

‘LEGAL CONSEQUENCES OF CONVICTION IN NEW SOUTH WALES’

‘Important legal things criminal law clients should
know before they make decisions’

*“Civil death has surreptitiously re-emerged. It no longer exists under that name,
but effectually a new civil death is meted out to persons convicted of crimes
in the form of a substantial and permanent change in legal status,
operationalized by a network of collateral consequences”¹*

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*Thanks to Michelle Giacomo (who authored the family law part of this paper) and Eric
Zhang (who provided research assistance).*

¹Said of the United States, but also true, though it would seem to a lesser extent, of Australia.

[https://www.law.upenn.edu/journals/lawreview/articles/volume160/issue6/Chin160U.Pa.L.Rev.1789\(2012\).pdf](https://www.law.upenn.edu/journals/lawreview/articles/volume160/issue6/Chin160U.Pa.L.Rev.1789(2012).pdf)

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INTRODUCTION

1. This paper aims to provide practitioners with some knowledge about the wide range of mainly non-criminal law related legal consequences that can flow from criminal offending and sentencing.
2. A particular focus of the paper is child protection, occupational regulation and migration law.
3. It is not exhaustive as to such consequences and should not be taken as such. It aims to be a useful starting point when advising clients. The paper's focus is state law though some federal legislation is discussed.
4. Most of the schemes that are discussed impose consequences as a consequence of conviction³ (or a particular sentence being imposed; for example liability to be tested as an untested former offender under Part 7B of the *Crimes (Forensic Procedures) Act 2000* (NSW) depends on a prison sentence having been previously imposed).
5. Some however (particularly under migration and some aspects of the child protection regime) can flow even when such offending is alleged but not proved to the criminal standard i.e. when a person is found not guilty, charges are withdrawn or the person is not charged at all.
6. There are a number of reasons why this subject matter is important.
7. **Firstly**, the overwhelming majority of people charged with a criminal offence plead guilty⁴ Fairness suggests that they ideally would be fully and properly advised of the legal consequences of doing so.⁵

³ Conviction is used in this paper interchangeably to refer to a finding of guilty or the formal entering of a conviction.

⁴<https://www.parliament.nsw.gov.au/researchpapers/Documents/A%20statistical%20snapshot%20of%20crime%20and%20justice%20in%20NSW.pdf> at page 43

⁵ Though it is unclear whether a plea of guilty will ever be set aside solely on the basis that a client was not advised of certain consequences extraneous to the sentencing process. In the United States the 'collateral consequences rule' has been involved to prevent such pleas being set aside

(<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1360&context=ilj>). Interestingly the recent NSW decision of *Thafer v R* [2019] NSWCCA 143 (5 July 2019) involved an appeal ground alleging a miscarriage of justice on the basis that immigration law consequences had not been properly explained to a client. The ground failed, on the basis it seems that the lawyer was not apprised of the relevant facts that gave rise to the immigration law issue, with the court not determining whether such a matter could vitiate the plea as a consequence of law.

8. Awareness that a plea of guilty will inevitably lead to loss of employment, an impact on migration status or another outcome might for the client be a decisive factor in making a different decision. Equally avoiding such factors might favour a negotiated outcome and a plea of guilty.
9. **Secondly**, sentencing courts will often taken into account the extra judicial consequences of offending and sentencing, even if often it is not a central consideration. Lawyers who understand what the consequences might be will be in a position to assist courts and potentially achieve better outcomes.
10. **Thirdly**, the operation of some of the regulatory schemes discussed in this paper can be influenced by decisions made in the criminal justice process (for example migration outcomes might be better if an AVO is made without admissions rather than at a final hearing where findings of fact are made). You will be able to achieve better overall outcomes for clients if you have at the forefront how the schemes operate.

CHILD PROTECTION LEGISLATION

Child Protection (Offenders Registration) Act 2000 (NSW)

11. The commission of certain offences involving children often renders the offender liable to registration under the *Child Protection (Offenders Registration) Act 2000*. The burdens of registration extend far greater than the ongoing reporting requirements and can severely limit future prospects of meaningful reintegration with society.

Offences and circumstances triggering the applicability of the CPA

12. The enlivening of statutory reporting requirements for individuals sentenced for child-related offences essentially hinges upon whether that individual falls within the purview of a “registrable person”.

Registrable Person

13. Relevantly, s 3A of the CPA provides:

“3A Registrable persons

(1) *A registrable person is a person whom a court has any time (whether before, on or after the commencement of this section) sentenced in respect of a **registrable offence**, and includes a corresponding registrable person”*

14. Status as a registrable person is therefore contingent upon whether the offences committed by the person are regarded as registrable offences.

Registrable Offences

15. Section 3 of the CPA defines a “registrable offence” as an offence that is--

- (a) *a Class 1 offence, or*
- (b) *a Class 2 offence, or*
- (c) *an offence that results in the making a of a child protection registration order*

Class 1 and Class 2 Offences

16. Practitioners are encouraged to familiarise themselves with all the types of particular offences which constitute as either Class 1 or Class 2 offences under the CPA. A list of such offences can be accessed through the following link:

<https://www.legislation.nsw.gov.au/#/view/act/2000/42/part1/sec3>

17. Four non-exhaustive examples of Class 1 Offences include:

- a. the offence of murder, where the person murdered is a child
- b. an offence that involves sexual intercourse with a child (other than an offence that is a Class 2 Offence
- c. the offence of maintaining an unlawful sexual relationship with a child contrary to s 66EA of the *Crimes Act 1900* (NSW)
- d. the offence of sexual assault by forced self-manipulation contrary to s 80A of the *Crimes Act 1900* (NSW)

18. Four non-exhaustive examples of Class 2 Offences include:

- a. the offence of manslaughter (other than manslaughter as a result of a motor vehicle accident), where the victim of the manslaughter is a child

- b. an offence that involves sexual touching or a sexual act against or in respect of a child, being an offence that is punishable by imprisonment for 12 months or more
- c. the offence of intent to cause grievous bodily harm as per s 33(1) of the *Crimes Act 1900* (NSW) in circumstances where the person whom the offence is committed is a child under 10 years of age and the person committing the offence is not a child
- d. the offence of procuring or grooming child under 16 for unlawful sexual activity contrary to s 66EB of the *Crimes Act 1900* (NSW)

Child Protection Registration Orders

19. The fact that an offence is not captured by the statutory definition of a Class 1 or Class 2 offence does not necessarily mean that a person will escape liability to reporting obligations under the Act. This understanding is enshrined in s 3D of the CPA which provides:

If a Court finds a person guilty of an offence that is not a Class 1 or Class 2 offence, it may order that the person comply with the reporting obligations of this Act

20. The Courts are empowered by sub-s 3D(1) of the CPA to impose child protection registration orders against individuals in circumstances where all the conditions stipulated by sub-s 3D(2) are satisfied. The conditions are stated as:

- (a) The court is satisfied that the person poses a risk to the lives or sexual safety of one or more children, or of children generally, and
- (b) The Court imposes a sentence on the person in relation to the offence (other than an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* or section 33(1) of the *Children (Criminal Proceedings) Act 1987*)
- (c) An application for the imposition of the order is made by the prosecution

21. The use of the words “and” between sub-s 3D(2)(a)-(c) indicates that the Courts are free to exercise a discretionary decision to impose a Child Protection Registration Order **only when all three conditions have been cumulatively fulfilled.**

22. A person who poses a risk to the sexual safety of one or more children, or of children generally is a person who poses a risk of engaging in

conduct that may constitute a Class 1 offence or a Class 2 offence against or in respect of a child or children.⁶ The satisfaction of sub-s3D(2) can occur in the absence of the Court being capable of specifying a risk in respect to particular children or class of children.⁷

Consequences of being defined as a “registrable person”

Statutory Reporting Obligations

- 23. Classification as a registrable person will subject the individual to ongoing statutory reporting obligations. An extensive overview of the particulars involved in such requirements is beyond the scope of this paper.
- 24. It is still nevertheless meaningful to anticipate some of the obligations that registrable persons will be subject to.
- 25. Section 10(1) of the CPA requires registrable persons to annually report “relevant personal information” to the Commissioner of Police. Section 10(2) specifies that the report must be made by *“the end of the calendar month in which the anniversary of the date on which the person first reported in accordance with this Act or a corresponding Act falls”*
- 26. Requirements relating to when a first initial report must be made by a registrable persons are governed by s 9A of the Act and such requirements shift in accordance to the individual circumstances of the registrable person.

Table

Column 1	Column 2
Registrable person	Period for initial report
A registrable person (other than a corresponding registrable person) who enters government custody in New South Wales before, on or after the commencement of this section as a consequence of having being sentenced for a registrable offence and who ceases to be in government custody while in New South Wales	Within 7 days after the registrable person ceases to be in government custody
Any other registrable person who is sentenced for a registrable offence in New South Wales	Within 7 days after the registrable person is sentenced for the registrable offence
A registrable person who enters New South Wales from a foreign jurisdiction and who has not previously been required under this Act to report his or her relevant personal information to the Commissioner of Police	Within 7 days after entering and remaining in New South Wales for 14 or more consecutive days, not counting any days spent in government custody

- 27. As stated above, the registrable person must provide relevant personal information. Section 9 of the Act outlines the types of information that

⁶ CPA s 3AA(1).

⁷ CPA s 3AA(2).

must be provided. Non-exhaustive examples include information relating to premises in which the registrable person resides or can generally be found, information relating to the registrable person's employment and obviously, particular personal identifiers such as date of birth, name.

28. A final note in respect of reporting obligations is that s 17 of the CPA makes it an offence for a registrable person to fail to comply with any of the person's reporting obligations without reasonable excuse

Restriction on ability to make an application for change of name

29. It is important to advise clients who are classified as registrable persons of their obligations to maintain their current name unless a change is forgiven due to a lawful excuse. Section 19(E)(1) provides:

19E Applications for change of name by or on behalf of registrable person

- (1) A registrable person must not without reasonable excuse:
 - (a) Apply to the NSW Registrar to register a change of his or her name under the *Births, Deaths and Marriages Registration Act 1995*, or
 - (b) Apply to an interstate Registrar to register a change of his, or her name under a law of another State or Territory that is the equivalent of the *Births, Deaths and Marriages Registration Act 1995*

Child Protection Prohibition (Offenders Prohibition Orders) Act 2004 (NSW)

30. This section explores the impact of the *Child Protection Prohibition (Offenders Prohibition Orders) Act 2004 (NSW)* (CPPOPO Act) on offenders who are classified as registrable persons.⁸ (Please note that this analysis is performed through the prism of a registrable person who is an adult, and that the implications may differ when applied to a registrable person who is a child).

31. The CPPOPO Act empowers the Commissioner of Police make an application for particular orders to be imposed on registrable persons. Similarly, the CPPOP Act also allows the Local Court to impose such

⁸ Note: This definition is discussed more comprehensively in this paper under the "Child Protection (Offenders Registration) Act 2000 (NSW)" **sub-heading**.

orders provide that certain conditions are fulfilled. Essentially, such orders specify conduct which individuals must refrain from doing.

Types of Orders Under the CPPOPO

32. There are two species of orders that can be imposed on a registrable person pursuant to the CPPOPO. They include:

- A Child Protection Prohibition Order⁹ (**CPPO**)
- A Contact Prohibition Order¹⁰ (**CPO**)

33. A Child Protection Prohibition Order means an order “*which prohibits a person from engaging in conduct specified in the order*”¹¹

34. A Contact Prohibition Order means “*an order prohibiting a person who is a registrable person in relation to a particular registrable offence from contacting any victim of the registrable offence who is specified in the order, or any person who was a co-offender in relation that registrable offence who is specified in the order*”.¹²

Who Can Apply for a CPPO/CPO and Under What Conditions?

35. Irrespective of whether the order is CPPO or CPO, the person who must make the application is the Commissioner of Police.

36. However, the conditions which must exist before the Commissioner of Police can make an application for a CPPO or CPO.

37. For CPPO’s, it appears the Commissioner of Police can make an application on its own imperative provided that the subject of the order is a registrable person.¹³

38. In stark contrast, **three conditions must exist cumulatively** before the Commissioner of Police can make an application for a CPO. They are contained under s 16B which provides¹⁴

An application may be made by the Commissioner of Police to the Local Court for a contact prohibition order against a registrable person if:

⁹ See generally CPPOPO Act, Part 2.

¹⁰ See generally CPPOPO Act, Part 2A.

¹¹ CPPOPO Act, s 5.

¹² CPPOPO Act, s 16A.

¹³ CPPOPO Act, s 3.

¹⁴ CPPOPO Act, s 16B.

- (a) *the Commissioner has reasonable grounds to suspect that the registrable person will seek to contact the victim or co-offender concerned, and*
- (b) *the registrable person is not subject to, and the Commissioner considers contact cannot be prevented by the making of, any of the following:*
 - (i) *an extended supervision order under the Crimes (High Risk Offenders) Act 2006 or the Terrorism (High Risk Offenders) Act 2017,*
 - (ii) *a prohibition order under this Act,*
 - (iii) *any court order prescribed by the regulations, and*
- (c) *the Commissioner is satisfied that there are sufficient grounds to justify the making of the application.*

39. The additional requirements which must be met prior to making an application for a CPO corresponds with the additional restrictions which are imposed on the individual (when compared with a CPPO) and this will be made apparent below.

When Can the Local Court Impose a CPPO/CPO?

40. The Local Court may impose a CPPO in circumstances where it is cumulatively satisfied that the following two conditions exist:¹⁵

- (a) *there is reasonable cause to believe, having regard to the nature and pattern of conduct of the person, that the person poses a risk to the lives or sexual safety of one or more children, or children generally, and*
- (b) *the making of the order will reduce that risk.*

41. Again, there are different conditions which the Local Court must be satisfied in respect of a CPO. They are specified under s 16C and include:¹⁶

- (1) *The Local Court may make a contact prohibition order against a registrable person if:*
 - (a) *it is satisfied that there are sufficient grounds for making the order, or*
 - (b) *the Commissioner of Police and the registrable person consent to the making of the order.*

42. Unlike a CPPO, only one of the two conditions specified under s 16C need to exist before a Local Court can issue a CPO. Moreover, the

¹⁵ CPPOPO Act, Section 5.

¹⁶ CPPOPO Act, Section 16C(1)(a)-(b).

standard of proof which must be met before either of the orders can be imposed are inconsistent. In the case of a CPPO, the Local Court must satisfy of particular conditions according to the balance of probabilities.¹⁷ However, in the case of a CPO, there is no specification of standard, and the assumption is that the standard is merely just “satisfied”.¹⁸

What Conduct Must My Client Refrain From Doing?

CPPO

43. Generally speaking, your client must not engage in any conduct that is prohibited by the order.

44. Types of conduct which may be included in a CPPO are listed under section 8(1) and can include:¹⁹

- associating with or other contact with specified persons or kinds of persons,
- being in specified locations or kinds of locations,
- engaging in specified behaviour,
- being a worker (within the meaning of the *Child Protection (Working with Children) Act 2012*) of a specified kind.

45. Whilst such conduct included, this by no means determines what conduct requirements will be imposed, an a CPPO can impose more onerous requirements by virtue of section (2) which provides:

(2) Subsection (1) does not limit the kinds of conduct that may be prohibited by a prohibition order.

CPO

46. Funnily enough, the conduct which an individual who is subject to a CPO must not engage in, is actually listed under the definition of a CPO at Section 16A. In summary, the individual must not contact:²⁰

- (a) any victim of the registrable offence who is specified in the order, or*
- (b) any person who was a co-offender in relation to that registrable offence who is specified in the order.*

¹⁷ See wording of CPPPO Act, Section 5(1).

¹⁸ See wording of CPPPO Act, Section 16C.

¹⁹ CPPPO Act, Section 8(1).

²⁰ CPPPO Act, Section 16A.

47. Contact means “to communicate in person or by any other means (including by post, facsimile, telephone and email or any other form of electronic communication).²¹

Consequences of Failing to Comply with a CPPO or CPO

48. A contravention of either a CPPO or CPO generally renders the individual liable to being charged for further offences and arrested pursuant to that further charge.

49. Section 13(1) makes it an offence to contravene a CPPO, the maximum penalty being 500 penalty units or imprisonment for 5 years or both. It is important check whether your client has received a copy of the child protection prohibition order, as if they haven't, then you may be able to raise a valid defence to the fresh charge.²²

50. In circumstances when an individual is subject to a CPO, that individual will commit an offence if they either:

- (a) contact or attempt to contact any victim or co-offender specified in the order, or*
- (b) procure another person to contact or attempt to contact that victim or co-offender.²³*

51. Contravention of a CPO carries a maximum penalty of 50 penalty units or imprisonment for 12 months, or both.²⁴

52. Again, it is important to note the specific statutory defences available to such charges which are enshrined under s 16G(2):

- (a) the registrable person did so in compliance with an order of a court, or*
- (b) having contacted the person unintentionally, the registrable person immediately terminated the contact, or*

²¹ Ibid.

²² CPPOPO Act, Section 13(1A).

²³ CPPOPO Act, Section 16G(1)(a)-(b).

²⁴ Ibid.

*(c) contact is made with a co-offender while the registrable person was in strict government custody within the meaning of the Child Protection (Offenders Registration) Act 2000.*²⁵

When a CPPO or CPO Takes effect

53. Section 16C(3) provides that a CPO takes effect when:

(a) when the order is made, or

(b) if it is stayed under section 17A by a court to which an appeal is made but is confirmed on appeal (whether expressly or impliedly)—when it is confirmed.

54. Upon examining Section 5 which is the statutory counterpart of Section 16C, there does not appear to be a similar provision mirroring Section 16C(3). By way of reasonable implication, it can be taken to have been effected as soon as the order is made.

Maximum Duration of a CPPO or CPO

55. A CPPO must not be imposed for a term that exceeds 5 years (in the case of an adult) and 2 years (in the case of a minor)²⁶

56. A CPO must not be imposed for a term that exceeds 12 months.²⁷

Migration Regulations 1994 (Cth)

57. Outcomes of various immigration-related matters are increasingly reliant upon the concept of the registrable offence. Various provisions contained in the *Migration Regulations 1994* rely on the existence of a registrable offence as a trigger for the mandatory refusal of sponsorships of certain classes of visas.

58. The implication is that it is not only the client who potentially faces an adverse immigration outcome (if applicable) post being classified as a registrable person under the CLA, it is also potentially individuals who are essentially unrelated to the client that also face such adversity.

59. Reg 1.20KB(2) of the *Migration Regulations 1994* (Cth) provides that:

²⁵ CPPOPO Act, Section 16G(2)(a)-(c).

²⁶ CPPOPO Act, Section 6.

²⁷ CPPOPO Act, Section 16C(2).

- (2) If the sponsor has been charged with a registrable offence, the Minister must refuse to approve the sponsorship of all of the applicants for the visa unless:
- (a) None of the applicants is under 18 at the time of the decision on the application for approval of sponsorship; or
 - (b) The charge has been withdrawn, dismissed or otherwise disposes of without the recording of convictions.

60. A registrable offence under the *Migration Regulations 1994* (Cth) is defined under section 13(a)(a)(i) to include the meaning of registrable offence under the *Child Protection (Offenders Registration) Act 2000* (NSW).

Child Protection (Working with Children) Act 2012 (NSW)

61. The conviction of a criminal offence will often present difficulties for individuals seeking to gain or maintain employment involving child-related work.²⁸ The gravity of such adverse consequences are made clear by the fact that decisions relating to the issuing of a WWC cannot be reviewed if an individual has been convicted of particular types of offences.²⁹ It is also important that absent conviction, a person who has been subject to a finding by a reporting body on misconduct involving children may also share similar difficulties in working with children.³⁰ Further it also important to note the application of the CPWWC Act in respect to other entities such as corporations.³¹

62. The CPWWC Act makes it an offence for individuals to engage in child-related work unless:

- (a) *the worker holds a working with children check clearance of a class applicable to the work, or*
- (b) *there is a current application by the worker to the Children's Guardian for a clearance of a class applicable to that work.*³²

63. A working with children check clearance (WCCC) means an authorisation that is in force under [the CPWWC Act] to engage in child-related work.

²⁸ For a statutory definition of 'child-related work', see CPWWC Act, Section 6.

²⁹ CPWWC Act, Section 26.

³⁰ See Schedule 1 to the CPWWC Act, Section 2.

³¹ See CPWWC Act, Section 50.

³² CPWWC Act, Section 8(1).

64. An individual's eligibility to obtain a WCCC is influenced by the operation of Section 18 which provides:

(1) The Children's Guardian must not grant a working with children check clearance to the following persons (disqualified persons)—

(a) a person convicted before, on or after the commencement of this section of an offence specified in Schedule 2, if the offence was committed as an adult,

(b) a person against whom proceedings for any such offence have been commenced, if the offence was committed as an adult, pending determination of the proceedings for the offence.

(2) The Children's Guardian must grant a clearance to a person who is subject to a risk assessment under Division 3 unless the Children's Guardian is satisfied that the person poses a risk to the safety of children.

(3) The Children's Guardian must grant a clearance to a person if it is satisfied that the person is not a disqualified person and the person is not subject to a risk assessment under Division 3.

65. Thus, the eligibility of obtaining a WCCC ultimately turns on the specific offence committed, and whether such offence is categorically defined as a disqualified offence pursuant to Schedule 2 of the CPWWC Act.

Circumstances where the individual has committed a disqualifying offence

66. As discussed above, Section 18 specifically prohibits the Children's Guardian from granting a WCCC to an individual where that individual has found to have committed a disqualifying offence, or where that individual has been accused of committing same and that proceedings for same are currently pending final determination.

67. Examples of disqualifying offences include murder,³³ manslaughter of a child,³⁴ rape or attempted rape³⁵ and possessing child pornography.³⁶

Circumstances where the individual has committed an offence under Schedule 1 to the CPWWC Act.

68. Where the offence committed was not a disqualifying offence, and the offence is one which is specified under Schedule 1 to the CPWWC Act, a

³³ Schedule 2 to CPWWC Act, Section (1)(a).

³⁴ Ibid Section (1)(b).

³⁵ Ibid Section (1)(f).

³⁶ Ibid Section (1)(v).

WCCC clearance must be granted unless the Children’s Guardian is satisfied that the person poses a risk to the safety of children.³⁷

69. For clarity, the meaning of “risk to the safety of children” is addressed under Section 5B of the CPWWC Act which describes it as “a reference to a real and appreciable risk to the safety of children”

Circumstances where the individual has committed any other offence

70. Section 18(3) of the CPWWC Act provides:

(3) The Children’s Guardian must grant a clearance to a person if it is satisfied that the person is not a disqualified person and the person is not subject to a risk assessment under Division 3.

71. A fair reading of the above indicates that an individual will be entitled to a grant of a WCCC as long as they have not been found to have committed an act or offence under either Schedule 1 or 2.

72. This is because a person would only be subject to a risk assessment under Division 3 if they were convicted of a particular offence under Schedule 1 or found to have misconducted themselves in the presence of children.³⁸

OCCUPATIONAL REGULATION

Aviation and Maritime Security

73. A range of occupations are dependent on the worker having an Aviation Security Identification Card (ASIC) or a Maritime Security Identification Card.

“An ASIC or MSIC may be required if:

- a person has an operational need for unescorted access to the secure areas of security controlled airports and the security zones of security regulated ports, security regulated ships and offshore oil and gas facilities, or*

³⁷ CPWWC Act, Section 18(2).

³⁸ CPWWC Act, Section 14.

- *a person performs a specifically prescribed security-sensitive role*³⁹

74. An ASIC cannot be issued to persons with certain criminal records (though appeal routes are available) Regulation 6.28 of the *Aviation Transport Security Regulations 2005* (Cth) states:

6.28 ASICs—issue

(1) *Subject to subregulations (3), (4), (4A), (4D) and (4H) and regulations 6.29, 6.31 and 6.35, an issuing body may issue an ASIC to a person only if:*

(a) *the person has an operational need for an ASIC; and*
(b) *the issuing body is satisfied of the person's identity, after verifying the person's identity in accordance with regulation 6.27AB; and*

(c) *the issuing body is satisfied that the person is not an unlawful non-citizen; and*

(d) *the issuing body has received a notice from the Secretary AGD stating that:*

(i) *the Secretary AGD has conducted an assessment under the AusCheck scheme to decide if the person has an adverse criminal record or a qualified criminal record; and*

(ii) *based on the criminal history, the person does not have an adverse criminal record; and*

(e) *the issuing body has been notified in writing that a security assessment of the person has been made, and:*

(i) *the assessment was not adverse; or*

(ii) *if the assessment was qualified—the issuing body has received a notice from the Secretary that an ASIC may be issued because the person is not a threat to aviation security; and*

(f) *the person is not disqualified under regulation 6.48 from holding an ASIC.*

75. The concepts of an adverse criminal record and a qualified criminal record are defined in the same regulation at 6.02:

(2) *A person has an **adverse criminal record** if the person:*

(a) *has been convicted of an aviation-security-relevant offence and sentenced to imprisonment; or*

³⁹ <https://www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/crime-prevention/aviation-maritime-security-identification-card-schemes>

(b) *in the case of a person who has been convicted twice or more of aviation-security-relevant offences, but no sentence of imprisonment was imposed—received 1 of those convictions within the 12 months ending on the date when the relevant background check was conducted.*

(3) *A person has a **qualified criminal record** if the person:*

(a) *has been convicted twice or more of aviation-security-relevant offences; and*

(b) *did not receive a sentence of imprisonment for any of those convictions; and*

(c) *did not receive any of those convictions within the 12 months ending on the date when the relevant background check was conducted*

76. An ‘aviation security relevant offence’ is then defined in the same regulations at 6.01:

aviation-security-relevant offence *means an offence of a kind mentioned in the following table against a law of the Commonwealth, or of a State or Territory, or of any other country or part of a country:*

<i>Item</i>	<i>Kind of offence</i>
1	<i>An offence involving dishonesty</i>
2	<i>An offence involving violence or a threat of violence</i>
3	<i>An offence involving intentional damage to property or a threat of damage to property</i>
4	<i>An offence constituted by the production, possession, supply, import or export of a substance that is:</i> (a) <i>a narcotic substance within the meaning of the Customs Act 1901; or</i> (b) <i>a drug, within the meaning of:</i> (i) <i>regulation 10 of the Customs (Prohibited Exports) Regulations 1958; or</i> (ii) <i>regulation 5 of the Customs (Prohibited Imports) Regulations 1956</i>
5	<i>An offence, of a kind dealt with in Part II of the Crimes Act 1914, committed in the Government of:</i> (a) <i>the Commonwealth or a State or Territory; or</i> (b) <i>a country or part of a country other than Australia</i>
6	<i>An offence against Part 2 of the Crimes (Aviation) Act 1991</i>
7	<i>An offence against Part 5.3 of the Criminal Code</i>
8	<i>An offence constituted by the production, possession, supply, import or export of explosives or explosive devices</i>

77. There are provisions for cancellation in the Regulations at 6.43 where the relevant authority becomes aware the person has a relevant criminal record.

78. A similar regime can be found in the *Maritime Transport and Offshore Facilities Security Regulations 2003* (Cth).

Legal Profession Regulation

79. Criminal convictions can impact a person's illegibility to apply or hold an Australian Practising Certificate. In this context all criminal convictions are relevant to the general fit and proper person test that is contained in Section 45(2) of the Legal Profession Uniform Law 2014 (NSW).

80. Section 45(2) provides that the regulatory authority *must* not grant or renew an Australian practising certificate if it considers that the applicant is not a fit and proper person to hold the certificate.

81. Regulation 13(1)(c) of the Rules provides that in considering whether a person is fit and proper person to hold an Australian practising certificate the Court may have regard to:

c) whether the applicant has been convicted or found guilty of an offence in Australia or a foreign country, and if so:

- i. the nature of the offence, and*
- ii. how long ago the offence was committed, and*
- iii. the applicant's age when the offence was committed,*

82. Although by virtue of Section 45(4) being charged or convicted is not an automatic bar to a renewal or a grant of a practising certificate, a conviction for an offence of dishonesty will generally see the applicant fail the fit and proper person test.

Automatic Show Cause Events

83. Additional to the fit and proper test, the legislation specifically provides for *automatic show cause events*. Section 86(b) of the Act provides that a conviction for a *serious offence* or a *tax offence* will amount to an automatic show cause offence.

84. *Serious offence* is defined in Section 6 of the Act as follows:

- (a) *an indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily); or*
- (b) *an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia);*

85. *Tax offence* means any offence under the *Taxation Administration Act 1953* of the Commonwealth: Section 6 of the Act.

86. If an applicant or a holder of a practising certificate is convicted of a *show cause event* the concerned person must provide to the authority a statement explaining why, despite the show cause event, the applicant considers himself or herself to be a fit and proper person to hold a certificate: Section 86 and 87 of the Act.

87. Once the statement is received the regulatory authority *must* determine whether the person is a fit and proper person to hold a certificate. Depending on the determination the authority may take no action, vary, suspend, cancel or refuse the application as per Section 92 of the Act.

Notice requirement for holders of licenses

88. Section 51(1)(a) of the Act requires that a holder of a practising certificate notify the authority with 7 days of being charged or convicted of a *serious offence* or a *tax offence*. Failure to do so may result in a civil penalty of 100 penalty units.

Medical Profession

89. Section 55(1)(b) of the *Health Practitioner Regulation National Law* provides that a National Board may decide that a person is not suitable to hold general registration if:

having regard to the individual's criminal history to the extent that is relevant to the individual's practice of the profession, the individual is not, in the Board's

opinion, an appropriate person to practise the profession or it is not in the public interest for the individual to practise the profession;

90. Section 79 provides that a National Board *must* check an applicant's criminal before granting an application for registration and accordingly provides the authority power to obtain an applicant's criminal history.

91. The Medical Board of Australia states that in deciding whether a health practitioner's criminal history is relevant to the practice of their profession, the Board will consider the following 10 factors⁴⁰:

- 1- *The nature and gravity of the offence or alleged offence and its relevance to health practice.*
- 2- *The period of time since the health practitioner committed, or allegedly committed, the offence.*
- 3- *Whether a finding of guilt or a conviction was recorded for the offence or a charge for the offence is still pending.*
- 4- *The sentence imposed for the offence.*
- 5- *The ages of the health practitioner and of any victim at the time the health practitioner committed, or allegedly committed, the offence.*
- 6- *Whether or not the conduct that constituted the offence or to which the charge relates has been decriminalised since the health practitioner committed, or allegedly committed, the offence.*
- 7- *The health practitioner's behaviour since he or she committed, or allegedly committed, the offence.*
- 8- *The likelihood of future threat to a patient of the health practitioner.*
- 9- *Any information given by the health practitioner.*
- 10- *Any other matter that the Board considers relevant.*

92. Convictions for offences that occur during medical practice are most likely to disentitle a person to practise as medical practitioner.

Notice requirement for holders of licenses

93. Section 130 provides that a registered health practitioner or student must, within 7 days after becoming aware that a relevant event has occurred provide written notice of the event.

94. As per Section 130(3)(a)(i) and (ii) a relevant event includes:

⁴⁰<http://www.medicalboard.gov.au/documents/default.aspx?record=WD16%2f19473&dbid=AP&checksum=r3KA%2fZ0ECm3jZ1M7CfEMSw%3d%3d>

- (i) *the practitioner is charged, whether in a participating jurisdiction or elsewhere, with an offence punishable by 12 months imprisonment or more; or*
- (ii) *the practitioner is convicted of or the subject of a finding of guilt for an offence, whether in a participating jurisdiction or elsewhere, punishable by imprisonment; or*

Security Licensing

95. The security industry is regulated by a NSW Police Force body, Security Licensing & Enforcement Directorate (SLED), and governed by the *Security Industry Act 1997* (NSW).

Applying for a Security Licence

96. To apply for a security licence, a person must satisfy a ‘general sustainability’ test,⁴¹ and a ‘criminal and other related history’ suitability test.⁴²

97. Section 16 of the *Security Industry Act 1997* (NSW) states that the Commissioner of Police **must** refuse to grant an application for a licence if satisfied that the applicant has:

- a. Within the previous 10 years before the application, been convicted in NSW or elsewhere of a **prescribed offence**; or
- b. Within the previous 5 years before the application, been found guilty (but no conviction recorded) of a **prescribed offence** in NSW or elsewhere

Prescribed offences

98. The prescribed offences that will disentitle a person to hold a security licence are detailed in clause 15 of the *Security Industry Regulation 2016* (NSW):

- a. *Offences relating to firearms or weapons;*

⁴¹ *Security Industry Act 1997* (NSW) s 15.

⁴² *Security Industry Act 1997* (NSW) s 16.

- b. *Offences relating to prohibited drugs (under Australian or international jurisdiction)*
- c. *Offences involving assault of any description where the penalty imposed includes any term of imprisonment (whether suspended or not), a good behaviour bond, a community service order, or a fine of \$200 or more*
- d. *Offences involving fraud, dishonesty or stealing;*
- e. *Offences involving robbery;*
- f. *Offences relating to industrial relations matters;*
- g. *Offences relating to riot;*
- h. *Offences relating to affray;*
- i. *Offences involving stalking or intimidation;*
- j. *Offences relating to reckless conduct causing death at workplace;*
- k. *Offences relating to terrorism; and*
- l. *Offences involving organised criminal groups and recruitment.*⁴³

99. Even if the applicant does not have a criminal history that would prevent them from obtaining a security licence, if the applicant is not deemed a ‘fit and proper person’ the police will refuse the application.⁴⁴

Who is considered a ‘fit and proper person’

100. Section 15 of the *Security Industry Act 1997* (NSW) states that, when considering who is a fit and proper person, the Commissioner may have regard to any criminal intelligence or any other criminal information that:

- b. *Is relevant to the activities carried out under the class of licence; or*

⁴³ More detail can be found in *Security Industry Regulation 2016* (NSW) cl 15.

⁴⁴ *Security Industry Act 1997* (NSW) s 15(1)(a).

- c. Causes the Commissioner to conclude that improper conduct is likely to occur if the applicant were granted the licence; or
- c. Causes the Commissioner not to have confidence that improper conduct will not occur if the applicant were granted the licence.⁴⁵

Suspension of a licence

101. SLED may suspend a person's licence if they are charged with *any* offence before a court outcome. Their adjudication team will review the information available to police and determine if the person should retain their licence based on public interest/fit and proper person considerations.⁴⁶
102. The Commissioner does not have to give a person an opportunity to be heard before being suspended.⁴⁷
103. The Commissioner will notify the person with their decision and the reasons for the suspension. The person will be requested to provide the Commissioner with reasons as to why the licence should not be revoked. Failure to do so can lead to the licence being revoked.
104. Under section 40 of the *Security Industry Act 1997* (NSW), the Court also has the power to suspend a licence if:
 - d. A licensee is convicted of an indictable offence
 - e. A licensee gives evidence or is convicted of an offence against the Act or the Regulations
 - f. A licensee is found liable of a civil penalty prescribed by the Regulations
105. A person whose licence has been automatically suspended because they have been charged with a prescribed offence still has the right to internal view and appeal (as explained below).

⁴⁵ *Security Industry Act 1997* (NSW) s 15(6).

⁴⁶ Considerations can include the nature and seriousness of the offence and whether the charges are directly related to the duties the licence holder was performing at the time of the offence.

⁴⁷ *Security Industry Act 1997* (NSW) s 25(1B).

Revocation of a licence

106. The Commissioner must revoke a licence where they are satisfied that, if the licence holder were applying for a new licence, their application would be refused.⁴⁸
107. Thus, if the licence holder is found guilty of a *prescribed offence*, then the Commissioner **must** automatically revoke the licence. There is no discretion to do otherwise.
108. If the licence holder is found guilty of an offence that is not prescribed, the Commissioner can still revoke the licence on the basis that the person is a fit and proper person, however if the offence is not a prescribed offence the words *must revoke* in Section 26 of the Act do not apply.

Grounds of appeal

109. Any person whose licence has been suspended or revoked has the right to two avenues of appeal: internal review and appeal to the NSW Civil and Administrative Tribunal. These avenues are available in all circumstances, including if a person's licence were suspended/revoked due to a prescribed offence conviction however given the wording in Section 26 it is unlikely that an appeal in respect of prescribed offence will have any merit.
110. Upon notice of suspension or revocation, a person has a right to internal review, as per s 53(1) of the *Administrative Decisions Review Act 1997* (NSW). The person will have 28 days to lodge an application in accordance with the requirements set out in s 53(2) of the *Administrative Decisions Review Act 1997* (NSW). SLED will finalise the review within 21 days by affirming, varying, or making a new decision.
111. If the Commissioner's initial decision was affirmed in the internal review, section 29 of the *Security Industry Act 1997* (NSW) states that a person has the right to appeal to the NSW Civil and Administrative Tribunal.

Surrendering the licence

⁴⁸ Security Industry Act 1997 s 26(1A).

112. Section 31 of the *Security Industry Act 1997* (NSW) requires a person to immediately surrender their security licence subject to being notified by the suspension or revocation. Failure to do so may lead to a fine of 100 penalty units or 6 months imprisonment or both.

AUSTRALIAN MIGRATION LAW

The Main Visa Cancellation/Refusal Powers

Section 116

113. Section 116 of the Act contains an array of cancellation powers and provides the broadest visa cancellation powers in the Act. The section in full is at Attachment A.

The Nature of the Test in (1)(e)

114. The power in (1)(e) is perhaps the most likely to apply to criminal clients:

(e) the presence of its holder in Australia is or may be, or would or might be, a risk to:

(i) the health, safety or good order of the Australian community or a segment of the Australian community; or

(ii) the health or safety of an individual or individuals;

115. It was described this way by Judge Smith in *Gong v Minister for Immigration & Anor* [2016] FCCA 561 (8 April 2016) at [41] to [42]:

“While it is true, as the applicant submits, that the word “risk” entails an element of futurity, the addition of the words “or may be” and “or might be” by the 2014 amendments undermines the balance of the applicant’s arguments. Simply put, the fact that sub-s. 116 (1)(e) is engaged where the Minister is satisfied that a visa holder’s presence “may be a risk” to certain matters means that there does not have to be, as the applicant suggests, any direct, solid or certain foundation before the power to cancel a visa can arise. In other words, it can arise on the possibility that some event occurred in the past. In this case, that possibility was supported by the laying of the charges. That is to say that that fact alone was not legally irrelevant to the question posed by sub-s. 116 (1)(e).

116. It is frequently used when the more specific provisions of section 501 are not necessarily enlivened. It is frequently used for people charged with less serious criminal offences, including driving offences and where persons are charged but not yet tried. In respect of a criminal client sub

paragraph (e) can be utilised prior to conviction and particularly where a person is charged with offending (but not yet convicted) and they have a criminal record in Australia. Alternatively, it can be and is used following an acquittal.

The Power in (1)(g)

117. This sub paragraph provides cancellation can occur when:

“a prescribed ground for cancelling a visa applies to the holder”.

118. For certain visa holders (Bridging Visa E) being charged with a criminal offence is a ‘prescribed ground’ under subparagraph (g) and a visa can be cancelled regardless of seriousness.⁴⁹

The Power in (1)(b)

119. This sub paragraph provides cancellation can occur when:

“its holder has not complied with a condition of the visa”.

120. For certain visa holders not engaging in criminal conduct is a visa condition.

Procedure

Permanent Visas

121. The power in section 116(1) does not apply to permanent visas, unless the visa holder is off-shore, see section 117.

Notice of Intention

122. Procedurally the person will receive a ‘Notice of Intention to Consider Cancellation Under Section 116 of the Migration Act 1958’. This should set out the grounds and particulars for possible cancellation.

Procedural Fairness

123. The person should be invited to comment in writing providing supporting evidence and stating why they believe their visa should not be cancelled.

Deemed Service

⁴⁹ See Ministerial Direction No. 63.

124. It is important to be aware that service is deemed under various provisions of the Act and a client will be taken to have waived the right to be heard if they don't respond.⁵⁰

Mandatory Cancellations Under Section 116(3)

125. Note that under section 116(3) certain cancellations are mandatory, it providing that '[i]f the Minister may cancel a visa under subsection (1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled'.

126. Those circumstances are set out in sub-regulation 2.43(2) of the Migration Regulations.⁵¹

Time Limits on Responding

127. Strict time frames apply to responding, five days if the person is in Australia.⁵²

Discretion

128. The decision maker then decides firstly whether the applicable portion of section 116 is enlivened and if so, whether in their discretion the visa will be cancelled.

Ministerial Directions

129. When a delegate or the AAT makes a decision they will be guided by a Ministerial Direction that sets out the relevant matters that must be considered as a matter of executive policy:

130. Which Direction applies will depend on the nature of the visa.

131. For example, in respect of Bridging Visa E, cancellations must be undertaken by applying Ministerial Direction No. 63, which requires the decision maker to consider a number of 'primary' and 'secondary' considerations:

Primary

⁵⁰ See for example section 494C of the Act; *Cheng v Minister for Immigration and Citizenship* [2011] FCA 1290 (11 November 2011)

⁵¹ http://classic.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/s2.43.html

⁵² *Migration Regulations 1994 - REG 2.44*

http://classic.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/s2.44.html

A paper presented 20 August 2020

- *‘The Government’s view that a person on a bridging visa who has been convicted of an offence, charged with an offence, is the subject of an adverse Interpol notice, is being investigated by law enforcement and is considered a threat, or does not have the intention to leave Australia, should be considered for cancellation’.*
- *‘The best interests of children under the age of 18 in Australia who would be affected by the cancellation’.*

Secondary

- *‘The impact of a decision to cancel the visa on the family unit’*
- *The degree of hardship that may be experienced by the visa holder*
- *The circumstances; mitigating factors, the seriousness of the offence, the reason for the person being the subject of an Interpol notice, or under investigation by law enforcement*
- *Consequences of cancellation, including indefinite detention and Australia’s non-refoulement obligations*
- *Any other matter delegates consider relevant*

132. Sections 118 to 133 contain a code of procedure for section 116 cancellations.

133. Section 133C contains a personal power for the Minister to cancel visas relying on section 116 personally.

134. The Minister also has additional powers under section 133C to revoke favourable decisions not to cancel visas under section 116 made by delegates or on merit review in the AAT.

135. It is important to be aware that proposed section 116 cancellations can occur more than once, sometimes relying on a different limb of the section after a successful decision not to cancel a visa.

Review of Cancellations

136. Decisions made personally by the Minister cannot be reviewed on merits reviews in the Administrative Appeals Tribunal (“AAT”).

137. Certain decisions made personally by the Minister do not attract the requirements of procedural fairness.
138. Adverse decisions by delegates under section 116 however can be reviewed in the AAT but clients need to be aware of the strict time limits on appeals, which currently are unable to be extended.
139. These reviews are heard in the Migration Division of the AAT.

Time Limits on Merit Review

140. Some time limits at the date of writing were:
 - Two working days if the person is in immigration detention and the visa was a bridging visa
 - Seven working days if the person is held elsewhere for example in a jail and the visa was a bridging visa
 - Seven days for review of a substantive visa cancellation
141. Judicial review relief is then available in the Federal Circuit Court⁵³ if it can be demonstrated a decision is vitiated by jurisdictional error.

Time Limits on Judicial Review

142. Under section 477(1) there is a 35-day time limit on applications. This can be extended on application upon satisfaction of the statutory test.

Section 501

143. Section 501 of the Act is the most significant visa cancellation power in the Act for criminal lawyers. It also creates powers to refuse applications. The section has generated significant controversy and even international concern in recent years.⁵⁴ This followed the amendment of the Act in 2014 to introduce mandatory cancellation in a range of circumstances. The number of visa cancellations, often involving long term residents of Australia, have skyrocketed since, as demonstrated in the graphs above.
144. The section is lengthy and at Attachment B.

⁵³ See Part 8 of the Act as to jurisdiction of courts in judicial review proceedings.

⁵⁴ <https://www.lowyinstitute.org/the-interpretor/australia-new-zealand-and-corrosive-character-test>

Powers

145. Broadly speaking section 501 can be used in the following three circumstances:

Discretionary - “*the minister may*”

- **Subsection Two**

The Minister reasonably suspects that the person does not pass the character test; and the person does not satisfy the Minister that the person passes the character test.

- **Subsection Three**

The Minister reasonably suspects that the person does not pass the character test; and the Minister is satisfied that the refusal or cancellation is in the national interest.⁵⁵

Mandatory – “*the minister must*”

- **Subsection Three A**

The Minister must cancel a visa that has been granted to a person if: the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or (ii) paragraph (6)(e) (sexually based offences involving a child); and (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

The Character Test

146. The character test is contained within section 501(6). In short it provides a person does not pass the character test if:

- The person has a substantial criminal record as defined by sub-section 7⁵⁶

⁵⁵ Natural justice does not apply to this power and nor (as a personal ministerial power) can it be reviewed on the merits.

⁵⁶ See discussion below as to sub-section (7)

- The person has been convicted of an offence that was committed while the person was in immigration detention; or during an escape by the person from immigration detention; or after the person escaped from immigration detention but before the person was taken into immigration detention again; or the person has been convicted of an offence against section 197A;
- **The Minister reasonably suspects: (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and (ii) that the group, organisation or person has been or is involved in criminal conduct;**
- The Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following: (i) an offence under one or more of sections 233A to 234A (people smuggling); (ii) an offence of trafficking in persons; (iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern; whether or not the person, or another person, has been convicted of an offence constituted by the conduct;
- **Having regard to either or both of the following: (i) the person's past and present criminal conduct; (ii) the person's past and present general conduct; the person is not of good character;**
- **In the event the person were allowed to enter or to remain in Australia, there is a risk that the person would: (i) engage in criminal conduct in Australia; or (ii) harass, molest, intimidate or stalk another person in Australia; or (iii) vilify a segment of the Australian community; or (iv) incite discord in the Australian community or in a segment of that community; or (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence**

threatening harm to, that community or segment, or in any other way;

- A court in Australia or a foreign country has:(i) convicted the person of one or more sexually based offences involving a child; or (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction;
- The person has, in Australia or a foreign country, been charged with or indicted for one or more of the following: (i) the crime of genocide; (ii) a crime against humanity; (iii) a war crime; (iv) a crime involving torture or slavery; (v) a crime that is otherwise of serious international concern;
- The person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*);
- An Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Substantial Criminal Record

147. The concept of a ‘substantial criminal record’, by virtue of which someone is deemed to fail the character test, is contained within subsection 7 (my emphasis):

*“For the purposes of the character test, a person has a substantial criminal record if: (a) the person has been sentenced to death; or (b) the person has been sentenced to imprisonment for life; or (c) **the person has been sentenced to a term of imprisonment of 12 months or more; or (d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more;** or (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or (f) the person has: (i) been found by a court to not be fit to plead, in relation to an offence; and (ii) the court has nonetheless found that on the evidence available the*

person committed the offence; and(iii) as a result, the person has been detained in a facility or institution”.

148. The term of imprisonment referred to in 7(c) is the head sentence, not the non-parole period.⁵⁷

149. Imprisonment is defined in the section to include, “*any form of punitive detention in a facility or institution*”.

150. Suspended sentences have been held to count for the purposes of determining whether a person has been sentenced to imprisonment for twelve months or more.⁵⁸

Procedure

151. As with section 116 a person has a right to be heard. (except for personal ministerial powers to which natural justice does not apply or mandatory cancellations).

152. A Notice of Intention to Consider Cancellation (or refusal) should be served identifying the grounds, issues and evidence.

Time Limits

153. A person who receives such a notice must respond within 28 days.⁵⁹

154. As with discretionary decisions under section 116(1) it is important to appreciate that the powers in (2) and (3) are discretionary. Once the decision maker is satisfied that the person fails the character test there is still an important discretion as to whether to cancel or refuse a visa.

155. This discretion will be exercised (if the decision is not made personally by the Minister) taking into account the contents of Ministerial Direction Number 65. Even where the decision is made personally the Minister will generally indicate that the Ministerial Direction should be taken as a guide to the matters the Minister will consider.

Revocation of Mandatory Cancellations

⁵⁷ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; 24 ALR 577; *Te v Minister for Immigration and Multicultural and Ethnic Affairs* [1999] FCA 111; (1999) 88 FCR 264; *Seyfarth v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 142 FCR 580, [2005] FCAFC 105.

⁵⁸ *Meng Kok Te v Minister for Immigration and Ethnic Affairs* [1999] FCA 111, *Stretton v Minister for Immigration and Border Protection* (No. 2) [2015] FCA 559)

⁵⁹ Regulation 2.53 (made under s501D) .

156. Visa revoked under the mandatory provisions in subsection (3A) can be the subject of applications to ‘revoke’ the cancellations.

157. These occur under section 501CA.

158. Procedural fairness applies to these decisions and the Minister must decide whether, “*the person passes the character test (as defined by section 501); or that there is another reason why the original decision should be revoked*”.

159. A person had 28 days to request revocation and this time limit cannot be extended.⁶⁰

Review of Cancellations

Merit Review

160. If the decision was not made personally by the Minister then merit review in the AAT will be available for discretionary cancellation decisions under section 501 as well as decisions not to revoke mandatory cancellations under section 501CA. This review occurs under section 500 of the Act. These reviews are heard in the ‘General Division’ of the AAT.

Time Limits

161. Strict time limits apply and they cannot be extended.

162. Some currently are:

- 9 days for decisions to cancel a visa under section 501 or not to revoke a cancellation under section 501CA if you are in Australia.
- 28 days in certain other circumstances

Judicial Review

163. The Federal Court is the appropriate venue for seeking judicial review relief in respect of decisions under section 500 and 501.⁶¹ Under section 477A a 35-day time limit applies to certain decisions.⁶²

Ministerial Power to Set Aside and Substitute Decisions

⁶⁰ Be aware of the provisions of section 500, including subsection 6(L) as to decisions being taken to be affirmed by the AAT in certain circumstances.

⁶¹ See sections 476 and 476A of the Act.

⁶² http://classic.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s477a.html

164. There are various powers to set aside decisions (made by delegates or the AAT). These include sections 501A, 501B, 501BA.

APPREHENDED VIOLENCE ORDERS

165. While not criminal in nature orders under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) are often made in criminal proceedings and sometimes are mandatory.
166. The hearing of applications for such orders also often occur concurrently with criminal charges with the result of the criminal hearing often determinative of whether the order is made.
167. Section 39 of the Act states:

39 Final order to be made on guilty plea or guilt finding for serious offence

(1) If a person pleads guilty to, or is found guilty of, a serious offence, the court hearing the proceedings must make a final apprehended violence order for the protection of the person against whom the offence was committed regardless of whether an interim apprehended violence order has been made or whether an application for an apprehended violence order has been made.

(2) However, the court need not make a final apprehended violence order if it is satisfied that it is not required (for example, because a final apprehended violence order has already been made against the person).

(3) In this section—

court includes the District Court.

serious offence has the same meaning as in section 40.

168. Serious offence is then defined in section 40(5) of the Act:

*(5) In this section, a **serious offence** means—*

(a) attempted murder, or

(b) a domestic violence offence (other than murder, manslaughter or an offence under section 25A of the Crimes Act 1900), or

(c) an offence under, or mentioned in, section 33, 35, 61I, 61J, 61JA, 61K, 61KC, 61KD, 61L, 61M, 63, 65, 66A, 66B, 66C, 66D, 66DA, 66DB, 66EA or 66F of the Crimes Act 1900, or

(d) an offence of attempting to commit an offence referred to in paragraph (b) or (c), or

(e) an offence under section 13, or

(f) an offence under the law of the Commonwealth, another State or a Territory or of another country that is similar to an offence referred to in paragraph (a), (b), (c), (d) or (e).

169. Such orders (whether made mandatorily or not) have a number of mandatory consequences that clients ought be aware of.

- They automatically cancel any firearms license
- They cancel any security license

ORDERS IN FAVOR OF VICTIMS OF CRIME

Victims Rights and Support Act 2013 (NSW)

170. This Act contains a range of powers for the making of restitution and compensation orders against offenders after conviction. Conviction is defined broadly in section 3 (to include non-conviction orders) and applications for the various orders can be made well after sentence (see for example sections 59(2) and 94).

171. Part 5 of the Act has the following purpose:

“The object of this Part is to enable financial support paid and recognition payments made under the Scheme to be recovered from persons found guilty of the crimes giving rise to the payments”

172. Divisions 2 and 3 of Part 5 of this Act are concerned with orders to compel offenders to repay compensation paid under the Act to victims. They facilitate the following types of orders upon conviction (the term is broadly defined in section 3) for a relevant offence:

- Provisional orders for restitution under section 59
- Restitution orders under section 60 where property disposed of to avoid scheme

173. Relevant offence is defined in section 58:

relevant offence means any of the following:

(a) an offence in respect of which an act of violence (whether or not a series of related acts) is found to have been committed,

(b) an offence for or in respect of which victims support is given under this Act,

(c) any other offence if an offence referred to in paragraph (a) or (b) was taken into account (under Division 3 of Part 3 of the Crimes (Sentencing Procedure) Act 1999) when sentence was passed on the offender for that other offence.

174. Part 6 of the Act contains provisions for compelling offender to pay compensation more generally to victims of crime.

175. Section 91 states:

“The object of this Part is to give effect to an alternative scheme under which a court may order the person it finds guilty of a crime to pay compensation to any victim of the crime”.

176. Section 94 states:

94 Directions for compensation for injury

(1) A court that convicts a person of an offence may (on the conviction or at any time afterwards), by notice given to the offender, direct that a sum not exceeding \$50,000 be paid out of the property of the offender to any:

(a) aggrieved person, or

(b) aggrieved persons in such proportions as may be specified in the direction, by way of compensation for any injury sustained through, or by reason of, the offence or any other offence taken into account (under Division 3 of Part 3 of the Crimes (Sentencing Procedure) Act 1999) when sentence was passed on the offender for that offence.

(2) A direction for compensation may be given by a court on its own initiative or on application made to it by or on behalf of an aggrieved person.

177. Section 97 states:

97 Directions for compensation for loss

(1) A court that convicts a person of an offence may (on the conviction or at any time afterwards), by notice given to the offender, direct that a specified sum be paid out of the property of the offender to any:

(a) aggrieved person, or

(b) aggrieved persons in such proportions as may be specified in the direction, by way of compensation for any loss sustained through, or by reason of, the offence or, if applicable, any further offence that the court has taken into account under Division 3 of Part 3 of the Crimes (Sentencing Procedure) Act 1999 in imposing a penalty for an offence for which the offender has been convicted.

(2) A direction for compensation may be given by a court on its own initiative or on an application made to it by or on behalf of the aggrieved person.

178. Part 7 of the Act then provides for the victims support levy which is an amount of money all offenders must pay following the conclusion of court proceedings.

FIREARMS LICENSING

179. The main statutory framework that regulates the issuing, suspending and revoking a licence is the *Firearms Act 1996* (NSW).

Applying for a Firearms licence

180. Section 11(5) of the *Firearms Act 1996* (NSW) sets out the general restrictions with respect to the issuing of firearms licences. In addition to satisfying the ‘fit and proper person’ test, as well as other considerations outlined in section 11(3), a licence **must** not be issued to a person who⁶³:

- a. Is under the age of 18; or
- b. Has, within the period of 10 years before the application, been convicted in NSW or elsewhere of an offence prescribed by the regulations; or
- c. Is subject to an AVO or interim AVO or who has, at any time within 10 years before the application, been subject to an AVO; or
- d. Is subject to one of the following in relation to an offence prescribed by regulations:
 - i. A good behaviour bond;
 - ii. A community correction order;
 - iii. A conditional release order; or

⁶³ *Firearms Act 1996* (NSW) s 11(5).

- e. Is subject to a firearms prohibition order; or
- f. Is a registrable person or corresponding registrable person under the *Child Protection (Offenders Registration) Act 2000* (NSW).

181. The prescribed offences in the Act are stated in the *Firearms Regulation 2017* (NSW)⁶⁴. Briefly, this includes:

- a. *Offences relating to firearms or weapons*
- b. *Offences relating to prohibited drugs*
- c. *Offences relating to public order or involving assaults against law enforcement officers*
- d. *Offences involving violence*
- e. *Offences of a sexual nature*
- f. *Offences involving fraud, dishonesty or stealing*
- g. *Offences relating to affray*
- h. *Offences relating to terrorism.*

182. Despite satisfying the factors mentioned above, as per Section 11(5A) of the Act, the Commissioner must still refuse to issue a licence if the police is of the opinion that the applicant is a risk to public safety and the issuing of the licence would be contrary to the public interest. This determination is made by reference to criminal intelligence reports or through other criminal information held by the police in relation to the person subject of the application.

Suspension of licence

183. Section 22 of the *Firearms Act 1996* (NSW) allows the Commissioner to suspend a licence if satisfied that there may be grounds for revocation.

⁶⁴ See r 5 of the *Firearms Regulation 2017*

184. Grounds for revocation include, but are not limited to, the general restrictions highlighted in section 11(5) of the *Firearms Act 1996* (NSW) (see Paragraph 118 of this paper).

- g. If a person's licence is suspended on these grounds, the suspension notice does not need to state the reason for suspension or request the person to provide reasons why the licence should not be revoked.

185. Section 22(2) states that the police **must** suspend a licence if the licence holder has been charged with a domestic violence offence or the police has reasonable cause to believe that the holder has committed or threatened to commit a domestic violence offence.

186. If an interim AVO is made against the licence holder, then the licence is **automatically suspended** until the order is confirmed or revoked.⁶⁵

Revocation of licence

187. A firearms licence is also **automatically revoked** if the licence holder becomes subject to either a firearms prohibition order or an AVO.⁶⁶

188. The police **may** also revoke a licence for the following reasons:

- a. For any reason for which the licence holder would be required to be refused a licence of the same kind; or
- b. If the licence holder:
 - i. supplied information which was (to the licensee's knowledge) false or misleading in a material particular in, or in connection with, the application for the licence; or
 - ii. Contravenes any provision of the *Firearms Act 1996* (NSW) or the regulations, whether or not the person has been convicted of the offence; or
 - iii. Contravenes any condition of the licence; or

⁶⁵ See section 23 Firearms Act

⁶⁶ See section 24(1)

- c. If the police are no longer of the opinion that the licence holder is a fit and proper person; or
- d. If the police are satisfied that the licence holder through any negligence or fraud on their part, caused a firearm to be lost or stolen; or
- e. For any other reason prescribed by the regulations.⁶⁷

Grounds of appeal

189. There are generally two avenues for appeal: (1) internal review to the Firearms Registry and (2) appeal to the NSW Civil and Administrative Tribunal.

190. A person may apply for a review for any of the decisions made in Section 75(1) of the *Firearms Act 1996* (NSW) including:

- a. The refusal or failure by the police to issue a licence;
- b. A condition imposed by the police on a licence;
- c. The revocation of a licence (other than a revocation as a result of the person being subject to a firearms prohibition order or an AVO).

191. The power to seek an internal review is contained in Section 53(1) of the *Administrative Decisions Review Act 1997* (NSW). An application for review must be lodged within 28 days in accordance with the requirements set out in section 53(2) of the *Administrative Decisions Review Act 1997* (NSW).

192. If the Commissioner's initial decision is affirmed in the internal review, section 75 of the *Firearms Act 1996* (NSW) states that a person has the right to appeal to the NSW Civil and Administrative Tribunal.

Non-reviewable decisions

⁶⁷ *Firearms Act 1996* (NSW) s 24(2).

193. However, not all decisions are reviewable. There is no right of review for a person whose licence has been suspended, including a person who is subject to an interim AVO.
194. A person may also not apply for a review if they were refused a licence based on the restrictions set out in s 11(5), as they are deemed a **‘disqualified person’**.⁶⁸

Surrendering the firearm and licence

195. If a licence is suspended, revoked or no longer in force, the person subject to these orders must immediately surrender to a police officer any firearm in the person’s possession as well as the firearms licence as per section 25 of the *Firearms Act 1996* (NSW). Non-compliance with this section gives rise to an offence which is punishable by way of 50 penalty units or a term of 2 years imprisonment or potentially both.

PARTICIPATION IN PUBLIC LIFE

Voting

196. Part VII of the Commonwealth Electoral Act 1918 (Cth) sets out the circumstances in which Australian citizens are entitled to vote.
197. If a person is in custody for the purpose of serving a sentence of 3 years or more, they are stripped of their entitlement to vote throughout the duration of their sentence.⁶⁹
198. Once that person has served their term of imprisonment, there is nothing under this section which suggests that they would not be entitled to vote.⁷⁰
199. However, a person convicted of treason or treachery will not regain the right to vote upon serving their prison sentence (unless they are subsequently pardoned for those offences).⁷¹

Public Office

200. Section 44 of the Australian Constitution provides that a person is incapable of being chosen to sit as a Senator or a Member of the House

⁶⁸ *Firearms Act 1996* (NSW) s 75(1A).

⁶⁹ *Commonwealth Electoral Act 1918* (Cth) s 93(8AA).

⁷⁰ See https://aec.gov.au/About/AEC/Publications/Fact_Sheets/fact_sheets/prisoner-voting.pdf

⁷¹ *Commonwealth Electoral Act 1918* (Cth) s 93(8)(b).

of Representatives if that person is:

“attained of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment of one year or longer”

201. The conviction of particular offences, such as bribery and undue influence,⁷² automatically disqualifies the convicted individual from being a Member of either House of Parliament. Section 386 of the *Commonwealth Electoral Act 1918 (Cth)* relevantly provides:

“Any person who:

(a) is convicted of an offence against:

(i) section 326 or 327 of this Act or section 83.4 of the Criminal Code ; or

(ii) an offence against section 11.1 of the Criminal Code that relates to an offence referred to in subparagraph (i); or

(b) is found by the Court of Disputed Returns to have committed or attempted to commit bribery or undue influence, within the meaning of Part XXII, when a candidate; shall, during a period of 2 years from the date of the conviction or finding, be incapable of being chosen or of sitting as a Member of either House of the Parliament.

202. ..

Jury Service

203. A criminal conviction will generally negatively affect an individual’s eligibility to participate in jury service. The eligibility of criminal offenders is detailed under Schedule 1 to the *Jury Act 1977 (NSW)* (***Jury Act***). It is important to be also conscious of other non-conviction outcomes that may also bear on an individual’s eligibility for jury service.

Exclusion for Life in Certain Circumstances

204. An individual will be excluded from jury service for life if they are convicted of any of the four category of offences:⁷³

⁷² *Commonwealth Electoral Act 1918 (Cth)* ss 326, 327; *Criminal Code* s 83.4.

⁷³ Schedule 1 to *Jury Act* s 1.

- The offence is an offence that, if committed in New South Wales, would be punishable with a maximum penalty of life imprisonment
- The offence is an offence that involves a terrorist act within the meaning of the Terrorism (Police Powers) Act 2002
- The offence is an offence under Part 7 (Public justice offences) of the Crimes Act 1900
- The offence is a sexual offence within the meaning of section 7 of the Criminal Records Act 1991

205. The effect of a prison sentence which is imposed for an offence other than offences stated in Section 1 of Schedule 1 to the *Jury Act* is an exclusion from jury service for a particular period of time. The applicable period of exclusion depends on the length of the sentence imposed.

206. Where a sentence of less than 3 consecutive months is imposed, the individual subject to the sentence will be excluded from jury service for 7 years after the individual has served the sentence.⁷⁴

207. Where a sentence of more than 3 consecutive months is imposed, the individual subject to the sentence will be excluded from a jury service for 10 years after the individual has served the sentence.⁷⁵

208. It is important to note that a sentence of imprisonment is for the purposes of the *Jury Act* defined to include:

(a) a sentence of imprisonment the subject of a periodic detention order or home detention order, or an intensive correction order that is subject to a home detention condition, under the Crimes (Sentencing Procedure) Act 1999,

(b) a suspended sentence of imprisonment,

(c) compulsory drug treatment detention within the meaning of the Crimes (Administration of Sentences) Act 1999,

(d) a sentence of imprisonment, a suspended sentence or detention of a similar nature to those referred to in paragraphs (a)–(c) served in another jurisdiction.⁷⁶

⁷⁴ Schedule 1 to *Jury Act* s 2(3)(a).

⁷⁵ Schedule 1 to *Jury Act* s 2(3)(b).

⁷⁶ Schedule 1 to *Jury Act* s 2(5).

209. Similarly, a sentence of imprisonment is also not confined to the ordinary meaning of the phrase and extends to circumstances where the individual is:

(a) *being subject to a suspended sentence of imprisonment, or*

(b) *being on probation or parole after serving part of a sentence of imprisonment*⁷⁷

The Effect of Serving a Period Detention

210. Section 3(2) of Schedule 1 to the *Jury Act* provides:

A person is excluded from jury service during any period in which the person is detained in a detention centre or other institution for juvenile offenders, or in a correctional centre, as a result of being found guilty of an offence committed when the person was under the age of 18 years.

211. Moreover, an additional period of exclusion of three years will be imposed when the individual is released from detention.⁷⁸

Persons subject to certain orders and disqualifications

212. As discussed at the beginning of this topic, there are a range of orders which can be imposed on an individual whereby such orders would disqualify the individual subject to the orders for participating in jury service for the duration that the orders remain operative.

213. Examples of such orders include an apprehended violence order, a community service order, an extended supervision order and a non-association order.⁷⁹ A comprehensive list of the types of orders are stipulated under Section 4 of Schedule 1 to the *Jury Act*.

FAMILY LAW IMPLICATIONS⁸⁰

214. The *Family Law Act* was amended in 2006. One of the most significant amendments was the creation of Division 12A which made provision for child-related proceedings to be conducted in a less-adversarial manner.

What are child-related proceedings?

⁷⁷ Schedule 1 to *Jury Act* s 2(6).

⁷⁸ Schedule 1 to *Jury Act* s 3(3).

⁷⁹ Schedule 1 to *Jury Act* s 4.

⁸⁰ The family law part of this paper is authored by Michelle Giacomo Barrister of Chalfont Chambers.

215. Child related proceedings are proceedings conducted under Part VII of the FLA. Overwhelmingly these proceedings will concern parenting arrangements for the children. Some proceedings concern children but are not conducted under Part VII. For example:

- Hague Convention matters
- Issues as to jurisdiction
- Admission of new evidence in an appeal concerning parenting orders

Principles for conducting child-related proceedings

216. The principles for conducting child-related proceedings are set out in **section 69ZN** and include:

- The court is to consider the needs of the child and the impact of the proceedings might have upon the in determining the conduct of the proceedings
- The court is to actively direct, control and manage the conduct of the proceedings
- Proceedings are to be conducted in a manner to safeguard the child from harm (including exposure to family violence) and safeguard the parties from family violence
- The proceedings are to be conducted without undue delay and with as little formality and legal technicality as possible.

217. Division 12A then sets out a number of provisions designed to meet the principles set out in section 69ZN. Of note to criminal lawyers are the following sections:

Section 69ZT – rules of evidence do not apply unless the Court determines they should (Some parts of the Evidence Act are preserved (eg privilege))

Section 69ZX(3)

The court may, in child-related proceedings:

receive into evidence the transcript of evidence in any other proceedings before:

the court; or

another court; or

a tribunal;

and draw any conclusions of fact from that transcript that it thinks proper; and adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).

Section 69ZM enables the parties to consent to Division 12A applying all other family law matters (such as the division of property) provided there is a child-related issue to be determined.

What are the consequences of sections 69ZT and section 69ZX(3)?

218. You will see from the legislation that a court exercising family law jurisdiction has the power to adopt findings of fact, credit and guilt that have been made in other proceedings.

219. If a court exercising family law jurisdiction use its discretion to adopt findings of fact, credit or guilt, this generally results in evidence contract to these findings from being adduced unless the evidence is adduced for a purpose other than the finding (eg. A parent, who notwithstanding a conviction maintaining their innocence).

Consequences of convictions on financial proceedings

What are financial proceedings

220. Broadly financial proceedings are those that concern the division of property and the maintenance of a spouse.

What impact does a finding of guilt have on financial proceedings

221. As a general rule, Courts exercising family law jurisdiction, do not take into account marital conduct when determining property division or spousal maintenance unless such conduct has had financial consequences for one or both parties.

222. The leading case regarding criminal conduct is that of *Kennon & Kennon* (1997) 22 Fam LR 1. In that case family violence during a marriage was considered by the court when determining the division of property between spouses. The following broad principles can be derived from that case:

- Consideration of family violence is restricted to the assessment of the impact on a spouse's contributions under s79 and in certain circumstances to the future needs assessment s75(2)(o)
- Any behaviour which has a significant adverse impact upon a party's contributions or made that party's contributions more arduous than they should have been, can be taken into account by the Trial Judge.

223. Generally, these cases involve the assertion of a course of violent conduct during a relationship. The issues for determination are the nature and degree of the violence and the impact it has had on an individual's contribution (financial and non-financial).

224. Whilst generally the cases involve a course of violent conduct, they can involve one serious incident of violence which has caused physical or psychological impairment to a party (or the child that party) that makes that party's contribution all the more arduous.

225. There does not need to be a criminal conviction for a family violence offence for the *Kennon* principles to apply. Often these cases do not involve any criminal convictions. In saying that, a conviction for a family violence offence (or an ADVO made after a contested hearing) will certainly assist in establishing that the violence has occurred.

PROCEEDS OF CRIME LEGISLATION

Confiscation of Proceeds of Crime Act 1989 (NSW)

226. This state Act contains an array of provisions that operate upon certain sentencing dispositions being made (note the term conviction is broadly defined in the Act).⁸¹

227. The orders and procedure it provides for can be described as onerous and can have huge financial implications upon people and their families.

228. The Act is complex but in summary provides for:

- Forfeiture Orders upon convictions for a 'serious offence'

⁸¹ Practitioners should also be aware of the federal legislation (*Proceeds of Crime Act 2002 (Cth)*).

- Pecuniary Penalty Orders upon convictions for a ‘serious offence’
- Drug proceeds orders upon conviction for a drug trafficking offence
- Substituted tainted property declaration upon conviction for a serious offence

229. These terms are defined in section 7:

“In this Act:

serious drug offence means:

(a) an offence referred to (before the commencement of the Drug Misuse and Trafficking Act 1985) in section 45A of the Poisons Act 1966:

(i) of supplying any drug of addiction or prohibited drug within the meaning of that Act, or

(ii) of cultivating, supplying or possessing any prohibited plant within the meaning of that Act, or

(iii) of permitting any premises, as owner, occupier or lessee of the premises, to be used for the purpose of the cultivation or supply of any prohibited plant within the meaning of that Act or of being concerned in the management of any such premises, or

(b) a drug trafficking offence, or

(c) a prescribed offence involving drugs or an offence of a prescribed kind involving drugs, or

(d) an offence, which involves theft, fraud, obtaining financial benefit by vice engaged in by others, extortion, violence, bribery, corruption or harbouring criminals, committed in connection with an offence referred to in paragraph (a), (b) or (c), or

(e) an offence under section 193B (money laundering) or 193D (dealing with property that subsequently becomes an instrument of crime) of the Crimes Act 1900 in relation to the proceeds of an offence, or an offence, referred to in paragraph (a), (b), (c) or (d), or

(f) an offence of attempting to commit, or of conspiracy or incitement to commit, an offence referred to in paragraph (a), (b), (c), (d) or (e).

serious offence means:

(a) an offence (including a common law offence) against the laws of New South Wales, being an offence that may be prosecuted on indictment, or

(b) the offence of supplying any restricted substance prescribed for the purposes of section 16 of the Poisons and Therapeutic Goods Act 1966 that arises under section 18A (1) of that Act, or

(c) an offence prescribed for the purposes of this paragraph by the regulations or an offence of a kind so prescribed.

230. Section 13 of the Act states (our emphasis):

13 Applications for confiscation orders

(1) If a person is convicted of a serious offence other than a drug trafficking offence, an appropriate officer may apply to an appropriate court for one or both of the following orders:

(a) a forfeiture order against property that is tainted property or substitutable tainted property in respect of the offence,

(b) a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.

(2) If a person is convicted of a drug trafficking offence, an appropriate officer may apply to an appropriate court for one or both of the following orders:

(a) a forfeiture order against property that is tainted property or substitutable tainted property in respect of any drug trafficking offences,

(b) a drug proceeds order against the person in respect of benefits derived by the person from the commission of any drug trafficking offences.

(3) An application must be made before the end of the relevant period in relation to the conviction, except with the leave of the Supreme Court.

(3A) The Supreme Court must not grant leave under subsection (3) unless:

(a) the property or benefit to which the application relates is:

*(i) property of the kind referred to in paragraph (d) of the definition of **tainted property** in section 4 (1), or*

(ii) a benefit of the kind referred to in section 25 (2) (a1) or 30 (1) (b), and

(b) the Court is satisfied that:

(i) the property or benefit was derived, realised or identified only after the end of the relevant period, or

(ii) necessary evidence became available only after the end of that period, or

(iii) *it is otherwise in the interests of justice to do so.*

(4) *An application may be made under subsection (1) (b) in relation to one or more serious offences.*

(5) *If an application under subsection (1) or subsection (2) has been finally determined, no further application may be made under that subsection in relation to the same conviction, except with the leave of the Supreme Court or in such circumstances as are prescribed.*

(6) *The Supreme Court shall not grant leave unless satisfied that:*

(a) *the tainted property or substitutable tainted property, or the benefit, to which the new application relates was identified only after the first application was determined, or*

(b) *necessary evidence became available only after the first application was determined, or*

(c) *the Court is otherwise satisfied that it is in the interests of justice to grant the leave.*

FORENSIC PROCEDURES

231. The *Crimes (Forensic Procedures) Act 2000* (NSW) contains provisions that operate upon conviction for a range of offences:

- Part 7, which provides for testing by consent or order of serious indictable offenders
- Part 7A, which provides for testing by consent or order of untested former offenders who have served a prison sentence for serious indictable offence and have since been served with a court attendance notice in respect of an indictable offence
- Part 7B which provides for testing by consent or by order on persons who are registrable offenders under the *Child Protection (Offenders Registration) Act 2000* (NSW), and required to comply with the reporting obligations under that Act.

232. The following definitions are relevant:

serious indictable offence means:

(a) *an indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment, or*

(b) *an indictable offence under a law of the State that is punishable by a maximum penalty of less than 5 years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of 5 or more years imprisonment.*

serious indictable offender means a person who has been convicted of a serious indictable offence.

EXTENDED DETENTION AND SUPERVISION LAWS

233. The NSW criminal legislative framework is structured to allow the Supreme Court to make decisions relating to the extended supervision and continued detention of individuals who are regarded as the most dangerous offenders.

Crimes (High Risk Offenders) Act 2006 (NSW)

Extended Supervision Orders

234. Section 5B of the *Crimes (High Risk Offenders) Act 2006 (NSW)* permits the Supreme Court to make extended supervision orders (orders which requires supervision in the community of person) in circumstances where:

(a) the person is an offender who is serving (or who has served) a sentence of imprisonment for a **serious offence** either in custody or under supervision in the community, and

(b) the person is a supervised offender (within the meaning of section 5I), and

(c) an application for the order is made in accordance with section 5I, and

(d) the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing another serious

offence if not kept under the supervision under the order

235. A serious offence is defined to include either a serious sex offence or a serious violence offence as per section 4 of the above Act.

236. An exhaustive list offences which constitute as either serious sex offences or serious violence offences are located at sections 5 and 5A respectively.

Continuing Detention Orders

237. Section 5C of the *Crimes (High Risk Offenders) Act 2006* allows the Supreme Court to order the continued detention of a person provided that:

(a) the person is an offender who is serving (or who has served) a sentence of imprisonment for a serious offence either in custody or under supervision in the community,

(b) the person is a detained offender or supervised offender (within the meaning of section 13B), and

(c) an application for the order is made in accordance with section 13B, and

(d) the Supreme Court is satisfied to a high degree of probability that the person poses an unacceptable risk of committing another serious offence if not kept in detention under the order

Terrorism (High Risk) Offenders Act 2017 (NSW)

238. The Terrorism (High Risk) Offenders Act 2017 similarly also allows the imposition of extended supervision orders and continuing detention orders on dangerous individual, specifically those who are regarded as possessing an unacceptable risk of committing a serious terrorism offence.

Supervision Orders

239. Section 20 of the *Terrorism (High Risk) Offenders Act 2017 (NSW)* stipulates that an extended supervision order made be made in respect of an individual where:

(a) the offender is in custody or under supervision (or was in custody or under supervision at the time the original application for the order was filed):

- (i) while serving a sentence of imprisonment for a NSW indictable offence, or
- (ii) under an existing interim supervision order, extended supervision order, interim detention order or continuing detention order, and

(b) an application for the order is made in accordance with this Part, and

(c) the Supreme Court is satisfied that the offender is any of the following:

- (i) a convicted NSW terrorist offender:
- (ii) a convicted NSW underlying terrorism offender
- (iii) a convicted NSW terrorism activity offender

(d) the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious terrorism offence if not kept under supervision under the order.

240. Definitions for the type of offenders which may be amenable to an extended supervision order can be found at Sections 8, 9 and 10.

Continuing Detention Order

241. It is a fair observation that Section 5B of the *Crimes (High Risk Offenders) Act 2006* (NSW) largely mirrors Section 20 of the *Terrorism (High Risk Offenders) Act 2017* in that they both provide for the imposition of extended supervision orders. However, there is a stark contrast between how the two statutes outline circumstances in which a continuing detention order may be imposed.

242. The later provide an obstacle which must be overcome before a particular offender can be subject to a continuing detention order. This limitation is furnished by s 34(2) of the *Terrorism (High Risk Offenders) Act 2017* which provides:

(2) However, the Supreme Court must not make a continuing detention

order in respect of a supervised offender who is under an extended supervision order or an interim supervision order that has not been suspended (the *existing supervision order*) unless:

(a) the offender has been found guilty of an offence under section 30 in respect of the existing supervision order, or

(b) the Supreme Court is satisfied that the offender poses an unacceptable risk of committing a serious terrorism offence if a continuing detention order is not made because of altered circumstances since the making of the existing supervision order.

CRIMINAL RECORDS

243. Clients will also be assisted by advice on practically what certain sentencing outcomes will mean in terms of how long they will remain “on their record” and for what purposes.

244. For the purpose of future criminal proceedings a court outcome will generally always remain “on a client’s record” in the sense that a future court will be told what occurred.

245. One important exception however is found in section 13 of the *Children (Criminal Proceedings Act) 1987* (NSW) which states:

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 firstmentioned 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.

246. The future relevance of a criminal record for a range of other purposes however is governed by the *Criminal Records Act 1991* (NSW).

247. The Act is complex and a full examination of it beyond the scope of this paper, but some key provisions include:

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 *means the following offences:*

(a) the offences under sections 61B–61F, 65A–66D, 66F, 73, 74, 78A, 78B, 78H, 78I, 78K, 78L, 78N, 78O, 78Q, 79, 80, 91A, 91B and 91D–91G of the Crimes Act 1900,

(b) from the date of commencement of Schedule 1 (3) to the Crimes (Amendment) Act 1989, the offences under sections 61I–61P of the Crimes Act 1900,

(c) from the date of commencement of Schedule 1 (6) to the Crimes (Amendment) Act 1989, the offence under section 80A of the Crimes Act 1900,

(d) the offence under section 5 of the Summary Offences Act 1988,

(e) an offence (such as an offence under section 37 (2) or 112 of the Crimes Act 1900) which includes the commission of, or an intention to commit, an offence referred to in paragraph (a), (b), (c) or (d),

(f) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b), (c), (d) or (e),

(g) an offence committed:

(i) before the date of commencement of this section against a law of New South Wales or a law of a place outside New South Wales, or

(ii) after the date of commencement of this section against a law of a place outside New South Wales,

which constituted or constitutes an offence of a similar nature to an offence referred to in paragraph (a), (b), (c), (d), (e) or (f),

(h) an offence prescribed by the regulations as a sexual offence for the purposes of this section.

(5) A reference in this section to a prison sentence means, in the case of an aggregate sentence of imprisonment (within the meaning of the Crimes (Sentencing Procedure) Act 1999) imposed in respect of more than 1 offence, each prison sentence that would have been imposed for each offence had separate sentences been imposed instead of an aggregate sentence, as recorded by the court that imposed the sentence.

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.

THE DOMESTIC VIOLENCE REGISTER

What is the Domestic Violence Disclosure Scheme?

248. The *Domestic Violence Disclosure Scheme (DVDs) Evaluation and Crisis Assistance Service (CAS) Review Summary* (**DVDs Review Summary**) describes DVDs as:

“a mechanism whereby people with concerns regarding their relationship can request a disclosure from the NSW Police Force about whether their partner (or former partner) has a prior conviction for domestic violence or other relevant criminal offences. It also allows family members, friends and professionals with an on-going relationship with a person they believe to be at risk of domestic violence to apply under the scheme. The Crisis Assistance Service pilot was designed to provide out of hours service support to victims of domestic and family violence in incidents reported to the police.”⁸²

What is the current legal status of DVDs in NSW?

249. DVDs were initially incorporated into the legal architecture by way of Directions made under Section 41 of the *Privacy and Personal Information Protection Act 1998* (NSW) (**Privacy Act**) and Section 62 of the *Health Records and Information Privacy Act 2002* (NSW).⁸³

250. The Direction which allowed domestic-violence related information to be disclosed under the Privacy Act no longer remains in force. This is because the duration of the Direction was to expire on:

‘either 11 July 2019, the end of the Domestic Violence Disclosure Scheme Pilot or the provision and commence of the required authorities and exemption by other means, whichever is the earlier’⁸⁴

⁸² Page 4: https://www.women.nsw.gov.au/_data/assets/pdf_file/0004/596704/Domestic-Violence-Disclosure-Scheme-Evaluation-and-Crisis-Assistance-Scheme-Review-Summary.pdf

⁸³ Page 9: https://www.women.nsw.gov.au/_data/assets/pdf_file/0004/596704/Domestic-Violence-Disclosure-Scheme-Evaluation-and-Crisis-Assistance-Scheme-Review-Summary.pdf

⁸⁴ <https://www.ipc.nsw.gov.au/privacy/nsw-privacy-laws/public-interest-directions#:~:text=Under%20section%2041%20of%20the,comply%20with%20an%20Information%20Protection;>
Page 6 of https://www.ipc.nsw.gov.au/sites/default/files/file_manager/PID%20-%20Section%2041%20PIIP%20-%20Domestic%20violence%20disclosure%20scheme%20pilot.pdf

251. According to Women NSW, the Domestic Violence Disclosure Scheme Pilot has now concluded, meaning that there is no legal authority which permits the disclosure of information envisioned under the DVDs.⁸⁵

252. The Direction which allowed disclosure of same under the HRIP Act has also expired.⁸⁶

Then why is it still relevant?

253. The fact that the operation of the relevant Directions has ended provides not indication as to whether future Directions will be issued.

254. Even if that is not the case, clients should still be aware of the possibility that information related to their domestic-violence offences could be disclosed in the future.

Type of information that could be disclosed

255. Page 10 of the DVDs Review Summary provides a table listing the types of offences that could be disclosed under the DVDs.

Offences that can be disclosed

Personal violence offences committed in a domestic relationship (as defined by the NSW Crimes (Domestic and Personal Violence) Act 2007. These include murder, manslaughter, physical and sexual assault, stalking, intimidation and property damage

Certain specific personal violence offences committed outside of a domestic relationship – such as sexual assault, child abuse offences, and murder

Breaches of Apprehended Domestic Violence Orders (ADVOs)

Offences that cannot be disclosed

Offences from jurisdictions outside NSW

Offences where no conviction was recorded

Convictions that have become 'spent'⁵

Juvenile convictions

Apprehended Domestic Violence Orders

Any other offence not listed in the relevant offence list

⁸⁵ <https://www.women.nsw.gov.au/programs/domestic-violence-disclosure-scheme>

⁸⁶ Page 7: https://www.ipc.nsw.gov.au/sites/default/files/file_manager/PID%20-%20Section%2062%20HRIP%20-%20Domestic%20violence%20disclosure%20scheme%20pilot.pdf

COMPANY DIRECTORSHIPS

256. Certain convictions will render a person ineligible to serve as a company director. Section 206B of the *Corporations Act 2001* (Cth) provides:

(1) A person becomes disqualified from managing corporations if the person:

(a) is convicted on indictment of an offence that:

(i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or

(ii) concerns an act that has the capacity to affect significantly the corporation's financial standing; or

(b) is convicted of an offence that:

(i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; or

(ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or

(c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.

The offences covered by paragraph (a) and subparagraph (b)(ii) include offences against the law of a foreign country.

CONCLUSION

257. The authors are happy to be contacted with feedback, comments, questions and corrections.

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20 August 2020