spent.

As with New South Wales law, there are exceptions to the non-disclosure of spent convictions (set out in Division 6 of Part VIIC).

The Office of the Australian Information Commissioner has published a fact sheet, with a useful flowchart at the end, at <https://www.oaic.gov.au/individuals/privacy-fact-sheets/general/privacy-fact-sheet-41-commonwealth-spent-convictions-scheme>.

9. DESTRUCTION OF FINGERPRINTS AND OTHER IDENTIFICATION MATERIAL UNDER NSW LEGISLATION

9.1 Children (Criminal Proceedings) Act 1987

In respect of criminal proceedings in the Children’s Court, if the court finds a person not guilty of an offence or finds a person guilty of the offence but makes an order dismissing

the charge, it will order the destruction of any photographs, finger-prints and palm-prints, and any other prescribed records (other than records of the Children's Court), collected in relation to the offence (section 38 *Children (Criminal Proceedings) Act 1987*).

Even if the Children's Court finds a person guilty of an offence, it may, if it is of the opinion that the circumstances of the case justify its doing so, make an order (whether on the application of the person or otherwise) that requires any photographs, finger-prints and palm-prints, and any other prescribed records (other than records of the Children's Court), relating to the offence to be destroyed (section 38 *Children (Criminal Proceedings) Act 1987*).

9.2 Law Enforcement (Powers and Responsibilities) Act 2002

Under s137 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, if a court finds that the offence against a child is not proved, the court will serve a notice on the child, its parents/guardian or any other person who has the care of the child stating that, if so desired, the court will order the destruction of the photograph, finger-prints and palm-prints, and any other prescribed records (other than the records of the court), relating to the alleged offence be destroyed.

An adult or child from whom any finger-prints or palm-prints are taken in relation to an offence may request that the Commissioner destroy the finger-prints or palm-prints if the offence is not proven (s137A). An offence is "not proven" if:

- the person is found not guilty or is acquitted of the offence, or
- the conviction is quashed, and an acquittal is entered, on appeal, or
- at the end of the period of 12 months after the finger-prints or palm-prints were taken (or, if an extension to that period is granted under s137B, at the end of the extended period), proceedings in respect of the offence have not been instituted or have been discontinued.

The Commissioner must, as soon as reasonably practicable after receiving a request, destroy the finger-prints or palm-prints taken from the person in relation to the offence that is not proven (subs137A(5)). This section **does not** require the destruction of any court records.

With effect from 1 September 2016, the new s137C provides:

- 1) The Commissioner may, in such cases as the Commissioner considers it to be appropriate, order the destruction of any photograph, finger-prints or palm-prints of a person that have been taken under this Division in relation to an offence.
- 2) This section does not affect any requirement under this Division relating to the destruction of a person's photograph, finger-prints or palm-prints.

Previously, for adult offenders at least, the Commissioner could order destruction of identification particulars only in cases where the offence was not proven. It is also worth noting that s137C extends to photographs whereas s137A does not.

9.3 Problems arising from State Records Act

In around 2005, the NSW Police formed the view that destruction of identification particular (or expungement of records) was inconsistent with part 3 of the *State Records Act*. Section 21, in particular, prohibits state records from being destroyed or disposed of except in limited circumstances.

In order to fix this problem, some amendments were subsequently made to the Regulations. Schedule 1 of the State Records Regulation 2015 lists a number of legislative provisions which are exempted from the operation of s21. These include s137A of LEPR. Curiously, however, it does not include s137C of LEPR or any provisions of the *Children (Criminal Proceedings) Act*.

We are currently seeking clarification as to whether the NSW Police force still regards the *State Records Act* as an impediment to destruction of records under any of these provisions⁶².

10. YOUNG OFFENDERS ACT 1997

10.1 Not findings of guilt

In order to be dealt with under the Young Offenders Act (YOA) a child does not need to plead guilty/be found guilty of an offence. No admissions are necessary for a warning: s 14 YOA. Admissions to the offence are necessary for a caution or conference: ss 19, 36 YOA. An admission is not a plea of guilty and arguably not “a finding that an offence has been proved or that a person is guilty of an offence”. Therefore, it is arguable that dealings under YOA don’t fall within the s 5 definition of “conviction” in the Criminal Records Act⁶³. Police referrals under the YOA are certainly not convictions within the s 5 CRA definition because they are not “findings of a court”.

As noted above, there is an especial benefit of having certain sexual matters (for which convictions can never be spent under s 7 CRA) dealt with under the YOA so that they do not remain as a disclosable offence on a child’s criminal record for the rest of their life.

⁶² See *AEC v NSW Police Force* [2013] NSWADT 32 and *AEC v Commissioner of Police NSW Police Force (GD)* [2013] NSWADTAP 30 for further discussion.

⁶³ Perhaps excepting the very limited circumstances where a court refers to a caution or conference after a guilty plea or after finding a child guilty at hearing, or where the referral to conference is under s 33(1)(c1) of the CCPA as opposed to s 40 YOA.

10.2 YOA Records

YOA Records are kept on the police COPS system. Cautions and conferences appear separate from a criminal history/bail report; a sentencing Children's Court would see a document called "Court Alternatives".

Records of all warnings are expunged when a child turns 21 years old: s 17 YOA.

Records are to be kept of cautions (s 33 YOA) and should contain material prescribed by the Young Offenders Regulations 2004, reg 15.

Records of conferences are to be kept (s 59 YOA) in accordance with Regulation 21.

Records must not be divulged except to specified persons: s 66 YOA. Regulation 23C regulates the disclosure of records under s 66(2)(e) to Juvenile Justice.

10.3 Section 68 –non disclosure of YOA dealings except for certain jobs

Section 68 YOA states that YOA dealings should not be disclosed and do not form part of a person's criminal history. YOA cautions and conferences may still be considered in applications for the jobs listed in s 68(2).

68 Interventions not to be disclosed as criminal history

- (1) If a person has been the subject of a warning, caution or conference under this Act:
 - (a) the person is not required to disclose to any other person for any purpose information concerning the warning, caution or conference, and
 - (b) a question concerning the person's criminal history is taken not to refer to any such warning, caution or conference, and
 - (c) in the application to the person of a provision of an Act or statutory instrument, a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of any such warning, caution or conference.
- (2) In so far as a caution or conference is concerned, subsection (1) does not apply in relation to:
 - (a) an application by a person for appointment or employment as a judge, magistrate, justice of the peace, police officer, prison officer, teacher or teachers aide, or
 - (b) an offence of arson or attempted arson if the person seeks to be appointed or employed in fire fighting or fire prevention, or
 - (c) proceedings before the Children's Court (including a decision concerning sentencing), or
 - (d) an application by a person for a working with children check clearance, the assessment of a person or an application under Part 4 of the *Child Protection (Working with Children) Act 2012*

10.4 Use of YOA records in court proceedings

YOA dealings (cautions and conferences only) form part of a child's "Court Alternatives" and can be tendered in a Children's Court as relevant in bail applications or sentence proceedings.

Section 66(2)(c) explicitly provides that that YOA cautions and conferences may be used in Children's Court proceedings. However, the section does not refer to proceedings before other courts.

Section 15(3) CCPA also restricts the use of dealings under the YOA with an exception only for the Children's Court.

15 Evidence of prior offences and other matters not admissible in certain criminal proceedings

- (1) The fact that a person has pleaded guilty to an offence in, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if:
 - (a) a conviction was not recorded against the person in respect of the first mentioned offence, and
 - (b) the person has not, within the period of 2 years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.
- (2) Subsection (1) or (3) does not apply to any criminal proceedings before the Children's Court.
- (3) The fact that a person has been dealt with by a warning, caution or youth justice conference under the Young Offenders Act 1997 (being in respect of an alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence.

Hence, YOA dealings are not admissible in other courts. They are not admissible in Local Court traffic matters (even if the child received several YOA matters for similar traffic matters when they were under 16 years old). They are also not admissible in the District or Supreme Court.

The DPP often try and tender YOA records in the District Court/Supreme Court – eg for a District Court/Supreme Court sentence, District Court appeal or Supreme Court bail application. This tender is not allowed by s 15(3)⁶⁴.

⁶⁴ An argument has been advanced that s 15(3) does not apply to bail applications or s 32 MHFPA applications because s 15(3) speaks of the YOA dealing not being admitted into evidence " (whether as to guilt or the imposition of any penalty) in any criminal proceedings". It is argued that a bail application and s 32 application is not concerned with guilty or the imposition of any penalty. However, I note that s 15(3) states that YOA dealings are not to be admitted into evidence "in any criminal proceedings". There is a strong argument that the words within the parentheses "whether as to guilt or the imposition of any penalty" are merely illustrative of types of criminal proceedings and do not restrict the types of criminal proceedings to which s 15(3) relates.

Section 15(3) is also important in that it is not only the YOA *record* that is inadmissible. The very fact that a person has been dealt with under the YOA is inadmissible. Consider the following:

A 13 year old child is charged with murder. He is committed to the Supreme Court for trial. *Doli incapax* is in issue. The only evidence that the prosecution have to rebut *doli* is the fact that the child had received several warnings, cautions, and conferences for assaults. Pursuant to s 15(3) CCPA, none of that evidence could be used in evidence as to guilt.

11. MENTAL HEALTH (FORENSIC PROVISIONS) ACT 1990

If a child is dealt with under the Mental Health (Forensic Provisions) Act 1990 – eg s 32, s 33 or as a forensic patient, then they are not "convicted". Thus, matters dealt with under this Act may not constitute a criminal record under the Criminal Records Act.

Section 32 and 33 applications may be made at any stage of proceedings so it may be more prudent and beneficial to, where possible, make such applications before any guilty plea is entered. If the application is successful then there is no finding of guilt recorded at all⁶⁵.

As noted above, a successful ss 32 or 33 application would avoid an unspent conviction for a sexual offence listed in s 7 CRA. Given that sexual offences are often serious, it can be difficult to persuade a court to deal with a matter under ss 32 or 33 without a compelling treatment plan, for example a plan which includes several sessions of sexual counselling/education.

I note that the Office of the Children's Guardian administers the NSW Child Sex Offenders Counsellors Accreditation Scheme. The Scheme provides a public register of counsellors who are specifically accredited to work with people who sexually offend against children, including children who offend against children.

The Office of the Children's Guardian webpage lists the benefits from the scheme:

- Children and young people - the counsellors in the scheme have the best interests of children and young people at heart.
- Courts - the courts know the counsellor is a recognised expert in the field.
- Clients - clients work with counsellors who have specialist skills and experience.
- Counsellors - counsellors are formally recognised for working in this highly specialised field.

⁶⁵ I note that ss 32, 33 are not available for serious children's indictable offences which cannot be dealt with summarily. You may need to negotiate for lesser charges (often via offering a guilty plea) and the withdrawal of the serious children's indictable so that the matter can be finalised in the Children's Court. Then, a ss 32, 33 application can be made.

The register of accredited specialists and their contact details are available on the webpage⁶⁶.

12. APPREHENDED VIOLENCE ORDERS⁶⁷

An AVO is not a criminal matter. An AVO can be made without any findings about the allegations which form the grounds of the AVO. Indeed, an AVO can be ordered because the defendant consents to it without admissions. If an AVO is made it will not form part of a criminal record. However, it may still affect applications for certain jobs or licences.

12.1 Firearms licence

If the Commissioner of Police is aware that a person has been charged with a domestic violence offence they must suspend the person's firearms licence: s 22 of the Firearms Act 1996. The licence is also suspended if an interim AVO is made: s 23. The licence is revoked if a final AVO is made: s 24. The definition of an AVO within the Act includes a final AVO made in NSW and also final AVOs made in other jurisdictions⁶⁹.

There are restrictions on the issue of a licence or permit if a person has been subject to a final AVO within the last 10 years unless that final AVO has been revoked: ss 11, 29.

12.2 NSW Police Recruitment

Applicants seeking appointment as a member or consultant of the NSW Police Force must undergo a vetting process. The NSW Police may obtain a variety of vetting information, including criminal intelligence, traffic records from the Roads and Maritime Services, information from Corrective Services NSW or Department of Attorney General and Justice, information from law enforcement agencies: s 96B(2) of the Police Act 1990.

The following information about the criminal history of a person may also be disclosed and considered for the purposes of this section:

- a) information relating to spent convictions, despite anything to the contrary in the Criminal Records Act 1991;
- b) information relating to criminal charges, whether or not heard, proven, dismissed, withdrawn or discharged;
- c) information relating to offences, despite anything to the contrary in section 579 of the Crimes Act 1900.

⁶⁶ <http://www.kidsguardian.nsw.gov.au/child-safe-organisations/offender-counsellors/offender-counsellors>. However, please note that many practitioners work for New Street. New Street Adolescent Services is run by the Department of Health and provides a services to children 10-17 who sexually abuse. The program is only available to a child who has not been charged with the sexual offence.

⁶⁷ See also Debra Maher, *Practical Tips for Representing Children as Defendants in ADVO/AVO Applications in the Children's Court* for Legal Aid Commission, November 2003.

⁶⁹ Firearms Act 1996, s 4 definition of apprehended violence order; Firearms Regulation 2006, reg 121.

The NSW Police recruitment policy also reflects the requirements set down in Firearms legislation. An applicant should not be subject to an AVO nor should a final AVO have been in existence within the last 10 years. I understand that the 10 year period does not apply to interim or revoked AVOs.

12.3 Security licence⁷⁰

The Security Industry Act 1997 provides that the Commissioner must refuse to grant an application for a security licence if the applicant has been convicted of prescribed offence: s 16.

There is no express provision for AVOs to be considered in the application process and there is nothing in the application form requiring disclosure of AVOs. Nevertheless, where a security job requires a firearm licence, the existence of an AVO may affect the firearm licence. Also, s 15 of the Act requires the Commissioner of Police to be satisfied that the applicant for a security licence is a “fit and proper person”. The Commissioner may consider any criminal intelligence or information the police hold⁷¹. This could include AVOs as well as dealings under the YOA and MHFPA.

12.4 Working with children check

Before 2012, working with children checks were governed by the Commission for Children and Young People Act 1998. Section 34 of that Act required background checks which included checks for any relevant criminal record or any relevant apprehended violence order. A relevant AVO was defined as a final AVO made for the protection of a child under 16⁷². Hence, many children were often advised to agree to long interim AVOs rather than final AVOs for the protection of children under 16. If there were no breaches of the interim AVOs then they would eventually be dismissed and the child defendant would not be affected in a working with children check. Also, if the PINOP became older than 16 then the AVO would not trigger the working with children background check.

Working with children checks are now conducted under the Child Protection (Working with Children Check) Act 2012. Checks are administered by the Office of the Children’s Guardian (OCG). The Act no longer expressly provides for AVOs. However, the OCG has confirmed that they will have access to

- any AVOs (whether interim or final⁷³) which have been made, including
 - AVOs where the police were the applicants (on behalf of a protected person)

⁷⁰ See The Shopfront Youth legal Centre *Getting a Security Licence*, April 2009.

⁷¹ s 15(6)

⁷² Commission for Children and Young People Act 1998, s 33.

⁷³ There is no formal process/procedure to include revoked AVOs. The OCG may have regard to them but this is likely to be in the context of FACS information rather than the fact of the revoked AVO causing the OCG to conduct a risk assessment. The OCG notes that revoked AVOs would, even if relevant, attract minimal weight in the context of risk assessments.

- “private AVOs” where the police were not involved in the application; and
- regardless of whether the protected person was under 16 or not.

See further discussion of working with children checks below.

12.5 Amendments to the AVO application

Even if a defendant consents to an AVO without admissions, it may be worthwhile to seek appropriate and favourable amendments to the application which outlines the allegations. This will save the defendant from potentially having to address/dispute the allegations later on when undergoing a working with children check.

12.6 Applications to vary/revoke AVOs

It is becoming increasingly easier for courts to make AVOs. Standard orders can now be made even if the protected person has no fears. The court can also make an AVO even where there has been no application:

- s38 - even though the standard orders of an AVO also cover any person in a domestic relationship with a protected person, a court that makes an AVO must also include as a protected person any child under 16 who is in a domestic relationship with the protected person. This may impact on any future application to vary or revoke the AVO (see below).
- s 39 – a court must make a final AVO if a person pleads guilty or is found guilty of a serious offence including a domestic violence offence.
- s 40- the court must make an interim AVO if a person is charged with a serious offence.

If an AVO is made (whether interim or final), applications can be made to vary or revoke the orders⁷⁶. The application can be made by police or an interested party (including the defendant or the protected person)⁷⁷. If the protected person (or one of the protected persons) is a child under 16 (at the time of the application) then the defendant can only make an application with the court’s leave⁷⁸. Leave is not necessary if the protected person (or one of the protected persons) was a child under 16 at the time of the making of the AVO but is no longer under 16 at the time of the application to vary/revoke.

If the application is made by one of the protected persons, the court can not vary/revoke the order unless satisfied that any other protected persons on the order who are under 16 have consented to the variation/revocation⁷⁹.

⁷⁶ Crimes (Domestic and Personal Violence) Act 2007, Div 5.

⁷⁷ s 72A(2).

⁷⁸ s 72B.

⁷⁹ s 74D(3)

An application to vary/revoke can be made at any time⁸⁰, even after the AVO has expired.

The Act used to specify that the court could revoke an AVO after its expiry if satisfied that were the final order still in force it should be revoked: s 72(6), now amended. The provision had a “Note” which indicated that the purpose of the subsection was to deal with certain consequences that result from an AVO being made and included the example of the Firearms Act.

Even though the existing Act does not now specifically provide for applications to vary/evoke after an AVOs expiry and does not refer to the Note about the Firearms Act, s 72A(1) still provides that an application to revoke may be made at any time: this would presumably still include after the AVOs expiry.

In any case, it may be prudent to advise a client to (where appropriate) apply for a revocation shortly before the expiry of a final AVO so that the final AVO does not have adverse impacts upon their future life, including the obtaining of a firearms licence/permit. The basis for an application vary/revoke could be that the AVO is no longer needed (because there has been compliance) and because of the adverse effects of an AVO.

13. CHILD PROTECTION REGISTER⁸¹

The Child Protection (Offenders Registration) Act 2000 provides for the placement of a registrable person on the child protection register. Section 3A defines a registrable person as

- someone who commits a Class 1 or Class 2 offence;
- is sentenced for the offence; and
- an exception does not apply.

Once a person is placed on the register they remain on the register for life. Relevant personal information must be reported to the police with:

- An initial report
- Ongoing reports (an annual report);
- Reporting any changes of the information; and
- Reporting relevant interstate or overseas travel.

⁸⁰ s 72A(1).

⁸¹ Whilst the Child Protection Register is not directly relevant to children’s convictions and criminal records it is a record of the child’s offence which lasts forever. Placement on the record is also intimately related to sentences for child sexual offences of which this paper has already addressed. Hence, this paper also includes this section to provide further assistance in dealing with such matters.

Reporting periods differ⁸².

	Single⁸³ Class 1 offence	Single⁸⁴ Class 2 offence	Repeat offender
Adult	15 years	8 years	life
Child	7 ½ years	4 years	life

13.1 Class 1 and 2 offences

The purpose of the register is to protect children. Hence, the majority of Class 1 and 2 offences are offences against children and mostly sexual offences against children. However, not all of the offences are against children and not all of the offences are sexual. For example:

Class 2

- a2) s 33(1) Crimes Act 1900 – wounding/causing grievous bodily harm with intent by an adult against a child under 10
- b) s 86 Crimes Act 1900 - kidnapping of a child unless the offender was a parent
- c1) s 87 Crimes Act 1900 – child abduction unless the offender had parental responsibility.

There have been instances where children have been placed on the register for detaining their siblings.

13.2 Sentenced for the offence

A person is a registrable person if the court has sentenced the person, regardless of whether there has been a conviction recorded or not.

The fact that a conviction becomes spent does not affect the status of a person as a registrable person and does not affect their reporting requirements⁸⁵.

Section 3 provides

“Sentence” includes the following:

- a. any order under section 24 (1) (b) of the Mental Health (Forensic Provisions) Act 1990 that causes a person to be kept in custody or any order of detention under section 27 or 39 of that Act,
- b. any order under section 33 (1) of the Children (Criminal Proceedings) Act 1987 ,
- c. any action taken under section 10A of the Crimes (Sentencing Procedure) Act 1999 ,

⁸² s 14A

⁸³ two or more offences arising out of the same incident are treated as a single offence: s 14A(4).

⁸⁴ two or more offences arising out of the same incident are treated as a single offence: s 14A(4).

⁸⁵ s 21C

- d. any undertaking under section 23 of the Pre-Trial Diversion of Offenders Act 1985 ,
- e. any sentence or equivalent order or undertaking imposed under the laws of a foreign jurisdiction.

The definition is not specified to be an exhaustive definition of “sentence”. It is an inclusive list.

The only way for an offender to avoid the child protection register is to

- Negotiate for an offence which is not a Class 1 or 2 offence
- Fall within an exception in s 3A (see below)
- Be diverted under Mental Health (Forensic Provisions) Act, ss 32 or 33. I note that the definition of sentence in the Child Protection Act includes an order under s 24(1)(b) MHFPA. If the Legislature had intended on ss 32, 33 orders being sentences it would have also included these within the definition.
- Be diverted under the Young Offenders Act. A police referral under Young Offenders Act would not be a sentence. There is uncertainty about whether a court referral under the Act would constitute a sentence. The court gives a YOA caution under s 31 YOA rather than under the sentencing provisions of the CCPA. The YOA caution is a diversion not a sentence. Moreover, s 31(1A) YOA provide that if a court gives a YOA caution, the court must dismiss the proceedings for the offence in respect of which the caution is given.

Similarly, a court referral to a Youth Justice Conference under s 40 YOA is a diversion⁸⁶. However, s 33(1)(c1) CCPA provides that a court may make an order releasing the person on condition that the person complies with an outcome plan determined at a conference held under the YOA. The definition of sentence in the Child Protection Act includes an order under s 33(1) CCPA. A literal interpretation would mean that an order under s 33(1)(c1) CCPA is a sentence.

However, the court does not need to make an order under s 33(1)(c1) in order to refer a child to a conference. It may simply make the referral under s 40 YOA. In practice, I do not think many courts make a s 33(1)(c1) order. Careful practitioners should ask the court to specify that the referral is made under s 40 YOA rather than s 33(1)(c1) CCPA.

I note also that section 57(2) YOA provides:

A court that referred a matter for a conference without making a finding that the child concerned was guilty of an offence must dismiss under this subsection a charge against a child on receiving notice that an outcome plan relating to the offence concerned has been satisfactorily completed by the child.

It is uncertain what happens if the court had referred the matter to conference after making a finding that the child was guilty. However, given that there are no other

⁸⁶ A court can refer the matter at any stage (provided that there is the requisite admission by the child), including after finding the child guilty of an offence: s 40(3) YOA.

applicable provisions, it is likely that the matter would also be dismissed upon satisfactory completion of the outcome plan.

13.3 Exceptions

A person is not a registrable person if they:

- a) were sentenced under s 10 CSPA or s 33(1)(a) CCPA (ie including a s10 bond or s 33(1)(a)(ii) bond); or
- b) as a child committed:
 - i. a *single* offence involving an act of indecency
 - ii. a single offence of s 91H Crimes Act 1900
 - iii. a single offence under s 91H, 91J(1), 91K(1) or 91L(1) Crimes Act 1900
 -

A “single offence” can include numerous offences of the same kind against the same victim within a 24 hour period: s 33(5) and s 3(3) of the Offender Registration Act.

If a child has committed two indecent assault on different days⁸⁸, they will still be a registrable person even if:

- o They receive a s33(1)(a) for one of the offence but not the other; or
- o One of the offences is placed on a Form 1. The question is not whether they are “convicted” of the offences or given distinct sentences for the offences but whether they “committed” the offences⁸⁹.

Sometimes a child may be sentenced for multiple offences of the same kind which happen on different days but there is a date range for the offences and it is left unclear on what exact dates the offences occurred. Where it is possible that the offences occurred within 24 hours, it could be argued that the exception applies.

Lastly, there may be arguments about whether offences are of the same kind. For example, a child client was sentenced for indecent assault against a child and kidnapping (detaining with the intention of committing a serious indictable offence, being the indecent assault). The two offences arose out of the same incident. Both offences were registrable offences. I note that the NSW Police considered that the child was a registrable person because the offences were both registrable and not of the same kind.

⁸⁸ More than 24 hours apart.

⁸⁹ Also noteworthy is s 3(2):

(2) For the purposes of this Act, a reference to a “finding of guilt” in relation to an offence (however expressed) committed by a person is a reference to any of the following:

- (a) a court making a formal finding of guilt in relation to the offence,
- (b) a court convicting the person of the offence, where there has been no formal finding of guilt before conviction,
- (c) a court accepting a plea of guilty from the person in relation to the offence,
- (d) a court accepting an admission of guilt from the person in relation to the offence for the purpose of the offence being taken into account under Division 3 of Part 3 of the Crimes (Sentencing Procedure) Act 1999, or under equivalent provisions of the laws of a foreign jurisdiction,
- (e) a verdict under section 22 (1) (b), (c) or (d) or section 38 of the Mental Health (Forensic Provisions) Act 1990, or under equivalent provisions of the laws of a foreign jurisdiction

13.4 Role of the sentencing court

13.4.1 Sentencing and diversion

The sentencing court has no role to play in placing or not placing a child on the Registry. Indeed, s 24A CSPA provides that the fact that an offender will go on the register must not be taken into account as a mitigating factor on sentence. That is, you cannot submit that the court should sentence via s 33(1)(a) so that the child avoids the register (although there may be other reasons why a s 33(1)(a) may be appropriate)⁹⁰.

It may be arguable whether the fact that the child goes on the register is a relevant factor that can be considered in a submission to divert the child under Young Offenders Act.

It is more arguable that applications for diversion under ss 32 and 33 MHFPA do not preclude consideration of the register.

13.4.2 Modification of reporting requirements

If the sentenced child will go on the register, it should be noted that there are onerous reporting requirements, including a requirement to report the name, date of birth and address of each child the with whom the offender has had contact and with whom the offender

- exchanges contact details (including providing the person's contact details to the child), or
- attempts to befriend⁹¹.

Contact with a child includes the registrable person having:

- a. physical contact with the child (including by touching the child or being in very close physical proximity to the child), or
- b. oral communication with the child (including communication that takes place in person, by telephone or by electronic means such as via the internet), or
- c. written communication with the child (including communication that takes place by mail, by telephone or by electronic means such as email)⁹².

These requirements have led to situations where the police have required a juvenile registrable person to provide the details of all of his friends at school and on social media. His school told him to stop making friends!

However, s 9(1C) provides that a sentencing court may order that the reporting obligations in respect of contact occurring before the person turns 18 may be modified if:

⁹⁰ Asides from s 24A CSPA, that is also case law that holds that it is not proper to dismiss a charge without conviction merely to avoid the operation of some other legislative provision that is otherwise applicable: *r v Stephenson* [2010] NSWSC 779 at 66.

⁹¹ s 9(1A)

⁹² s 9(1B)

- the person is under 18 years of age, and
- the court is of the view that the modification is appropriate in the circumstances taking into account the educational and other needs of the person⁹³.

Such modification should be sought where applicable.

13.4.3 Notices

Often, prior to sentence, the court will receive a sealed envelope containing relevant notices under the Child Protection Register Act. The envelope is usually marked that it is not to be opened except by the court registry after sentence.

After sentence, the Court registry provides notice to the offender and to the police pursuant to s 4(1) and (2). Notices may also be given to the offender by the police⁹⁴. Failure to comply with the notice provisions does not affect the registrable person's reporting obligations⁹⁵.

Whilst, it is usually the Court Registry who provide the notices, s 4 refers to the sentencing court providing the notices. If there is any doubt about whether the sentenced offender should go on the register, representations could be made to the Registry and/or a direction could be sought from the sentencing court that the offender is not a registrable person and no notice should issue. I am not sure whether the NSW Police will still place a child on the register even if they do not receive a court notice. The police will have access to the sentencing outcome regardless of the notice.

Where a decision by the NSW Police to place an offender on the register is disputed, remedy can be sought at the NSW Civil and Administrative Tribunal.

13.5 Forensic procedure applications for registered offenders

Under Pt 7B of the Crimes (Forensic Procedures) Act, a court can order a forensic procedure for registered offenders whose DNA is not in the offenders index of DNA database. *W4 v Detective Senior Constable Ayscough* [2016] NSWSC 1106 involved such an application and illustrates the impact of registration on a juvenile sex offender.

⁹³ Note s 9(1D) provides: A person who, because of a modification under subsection (1C), was not required to report a contact occurring before the person was 18 years of age is not subsequently required to report that contact unless the person's reporting obligations are further modified so as to require the contact to be reported.

⁹⁴ s 7

⁹⁵ s 8

13.7 National Child Offender System

The National Child Offender System (NCOS) is managed by the Australian Criminal Intelligence Commission (ACIC). The system allows Australian police to record and share child offender information across jurisdictions. It consists of the:

- Australian National Child Offender Register (ANCOR) which allows authorised officers to register, case manage and share information about registered persons.
- Managed Person System (MPS) which holds information on offenders who are charged but not convicted, or after an offender's reporting obligations have been completed.

Any requests about information contained on NCOS should be directed to the Child Protection Unit in the relevant police agency.

13.8 Law reform

The Child Protection Register and its application to children has been subject to discussion/review in a number of different inquiries including the Child Abuse Royal Commission Criminal Justice System Consultation 2016, the Review of the Act in 2013, NSW Parliamentary Inquiry into the Sexualisation of Children and Young People 2016, and NSW Parliamentary Inquiry into Sentencing Child Sexual Assault Offenders. The Law Society has made submissions about the adverse impact of the register on juveniles and advocated for children to not be placed on the register unless via a specific court order.

14. WORKING WITH CHILDREN CHECK

The Child Protection (Working With Children) Act 2012 provides for the NSW Working with Children Check (WWCC). The Act protects children by:

- 1) Not permitting certain persons to engage in child related work, and
- 2) Requiring persons engaged in child-related work to have a working with children check clearance.”⁹⁶

The WWCC is administered by the Office of Children's Guardian (OCG).

14.1 Child related work

Section 5 of the Act defines a "worker" as a person engaged in work in any capacity as an employee, self-employed person, volunteer, trainee of an educational or vocational course, or religious or spiritual leader (minister, priest, rabbi, mufti etc).

⁹⁶ s 3

Child related work is work engaged by a worker that involves direct contact⁹⁷ with children in a child related sector or in a specified child-related role⁹⁸. A child related sector includes:

- a. mentoring and counselling services for children,
- b. child protection services,
- c. the provision of health care in wards of hospitals where children are treated and the direct provision of other child health services,
- d. clubs, associations, movements, societies or other bodies (including bodies of a cultural, recreational or sporting nature) providing programs or services for children,
- e. respite care or other support services for children with a disability,
- f. education and care services, child care centres, nanny services and other child care,
- g. schools or other educational institutions (other than universities) and private coaching or tuition of children,
- h. sporting, cultural or other entertainment venues used primarily by children and entertainment services for children,
- i. detention centres (within the meaning of the Children (Detention Centres) Act 1987) and juvenile correctional centres (within the meaning of the Crimes (Administration of Sentences) Act 1999),
- j. any religious organisation,
- k. refuges used by children, long term home stays for children, boarding houses or other residential services for children and overnight camps for children,
- l. transport services especially for children, including school bus services and taxi services for children with a disability and supervision of school road crossings.

14.2 The WWCC: what is seen by the OCG?

There is an obligation on persons engaged in child related work to either hold a working with children clearance or have a current application for clearance⁹⁹. There is also an obligation on employers to ensure that employees have clearances¹⁰⁰.

An application for a WWCC requires the applicant to sign an approved form authorising/consenting to¹⁰¹

- a) the conduct of a criminal record check
- b) the disclosure of the applicant's criminal history,
- c) other inquiries about the applicant relevant to the application or clearance,

⁹⁷ direct contact is defined as physical contact or face to face contact: s 6(4)

⁹⁸ s 6. Additional roles and sectors can be found in the Child Protection (Working With Children) Regulation 2013

⁹⁹ s 8

¹⁰⁰ s 9 and 9A

¹⁰¹ s 13(3)

- d) disclosure of information about the applicant relevant to whether the applicant may be subject to an assessment requirement.

This will involve the OCG obtaining information about:

- convictions (including findings of guilt where no convictions are recorded¹⁰² and including spent convictions¹⁰³),
- charges (whether heard or not heard, proven, dismissed, withdrawn or discharged)¹⁰⁴
- juvenile records¹⁰⁵.
- AVOs

The Act does not provide a statutory definition of criminal history and does not explicitly include or exclude juvenile records¹⁰⁶. However, the consent to the WWCC will include consent to the disclosure of juvenile records. This will include cautions and conferences under the Young Offenders Act 1997 (YOA). Even though s 68 of the YOA prohibits disclosure of YOA records, s 68(2)(d) provides an exception for WWCC assessments.

Furthermore, section 31 of the Working with Children Act allows the OCG to request from any government agency, information which may be relevant to an assessment of whether a person poses a risk to the safety of children. Section 33 authorises the the Commissioner of Police at any time to disclose information to the OCG, including spent convictions, charges (regardless of outcome) and juvenile records.

Under the previous (pre 2012) NSW WWCC scheme, there was express provision for the checking of final AVOs for the protection of children under 16¹⁰⁷. The current Working with Children Act does not refer to AVOs at all. Nevertheless, the OCG has indicated that they do access AVOs¹⁰⁸ but AVOs are not listed as matters which would trigger a risk assessment¹⁰⁹.

¹⁰² s 5

¹⁰³ Section 15 of the Criminal Records Act 1991 provides that spent convictions may be disclosed in relation to an application by a person for a working with children check clearance under the Child Protection (Working with Children) Act 2012, or to the assessment of the holder of a clearance under that Act. Crimes Act 1914 (Cth), s 85ZZGB provides a similar exception within the Commonwealth scheme. See also s 33(2)(a) of the Working with Children Act.

¹⁰⁴ See s 33(2)(b)

¹⁰⁵ s 33(4)

¹⁰⁶ None of the WWCC laws across the country specifically include or exclude juvenile records.

¹⁰⁷ Commission for Children and Young People Act 1998, ss 33 and 34.

¹⁰⁸ See above discussion under AVOs.

¹⁰⁹ However, note the below discussion about Sch 1, cl 1(6) and the general discretion under s 15(3).

14.3 Disqualified person

The OCG must not grant a working with children check clearance to a disqualified person¹¹⁰. A disqualified person is a person who, as an adult, has been convicted (including proceedings that are pending¹¹¹) of a disqualifying offence listed in Schedule 2¹¹².

See the OCG's Fact Sheet 13: Disqualifying offences (Schedule 2), May 2015, for a table of the offences.

If the offence is committed as a juvenile, the person is not automatically disqualified but the offence will trigger a risk assessment.

14.4 Risk assessment triggers

The OCG is required to undertake a risk assessment if any of the matters specified in Schedule 1 applies¹¹³, including:

- 1) Offences
 - Juvenile convictions for Sch 2 offences; or
 - “Proceedings have been commenced against a person” for various offences listed in cl 1(1), (2), (3)¹¹⁴, unless the person is found not guilty of the offences in cl 1(3); or
 - “A person has been convicted of an offence under s 61 of the Crimes Act 1900 committed against a child”¹¹⁵ (ie common assault of a child); or
 - “A person has been convicted of, or proceedings have been commenced against a person for, offences involving violence or sexual misconduct (whether or not listed in Sch 1 or 2) sufficient to indicate a pattern of behaviour that warrants investigation as to whether it may cause a risk to the safety of children”¹¹⁶.
- 2) Findings of misconduct (sexual misconduct or serious physical assaults) by a reporting body (eg employers) involving children¹¹⁷; or

¹¹⁰ S 18(1)

¹¹¹ Section 18(1)(b)

¹¹² This includes offences where an element is an intention to commit one of the other Sch 2 offences. It also includes attempting, conspiring or inciting any of the offences listed in Sch 2. It also includes similar offences from other States/Territories/foreign territories.

¹¹³ S 14

¹¹⁴ Sch 1, cl 1(5) provides that this includes offences where an element is an intention to commit one of the other Sch 1, cl 1(1), (2), (3), (4) offences. It also includes attempting, conspiring or inciting any of the offences or similar offences from other States/Territories/foreign territories.

¹¹⁵ Sch 1, cl 1(4)

¹¹⁶ Sch 1, cl 1(6)

¹¹⁷ Sch 1, cl 2. The OCG notes that it is unlikely that a juvenile will have been the subject of relevant employment proceedings resulting in such a finding specified in Sch 1, cl 2.

3) Notifications by the Ombudsman.

See the OCG's Fact Sheet 14: Assessment requirement triggers (Schedule 1), May 2015.

It is noteworthy that not all of the offences listed in Sch 1 are offences against children.

The following are included:

- Assaults at school¹¹⁸ (which may be by a child against a staff member)
- Aggravated cruelty to animals¹¹⁹
- Serious Animal cruelty¹²⁰

The OCG notes that, anecdotally, they have had very few matters involving animal cruelty. However, I imagine that it would not be uncommon for children to be charged with assaults at school.

Also of concern, a child who is charged with stalking/intimidating another child under s 13 Crimes (Domestic and Personal Violence) Act 2007 (regardless of the outcome) will also require a risk assessment.

Many children may also be convicted of common assaults against other children. This will trigger a risk assessment.

For example, I had a child client with no prior record who had an argument with his brother over the TV remote. Even though his younger brother did not make a statement, the police charged him with common assault and took out an AVO. Both charge and AVO were dismissed in court. However, when he wanted to be on the University Student Representative Council, he needed to address both matters on a working with children check.

14.4.1 Do police referrals to YOA cautions or conferences trigger a risk assessment?

Risk assessments under several clauses in Schedule 1 are triggered by "proceedings commenced against a person" for various offences if the person has been "convicted" of various offences.

Section 4 of the Working with Children Act defines "conviction" to include a finding that a charge for an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction.

However, where a child is dealt with under the Young Offenders Act (YOA) by police, there has been:

- No "*proceedings* commenced against the person" (ie there is no charge)
- They have not been "convicted" of an offence. There is no "conviction" within the meaning of s 4 of the Working with Children Act:

¹¹⁸ s 60E of the Crimes Act 1900.

¹¹⁹ s 6 of the Prevention of Cruelty to Animals Act 1979

¹²⁰ s 530 of the Crimes Act 1900

- There is no *charge* for an offence proven
- The child is not *guilty* of an offence (they need only “admit” the offence under the YOA)
- There is no conviction recorded.

Hence, it would seem that a police YOA option would not trigger a risk assessment. The current approach of the OCG is to regard “proceedings” as meaning “criminal proceedings”. However, *BKE v Office of the Children’s Guardian and anor* [2015] NSWSC 523 at 23 suggests (albeit for another purpose) that the word “proceedings” is not limited to criminal proceedings. The OCG is still in the process of considering this issue¹²¹. So, for now, a police referred YOA option is not likely to be a trigger but this position may change.

The position with court imposed YOA cautions and referrals to youth justice conferences is more tricky. They may or may not trigger a risk assessment.

- Regardless of the outcome, the fact that there were court *proceedings* may trigger a risk assessment for any of the offences listed in Sch 1, cl 1(1), (2), (3), and (6).
- For common assaults against children, a risk assessment is triggered only if the offender was “convicted”:
 - If the *offence was found proven* after a hearing (and then the child was diverted under YOA) there has probably been a conviction within the meaning of s 4 of the Working with Children Act and a risk assessment is triggered
 - If the child *pleaded guilty* there has probably been a conviction and a risk assessment is triggered
 - If the child merely *admitted*¹²² the offence and was given a caution or referred to conference, then there probably has not been a conviction and no risk assessment is triggered.

There are several offences listed within Sch 1 which are eligible for a YOA option, including some sexual offences. Legal practitioners may need to take particular care in providing advice about these matters, taking into account the potential impact on future WWCC.

For example, a child who has engaged in “consensual” sexting with a peer may have committed possession/dissemination of child abuse material: s 91 H of the Crimes Act 1900. If the police offer a YOA caution, the child may be better off accepting the caution, rather than taking the matter to court, even if it could be successfully defended in court. Whilst a single police caution would still show on a WWCC it would probably not trigger a risk assessment¹²³, whereas a court proceeding would.

¹²¹ including in the context of their five year statutory review.

¹²² An admission under ss 31 and 40 YOA is different from a plea of guilty.

¹²³ Provided it didn’t trigger an assessment via Sch 1, cl 1(1)(6) or the OCG exercising its discretion under s 15(3).

14.4.2 A pattern of behaviour that warrants investigation and the general discretion

Schedule 1, Clause 1(6) allows for a risk assessment to be triggered if there have been proceedings against a person for offences involving violence or sexual misconduct which establish a pattern of behaviour that warrants an investigation.

The OCG has informed that even though AVOs and police YOA cautions/conferences are not listed in Sch 1 as part of the matters which trigger a risk assessment, they may possibly establish a pattern of behaviour that triggers assessment under cl 1(6)¹²⁴.

Also, note that regardless of the risk assessment triggers in Sch 1, the OCG still retains a general discretion to conduct a risk assessment if it feels that it is warranted. The OCG has indicated that the discretion provided by s 15(3) is exercised carefully and most often in relation to information that points to domestic violence conduct that does not sit easily within clause 1(6). Information received under Chapter 16A of the Care and Protection Act would be another example of circumstances where s15(3) may be exercised.

The discretion may also be exercised for historical disqualifying offences where the OCG know the offence type is specified in Schedule 2 of the Act and the court outcome was a conviction but the OCG can not make a reliable finding that the person was 18 years of age when the offence was committed (usually because of lost court records where the court date may be known but not the offence date). This circumstance is not captured by Schedule 1, so the OCG have to exercise s 15(3) to respond appropriately to the seriousness of the record where the Act would otherwise allow a clearance to be issued.

14.5 The risk assessment

If the person is not a disqualified person and there is no requirement for a risk assessment then the OCG must grant a clearance¹²⁵.

If a risk assessment is triggered under Schedule 1 then the OCG must conduct the assessment¹²⁶. The OCG must grant a clearance unless it finds that there is a risk to the safety of children¹²⁷.

A risk assessment can take in excess of six months, depending on the nature and location of the records involved. However, the OCG will keep applicants informed throughout the process and will make all reasonable attempts to complete the process as soon as is practicable¹²⁸.

¹²⁴ Even though AVOs are arguably not proceedings *for offences* and police YOA options are arguably not *proceedings*, the OCG are still in the process of clarifying the breadth of cl 1(6) and there is little authoritative assistance on the meaning of “proceedings” beyond *BKE*. Currently, the OCG considers “proceeding” to mean criminal proceedings.

¹²⁵ s 18(3)

¹²⁶ s 15

¹²⁷ s 18(2)

¹²⁸ See Fact sheet 8 attached titled “Risk assessment” dated July 2014.

The OCG will consider the following factors¹²⁹:

- 1) Factors relating to the conduct
 - a. Seriousness (as demonstrated by details of the conduct, court outcome and penalty)
 - b. Length of time since its occurrence
 - c. Age and vulnerability of the victim
 - d. Relationship between offender and victim(s)
 - e. Age difference between offender and victim
 - f. Whether the offender knew or could have known the victim was under 18
- 2) Factors relating to the applicant
 - a. Conduct since the offence
 - b. Age at the time
 - c. Current age
 - d. Seriousness of total criminal records
- 3) Factors relating to recurrence
 - a. Likelihood of the offences being repeated
 - b. Impact on children of the offences being repeated

Before it determines that an applicant does not pose a risk, the OCG must be satisfied that:

- a) a reasonable person would allow his or her child to have direct contact with the applicant that was not directly supervised by another person while the applicant was engaged in any child related work, and
- b) it is in the public interest to make the determination¹³⁰.

14.6 Interim bar

Whilst a risk assessment is being undertaken an interim bar may be applied. The result is that a person cannot engage in any child related employment for 12 months or until the interim bar is revoked, whichever comes first. Although it is not directly relevant to risk assessments it is a procedural decision that may have significant consequences for the person being risk assessed. The Supreme Court in *Re Tilly v Minister for Family and Community Services* [2015] NSWSC 120 provides some guidance on interim bars.

14.7 Review

Unless they are excluded because they committed an offence listed in s 26 of the Working with Children Act, a person who has been refused a clearance may apply to the Civil and Administrative Tribunal for a review¹³¹.

¹²⁹ s 15(4)

¹³⁰ S 15(4A)

¹³¹ s 27

There are numerous Tribunal decisions which provide guidance about risk assessments and the public interest test. See for example: *Office of the Children's Guardian v CFW* [2016] NSWSC 1406; *CHB v Children's Guardian* [2016] NSWCATAD 214; *CMT v Children's Guardian* [2016] NSWCATD 280; *CNR v Children's Guardian* [2016] NSWCATD 196; *Children's Guardian v BQP* [2016] NSWSC 1099; *CFR v Children's Guardian* [2016] NSWCATAD 159; *BKE v Office of the Children's Guardian* [2015] NSWSC 523¹³².

14.8 Child Abuse Royal Commission Working with Children Check's Report

In 2015, the Royal Commission into Institutional Response to Child Sexual Abuse examined working with children checks across the country and produced a *Working With Children Checks Report*. It found different schemes operated in different States/Territories. The schemes operated independently of each other, were inconsistent and complex and contained unnecessary duplication. There was inadequate information sharing and lack of continuous monitoring of people with WWCC. The various schemes were also difficult to understand and apply and had loopholes that could be exploited. Accordingly, the Report recommended a nationally consistent approach to WWCC, including establishing a centralised database. The report recognised, to some extent, a different approach for juvenile criminal records as compared to adult records. However, similar to the existing NSW scheme, the recommended scheme would still consider juvenile records as part of criminal history information¹³³, and would exclude juvenile offences from disqualifying offences¹³⁴ but still include them as triggers for a risk assessment¹³⁵.

The States/Territories have been called upon to amend their WWCC laws to implement the Report's standards and enable cross recognition of clearances within 12-18 months of the Report's publication.

¹³² Guidance from the previous scheme applies to the current scheme in the context of risk and the test continues to require that the risk is real and appreciable and related to children.

¹³³ Recommendation 17

¹³⁴ Recommendation 20

¹³⁵ Recommendation 21

15. NATIONAL POLICE CHECKING SERVICE¹⁵⁰

The Australian Criminal Intelligence Commission (ACIC) commenced operations on 1 July 2016. The Commission formed following the merge of the Australian Crime Commission and CrimTrac – a national agency which managed the National Police Check for police and working with children check agencies. The Commission’s role is to facilitate and maintain the National Police Checking Service (NPCS) and the National Child Offender System (NCOS).

An individual must provide identifying information and their consent before a National Police Check may be carried out. The individual provides their consent to one of the following organisations:

- An ACIC accredited organisation (eg Office of Children’s Guardian¹⁵¹); or
- A police agency (eg NSW Police, Victorian Police); or
- An ACIC accredited broker –mostly private firms who are accredited to provide the NPCS directly to individuals, eg CV Check Ltd, Background Screening Australia¹⁵².

The organisation then requests the check by submitting the personal information provided by the applicant into the NPCS Support System (NSS).

15.1 Application

In NSW, the relevant police agency is NSW Police. NSW Police Criminal Records Section (CRS) provides an opportunity for NSW residents aged 14 years¹⁵³ and above to apply for a National Police Check for visa, adoption, paid employment (including authorisation as an authorised carer), approval as a household member of an authorised carer, some occupational licensing purposes, student placements and for volunteers working in Commonwealth supported aged care facilities.

The CRS does not provide a National Police Check for child related employment, security industry licensing, firearms licensing, Australian permanent residency purposes

¹⁵⁰ The check has variously been known as the national Criminal History Record Check (NCHRC), the National Police Check, the National Criminal Records Check (NCRC).

¹⁵¹ Other examples include:

- various State/Territory and Federal public service departments such as Department of Human Services, Department of Defence, Department of Immigration and Border Protection, Department of Health (Vic), Brisbane City Council;
- various charities such as Mission Australia, the Smith Family, the Salvation Army, Australian Red Cross Society
- regulatory authorities such as Australian Health Practitioner Regulation Agency
- private firms –CV Check Ltd, People Check Pty Ltd

¹⁵² New Zealand police is also a broker.

¹⁵³ The Criminal Records Section state that the age restriction is because those under age are not able to consent to release of their criminal record.

or for insurance claims. Child related employment checks are conducted by the Office of the Children's Guardian (OCG). Security, firearms and insurance have other specialized sections of the NSW Police which deal with relevant checks.

Individuals requiring a check for Australian citizenship, residency, spouse visa, guardianship of a child from another country, working visa or whilst travelling or living abroad, must apply via the Australian Federal Police (AFP)¹⁵⁴.

An applicant for a National Police Check fills out a form which provides consent for the record check. If the applicant is a child under 18 then the consent of the parent/guardian or lawyer is needed.

The form can be filled out online although it will ultimately still need to be submitted in person to a police station where identification can be verified.

There are two types of disclosures - Standard disclosure and Full Disclosure¹⁵⁵. A full disclosure is necessary for certain occupations or purposes which can take into account spent convictions.

If filling in the online form, Step 2 asks for selection of the type of check:

- \$54.60 – name and date of birth check
- \$183.70 – name, date of birth and fingerprint check
- \$15.00 – name and date of birth check – volunteer – for use of Commonwealth funded care services only

The form itself does not explain the difference between these types of check but the difference is explained in the CRS Information Sheet No 2 *How to apply for a National Police Check* (available via the CRS webpage's Frequently Asked Questions)

The name and date of birth check box is for employment, visa or licensing purposes. The name, date of birth and fingerprint check box is required for visa or adoption purposes AND the overseas country or adoption organisation has requested a fingerprint check.

If fingerprints are required the applicant should contact the police station prior to attending to ensure that an officer may be assigned to take fingerprints.

At Step 3 the applicant must also select from a drop down menu the purpose of the check (employment, licensing, visa or adoption purposes) and then must specify details. For example checks for employment purposes *must* include the type of occupation (eg cleaner, electrician); licensing checks must nominate the type of licence (eg boat licence); visa applications must include the country for which the visa is required (eg Canada). The form only allows you to type 20 characters when specifying details.

The form allows for the results to be sent back to the applicant and also forwarded to an organisation (eg prospective employer).

¹⁵⁴ www.afp.gov.au

¹⁵⁵ A full disclosure needs the approval of the CRS Manager.

15.2 National Names Index

Once the application is received from the CRS (or other requesting organisation) by NSS an automated check is done on the personal information supplied.

A check is performed on a central database of names - the National Names Index (NNI) - using the name, date of birth (and if applicable) fingerprints supplied by the applicant. The NNI is a national index of any convictions recorded under a name. Given that fingerprints are not taken by all Australian police in all instances it is possible that the NNI may contain information against the person but under another name/alias. The NNI will also not include

- charges which haven't resulted in a conviction,
- convictions that have not been added to the NNI due to time lapse between the conviction and the updating of the NNI,
- some offences prosecuted by non police organizations which do not submit to the NNI

The check will result in either:

- no match and an immediate result of "No Disclosable Court outcomes" is released to the requesting organisation and the National Police Check is completed; or
- one or more potential matches are found. A referral is then sent to the relevant police agencies for assessment. For example, if a match is found in Victoria, a referral is made for Victorian Police to assess their records.

15.3 Matching and initial vetting

The relevant State/Territory police do an initial manual assessment to verify if the match relates to the applicant (a process called "matching").

Sometimes the police may make request for further information (RFI) through the check in NSS. The RFI will generally take the form of additional personal details, such as previous addresses, photo ID or requesting an applicant to attend a police station to submit a fingerprint sample.

If there is no match, then a "No Disclosable Court Outcomes" result is released. If there is a confirmed match the police undertake an initial vetting. Police assess the police history information (PHI) to determine what details can be released in compliance with that State/Territory's spent conviction legislation and taking into account the purposes of the check.

15.4 Final vetting

The vetted results are sent back to the requesting organisation via NSS. The results will be either:

- "No Disclosable Court Outcomes" – there is no PHI that can be released

- “Disclosable Court Outcomes” –PHI exists and can be released. It may include charges, convictions, sentences, findings of guilt without conviction, court appearances, outstanding court matters, traffic offences.
- “Unable to Process” – in some circumstances checks will be closed as unable to process because the check cannot be completed for some reason which may include:
 - insufficient or incorrect check data submitted
 - legislation prevents juvenile check from being processed
 - no informed consent collected
 - police data integrity issues

If there are disclosable outcomes, the requesting police agency or the police agency in the State/Territory that the Accredited organisation/broker has its registered business is responsible for a final vetting: ie reviewing the vetted results from each State/Territory/Federal police that provided results and then applying its own legislation/policy to determine what PHI can be released to the Accredited Organisation.

15.5 Results

The organisation that requested the check will provide the results to the applicant.

- If the check was submitted through a police agency then that agency will issue a National Police Certificate to the individual¹⁵⁷.
- If the check was submitted through an ACIC organisation they will receive the result through a “check results report”

A National Police Certificate contains relevant convictions and also contains the following:

- Future court appearances
- Outstanding matters if they are still before a court with no result¹⁵⁸
- Traffic matters only if they are criminal

It does not contain police intelligence. It should not include charges which have been withdrawn or where the defendant has been acquitted.

The result is a “point in time” result and does not last. The check result cannot be used to apply for other jobs.

15.6 How long does it take?

It usually takes 10 business days to process name and date of birth applications and 15 business days for fingerprint checks.

¹⁵⁷ I am not sure whether an ACIC broker provides to the individual a National Police Certificate or a check results report.

¹⁵⁸ Even though these are obviously not convictions they form part of the National Police Certificate because the applicant has given consent to their release.

ACIC's aim is to process 95% of police checks within 10 business days. Around 70% of checks are completed almost instantly and provided within minutes. The remaining 30% are referred to one or more police agencies.

15.7 Disputed records

The applicant states on a NSW CRS National Police Check application form whether they wish the check to be returned to themselves or forwarded (eg to an employer). If there is concern about what will appear on the National Police Certificate it is prudent to ask for it to be returned rather than forwarded. Any disputes about the certificate (or indeed any dispute about a child's criminal history) may be addressed to the CRS¹⁵⁹. A *Disputing Criminal Record Information* form is available on the CRS webpage.

See also the ACIC webpage for a flowchart illustrating the ACIC National Police History Check dispute process.

If the dispute cannot be resolved with the CRS and/or via ACIC's process then the matter could be challenged in the NSW Civil and Administrative Tribunal.

16. EMPLOYMENT

Employment is significant for the successful reintegration into the community, especially for children who are starting their careers. Employment provides financial independence, structure, routine, a social network and a sense of contributing, which leads to improved self esteem and confidence. Importantly, evidence exists that employment reduces recidivism, benefiting the community and reducing the costs associated with court procedures and incarceration. It is estimated that 60-70% of people who re-offend are unemployed at the time they re-offend.¹⁶⁰

Unfortunately, employers (perhaps understandably) do not wish to hire those who have a criminal record. US research into employer attitudes to hiring ex-prisoners indicates that

- only 12% of employers agreed that they were willing to hire an ex-prisoner.¹⁶¹
- 66% of employers reported that they would not knowingly hire a person with a criminal record.¹⁶²

¹⁵⁹ The CRS is contactable on (02) 88357 888. The Assistant Manager is Stephen McKnight.

¹⁶⁰ Victorian Department of Justice 200-2001, *Output Group: Correctional Services*. Victoria Department of Justice Annual Report <www.justice.vic.gov.au/ir1a1dd5/1/hilite> at 12 December 2002.

¹⁶¹ S. Albright, F. Denq, 'Employer attitudes toward hiring ex-offenders (1996) 76 *Prison Journal* 118, 137. See also Joe Graffman, Alison Shinkfield, Barbara Lavelle and Lesley Hardcastle, 'Attitudes of Employers, Corrective Services Workers, Employment Support Workers, and Prisoners and Offenders Towards Employing Ex-Prisoners' (Report to the Criminology Research Council Grant 26/02-03 April 2004, Deakin Univeristy) 1, 2.

¹⁶² H. Holzer, 'What employers want: job prospects for less-educated workers' (1996) New York: Russell Sage Foundation.

- 20% said they would hire a person with a criminal record, 66% would hire a person with a chequered work history, 80% with a history of unemployment, 97% with no high school diploma and 93% who were current welfare recipients.¹⁶³

In Australia it was found that having been arrested reduced the probability of employment by 10% and 20% for males and 7% and 17% for females for indigenous Australians¹⁶⁴. Complaints of discrimination in employment based on criminal record outnumbered complaints of discrimination in employment on the basis of religion, age, trade union activity or sexual preference¹⁶⁵.

Employment in the NSW Public Sector requires a criminal record check. Increasingly employment in the private sector also requires a check. Even where there is no legislative obligation to request a criminal record check, an employer may still ask a job applicant for a check¹⁶⁶. Whilst an applicant does not need to give consent to a record check, if they refuse they are not likely to get the job¹⁶⁷.

Similarly, once employed, an employee is not under a duty (unless, for example, they are a prohibited person) to volunteer facts about their criminal history¹⁶⁸. However, if an employee is not honest about their criminal record an employer may suggest that they have terminated the employees position as a result of ‘dishonesty’ as opposed to ‘discrimination’¹⁶⁹.

The employer can ask not only about criminal records but may arguably be able to ask whether the applicant has been “charged”. There is no NSW anti discrimination legislation dealing with job applications and criminal records.

Discrimination on basis of criminal record

Discrimination in employment on the basis of criminal record is a widespread problem, and has been recognised as such by the Australian Human Rights Commission.

¹⁶³ H. Holzer, S. Raphael and. Stoll ‘Employer demand for ex-offenders: recent evidence from Los Angeles: (2003) *The Urban Institute*.

¹⁶⁴ Jeff Borland, Boyd Hunter, ‘Does Crime Affect Employment Status? The Case of Indigenous Australians’ (2000) 67:265 *Economica* 1.

¹⁶⁵ Human Rights Commission Annual Report 2003?

¹⁶⁶ The Human Rights and Equal Opportunity Commission state that the request should only be where there is a connection between the inherent requirements of a particular job and a criminal record. However, NSW has not legislated this principle. Only the Northern Territory and Tasmania has Anti Discrimination legislation in relation to criminal records.

¹⁶⁷ In *Hosking v Fraser Central Recruiting* (1996) EOC 92-859 the Northern Territory Anti Discrimination Commission found that an employment agency should not have sought criminal record information from all applicants for a nursing position because it was not relevant to the inherent requirements of the position.

¹⁶⁸ *Stock v Narrabri Nominees*, WA Industrial Relations Commission, No 1122 of 1990.

¹⁶⁹ *Stock v Narrabri Nominees*, WA Industrial Relations Commission, No 1122 of 1990: The subject of a criminal record was not raised and the applicant did not volunteer the information. In a complaint to the Commission it was found that there had been no discrimination, the employer said that the absence of a criminal record was not an inherent requirement but that he had dismissed the applicant due to a lack of honesty.

Except in Tasmania and the Northern Territory, it is not unlawful to discriminate on the basis of a person's criminal record.

However, it is a matter covered by the *Australian Human Rights Commission Act 1986*, which means that an individual may complain to the Commission about criminal record discrimination.

Ideally complaints will be resolved by conciliation but, if this is unsuccessful or inappropriate, the Commission may investigate the complaint and make recommendations. In some cases the Commission prepares a report to the Federal Attorney-General, which is tabled in Parliament.

For further information see <http://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/discrimination-employment-basis-criminal-record>.

An employee who is dismissed because of a conviction (particularly if it is a spent conviction which an employer has improperly taken into account) may possibly have an unfair dismissal action. A discussion of the unfair dismissal provisions, and employment law more generally, is beyond the scope of this paper.

17. AUSTRALIAN DEFENCE FORCE

Many children wish to enter the Australian Defence Force (ADF). To be eligible, the applicant must meet several requirements concerning::

- Minimum age – 17 years old
- Education
- Fitness
- Health – including mental health
- Character/Background – including restrictions around drug use

Recruitment is performed by Defence Force Recruitment (DFR) who are guided by Recruiting Instructions: eg the *Australian Defence Force Recruiting Instruction – National Police History Checks, Civil convictions and involvement in prohibited substances* (ADFR1021) (the Instruction).

The Instruction provides:

In accordance with Defence Act 1903, the Australian Defence Force (ADF) retains the right to select only those individuals who it considers suitable for employment¹⁷⁹. The ADF strives to maintain an operationally capable force,

¹⁷⁹ Section 123F of the Defence Act 1903. Certain persons not permitted to serve in the Defence Force: A person shall not be permitted to serve in the Defence Force if: (a) that person has been convicted of a crime that, in the opinion of the Chief of Navy, the Chief of Army or the Chief of Air Force, as the case requires, is such as to render that person unsuitable for service in the Defence Force; or (b) the service of that person in the Defence Force might, in the opinion of the

and therefore requires high levels of fitness, self-discipline, efficiency, commitment and respect from its members. A criminal record, a history of unacceptable behaviour, or the use or involvement with prohibited substances may indicate an attitude that is incompatible with the requirements of service life

17.1 Checks conducted

A National Police History Check is conducted prior to enlistment/appointment. The applicant is requested to sign a consent form. If the applicant is a child then the parent/guardian must sign the form too.

The Instruction indicates that the check normally does not reveal spent convictions. However, this is not always the case and upon receipt of the results, the DFR must also vet the results to determine if any recorded convictions are spent or not.

I understand that Recruitment would have access to¹⁸⁰:

- any charges and convictions, including charges which have been withdrawn, dismissed, acquitted, pardoned, quashed.
- Young Offenders Act dealings
- AVOs
- Traffic offences

However, the ADF comply with spent convictions schemes and will not take in account spent convictions. Commonwealth offences are spent under the Commonwealth spent convictions scheme. For State /Territory offences, the DFR will consider both the Commonwealth and State/Territory spent conviction schemes. If the offence is spent under either of the scheme then it will be considered to be spent.

17.2 Assessment

If the check reveals unspent convictions (what the DFR refer to as “civil convictions”¹⁸¹) and the candidate does not meet entry requirements, a Senior Military Recruiting Officer (SMRO) may make a request to the Service (eg the Army, Navy or Air Force) for a waiver. Such a request may only be made if there are insufficient candidates for the Service need, the candidate has skills and there are mitigating circumstances.

Certain jobs (eg military police) require no convictions whatsoever.

When assessing a candidate's suitability for a waiver, SMROs¹⁸² should consider the following:

Chief of Navy, the Chief of Army or the Chief of Air Force, as the case requires, be prejudicial to the security of Australia.

¹⁸⁰ I do not know the basis on which the DFR would obtain this information.

¹⁸¹ A “civil conviction” includes where a court has found a person guilty of an offence and includes where the person has had a conviction recorded against them or where the offence has been taken into account in passing sentence for another offence (eg Form 1). The reference to “civil” includes a reference to criminal courts; civil in this context means non military.

¹⁸² Recruitment is also assisted by candidate interviews with a psychologist.

- a. the number and nature of offences and whether they are recurring
- b. the seriousness of the offence (as indicated by the sentence imposed)
- c. the circumstances surrounding the offence (determined by interview)
- d. the candidate's age at the time of the offence
- e. attitude of the candidate towards their criminal history (determined by interview)

It is expected the SMRO would not recommend a waiver where a candidate has been involved in any of the following:

- a) activity involving serious assault
- b) activity involving a minor¹⁸³
- c) activity that is sexual in nature
- d) activity involving excessive violence or use of force
- e) multiple DUI charges over a relatively short time period
- f) multiple theft or fraud related charges
- g) any serious activity that resulted in detention regardless of length of time detained.

The Instruction also provides that the application would be suspended (if a waiver was not appropriate) and the offences related to these additional offences:

- h) manufacture, cultivation or trafficking of prohibited substances¹⁸⁴
- i) domestic violence,
- j) property damage

The Recruitment Instruction provides that:

...any candidate who blames external influences such as peer pressure, drug or alcohol use for illegal activity, should be carefully assessed for their suitability for Service life. Such excuses do not, by themselves, constitute mitigating circumstances; however, youthful exuberance, sincere remorse and a subsequent clean conduct record may assist in any such assessment.

17.3 Drugs

There is a zero tolerance to the use or involvement with prohibited substances, whether revealed by civil convictions or otherwise.. Nevertheless, there is a discretion to consider an application if the candidate admits to minor non habitual use, no longer uses or is involved and is considered unlikely to use or be involved again¹⁸⁵.

I note that the defencejobs.gov.au website states:

Candidates seeking appointment or enlistment to any part of the ADF will have their application automatically rejected if:

- they admit to ongoing habitual drug involvement,

¹⁸³ I am not sure whether exception might be made where the offender was also a child.

¹⁸⁴ Note: possession of prohibited substances does not lead to automatic rejection/suspension of the application. However, see below discussion about drugs.

¹⁸⁵ See Defence Personnel Regulations 2002, Chp 4, Pts 1 and 2.

- they have been found guilty in a Court of Law, or otherwise convicted, of drug involvement,
- they are found to have an addiction to habitual drug involvement, or
- they admit to, or there is evidence of, a conviction for the use of or possession of an illegal drug, or of trafficking in any restricted or prohibited drug.

However, this is slightly at odds with the Recruitment Instruction which notes that mere possession of drug may not lead to automatic rejection.

17.4 Suspension of application

Furthermore, the application cannot proceed if there are outstanding court matters or orders¹⁸⁶ which restrict service.

I note that AVOs and other orders restricting the use of weapons (eg firearms) – Weapons Protection Orders – are considered by the ADF. However, such orders generally do not apply to the authorise possession and use of military weapons for military duties. Noting the seriousness of WPOs, the ADF might voluntarily control/limit the use of military weapons by an ADF member¹⁸⁷.

Candidates whose application cannot proceed because of a restrictive court order may be kept on a waiting list until the restriction cease (eg the bond expires). The waiting list itself expires after 12 months.

18. OTHER EFFECTS OF A CRIMINAL RECORD

18.1 Occupational licences/registrations/admissions

Some licences etc require a criminal record check. There needs to be a clear relationship between the individual's criminal record and the licensing rules and regulations. There should be the opportunity for an individual assessment of the particular criminal record and the inherent requirements of the particular job¹⁸⁹. Individuals should have the opportunity to state their case and appeals to the relevant tribunals do exist where applicants have been discriminated against on the basis of a criminal record.

Security Licences: See discussion above.

¹⁸⁶ These could include, bonds, conditional discharges, probation, community service orders, suspended sentences, driver's licence suspension or disqualification, acquittals on the grounds of insanity, AVOs or Weapons Protection Orders.

¹⁸⁷ Military Personnel Policy Manual, Pt 11, Chp1, Policy Statement 1.3.

¹⁸⁹ Human Rights Commission, 'Guidelines for Employers: On the record; Guidelines for the prevention of discrimination in employment on the basis of criminal record' November 2005, Minor revision September 2007, 23.

Health professionals

All persons engaged or employed by NSW Health and those who seek engagement/employment (whether paid, unpaid or as a student on clinical placement) must undertake a National Police Check and a Working with Children's Check¹⁹¹.

Furthermore, nurses, dentists, opticians, optometrists and medical practitioners, inter alia, must also be registered. The relevant registration board may refuse to register people who are convicted of an offence: Medical Practice Act 1992, s 15. There are also special legislative provisions for different medical practitioners¹⁹².

Hosking v Fraser Central Recruiting (1996) EOC 92-859

Ms Hosking refused consent for a criminal record check, even though her record was clear, on the basis that professional registration was a record of her professional conduct and integrity. She was refused employment. The Northern Territory Anti-Discrimination Commission found that there was *no direct correlation* between the duties of a nursing position and a clean criminal record and therefore the policy requiring criminal record checks for all nurses violated the Northern Territory Anti-Discrimination Act¹⁹³. Note however, that these protections only exist in the Northern Territory and Tasmania.

Legal Profession admission

To be admitted as a lawyer one must be of good fame and character and pass a "fit and proper person" test. This includes disclosure of matters not just on a criminal record but including juvenile cautions and conferences as well as any disciplinary matters (eg plagiarism). See *RE B* [1981] 2 NSWLR 372.

Thoroughbred Racing Board

See *Mr Mark Hall v NSW Thoroughbred Racing Board, HREOC Report No 19 (2002) (Hall's case)*

18.2 Immigration

Visas may be cancelled if a person does not pass the character test.

A person fails the character test for a variety of reasons¹⁹⁴, including if the person

¹⁹¹ NSW Health Policy Directive PD2016_047, *Employment checks – criminal record checks and working with children checks*, 19 October 2016.

¹⁹² Eg. Chiropractors Act 2001, Chiropractors Regulation 2007, Dental Practice Act 2001, Dental Practice Regulation 2004, Dental Technician Registration Act 1975, Dental Technician Registration Regulation 2008, Health Professionals (Special Events Exemption) Act 1997, Medical Practice Act 1992, Medical Practice Regulation 2008

Nurses and Midwives Act 1991, Nurses and Midwives Regulation 2008, Optical Dispensers Act 1963, Optical Dispensers Regulation 2007, Optometrists Act 2002

Optometrists Regulation 2004, Osteopaths Act 2001, Osteopaths Regulation 2007, Pharmacy Act 1964, Pharmacy Practice Regulation 2008, Physiotherapists Act 2001, Physiotherapists Regulation 2008, Podiatrists Act 2003, Podiatrists Regulation 2005, Psychologists Act 2001, Psychologists Regulation 2008

¹⁹³ Anti Discrimination Act 1992 (NT), s 26.

¹⁹⁴ Migration Act 1958, s 501(6)

- Has been convicted, found guilty or had the charged proved (even if they were discharged without conviction) for one or more sexually based offences involving a child; or
- Has a substantial criminal record

A substantial criminal record¹⁹⁵ may be constituted by a:

- sentence of imprisonment for 12 months or more
- sentence of life imprisonment
- sentence of two or more terms of imprisonment where the total is 12 months or more
- acquittal of an offence due to unsoundness of mind, as a result of which the person is detained in a facility or institution
- the person serving a limiting term.

Where a person does not pass the character test as a result of substantial criminal history they will need to show the Minister why their visa should not be cancelled. The Minister may consider:

- the protection of the community
- the best interests of children including the impact on any children/family
- relevant international obligations.

Once a person is removed on character grounds they will never be allowed to re-enter Australia.

18.3 Insurance

A person seeking insurance must provide accurate details to the insurer to allow the insurer to assess any likely risk. There is a common law duty of disclosure of material facts, eg ‘physical hazards’, such as the characteristic of a building for fire insurance, or ‘moral hazards’ – ie any matter going to the honesty and personal characteristics of the insured person. For example a car insurer is entitled to know of any previous motoring offences or the age of the driver.

Many policies will require disclosure about the existence of a criminal record especially where it relates to fraud or theft.¹⁹⁷

Similarly, a person seeking credit may be required to disclose their criminal record.

18.4 Jury Service

Persons are disqualified from jury service¹⁹⁸ if found guilty or convicted offences, including:

- Sexual offences prescribed under s 7 CRA;
- Offences punishable by a maximum penalty of life;

¹⁹⁵ s 501(7)

¹⁹⁸ Jury Act 1977, Sch 1, cl 1

- Terrorist acts.

Juvenile offenders are excluded from jury service if

- Serving a sentence in custody; or
- They served a sentence in custody within the last 3 years¹⁹⁹.

Persons are also excluded from service if subject to an AVO.

18.5 Accommodation

Many homeless children struggle to find accommodation either in rental property and/or refuges because they are asked to disclose their criminal records. The Homeless Persons Legal Service, The Shopfront Youth Legal Service and others continue to advocate on this issue.

¹⁹⁹ Sch 1, cl 3.

CONCLUSION

We have attempted to make this paper as comprehensive as possible but, doubtless, there are many other aspects of children's convictions and criminal records which we have not been able to address.

Many children are not able to anticipate what they will do next week, let alone in the more distant future. Thus, it is always difficult to give completely comprehensive advice about whether a conviction will or will not affect them. Nevertheless, hopefully this paper has begun to identify and shed some light on various different and interacting aspects of children's convictions and criminal records.

A conviction and a criminal record places a stigma on a child which, though often unseen, stays with them like a long shadow. On the other hand, if a conviction and record can be avoided, the child's chance of rehabilitation will be greatly enhanced and allow them to reintegrate into the community where they can make positive contributions (eg employment, volunteer work). We need to constantly bear in mind that what we (as children's legal practitioners) do in one day at court can affect what happens to the child not only tomorrow but possibly for the rest of their lives.

Jane Sanders
Principal Solicitor
The Shopfront Youth Legal Centre
356 Victoria Street
Darlinghurst NSW 2010
Tel: 02 9322 4808
Fax: 02 9331 3287
www.theshopfront.org

Aaron Tang
Legal Aid NSW,
Children's Legal Service
Ph: 02 8688 3800
Aaron.Tang@legalaid.nsw.gov.au

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