

Is It Gone... or Just Waiting Patiently in a Database?

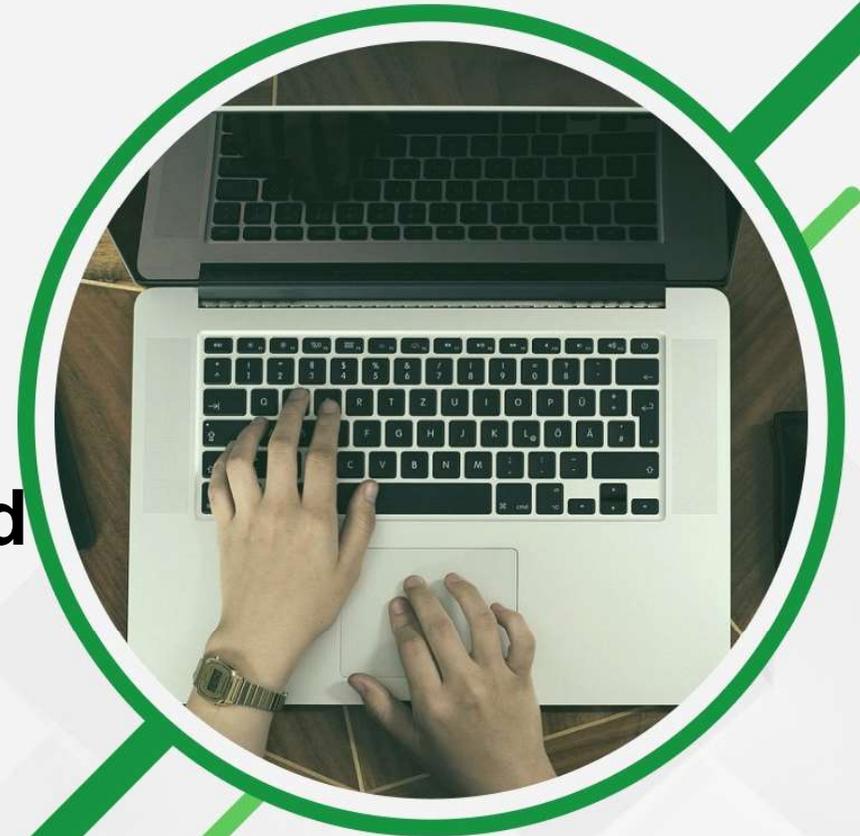
Criminal history checks and recording of convictions explained

Navigating Sentencing Legislation

Understanding spent convictions

Assisting clients with past convictions

By Guglielmo Plain



Acknowledgement of Country

We acknowledge that we meet on the traditional lands of the Kurna people and pay our respects to their Elders past, present and emerging.

We also recognize the Traditional Owners of all the lands represented by those joining us from across the state today.

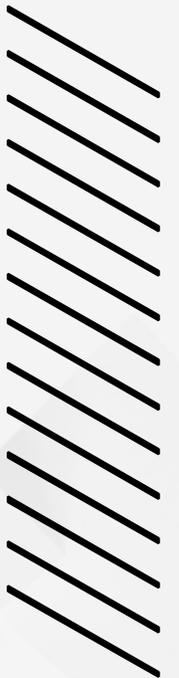
We acknowledge their deep and enduring connection to Country and the Law.



Why This Hour Matters:

Bio: Youth criminal defence lawyer, working Uniting Communities Law Centre, have done a fair few matters relating to spent convictions

Purpose of today: Practical tips for criminal defence and dealing with criminal history



Contents

01. What is the point of convictions

Why record a conviction? What are the implications for public safety and criminal punishment.

02. Recording a Criminal Conviction in court

Examining conviction versus spent convictions under Sentencing Act and Spent Convictions Act, balancing public safety with defendant rights

03. Work Checks

What are the different types of work checks and what information is accessed in the process?

Part 1: What is the point of convictions

Understanding the principles

Why record a conviction

- **Community protection**
- **Punishment**
- **Meant to assess if you are a fit and proper person for a given job**
- **Nature and seriousness of offending**
- **When does it go too far or not far enough?**

What needs to be balanced?

- **Extent of punishment**
- **Likelihood of reoffending**
- **Age of the offender**
- **Offences that as a society we find particularly problematic**
- **Nature of the job that will be engaged in**
- **When has a person changed their life sufficiently**
- **Allowing and fostering rehabilitation**
- **Are we creating a class of citizens that are doomed to be on Centrelink**

Part 2: Recording a Criminal Conviction in court

Understanding how convictions are recorded and spent

Starting point – Sentencing Act 2017 s23

Is there a defence (NO)

Plead guilty or found guilty (YES)

Seriousness of offence (LOW)

Should s23 be considered?
consider 23(1)(b) and 2(d)

23—Discharge without penalty

- (1) If a court finds a person guilty of an offence but finds the offence so trifling that it is inappropriate to impose a penalty, the court may—
 - (a) without recording a conviction—dismiss the charge; or
 - (b) on recording a conviction—discharge the defendant without penalty.
- (2) If a court finds a person guilty of an offence and—
 - (a) the defendant has spent time in custody in respect of the offence; and
 - (b) the court is satisfied there is good reason not to impose any further penalty on the defendant,the court may—
 - (c) without recording a conviction—dismiss the charge; or
 - (d) on recording a conviction—discharge the defendant without further penalty.
- (3) A court may exercise the powers conferred by this section despite any minimum penalty fixed by an Act or statutory instrument.

If s23 does not apply consider s24

Sentencing Act 2017 s24

- **24—Imposition of penalty without conviction**
- If a [court](#) finds a person guilty of an offence for which it proposes to impose a fine, a [sentence](#) of community service, or both, and the [court](#) is of the opinion—
 - (a) that the defendant is unlikely to commit such an offence again; and
 - (b) that, having regard to—
 - (i) the character, antecedents, age, or physical or mental condition, of the defendant; or
 - (ii) the fact that the offence was trifling; or
 - (iii) any other extenuating circumstances,
- good reason exists for not recording a conviction,
- the [court](#) may impose the penalty without recording a conviction.

Magistrate Decision Factors – Summary



Positive Weight Factors

- **First-time offender status**
- **Minor offense**
- **Genuine remorse**
- **Strong rehabilitation prospects**
- **Younger age**
- **Mental health considerations**
- **Current or future employment requiring clearance**



Negative Weight Factors

- **Serious offense committed**
- **Prior criminal history**
- **Public safety concerns**
- **Victim impact severity**
- **Administrative penalties ie driving offences**

The Two Paths



Conviction Recorded

- **Formal criminal record registered and discoverable with police and other checks.**
- **Can affect employment and travel.**
- **Full disclosure required in many legal and administrative settings.**
- **Long-term consequences flow into civil rights and licensing eligibility.**
- **Usually becomes a spent conviction after 10 years**



No Conviction Recorded

- **Becomes a “Spent Conviction” immediately**
- **Carries more limited public disclosure**
- **May not require disclosure depending on nature of job and questions asked**
- **Usually, no need to declare for travel**

Spent Convictions Act 2009

Governs the operation of “spent convictions”

What is a “Spent Conviction”

- **A no conviction recorded**
- **Family Conference or Formal Caution ordered by court**
- **A conviction recorded but**
 - **10 years have passed, for adult offences**
 - **5 years have passed for youth offences**
 - **Unless convicted as an adult**
- **Certain designated sexual and public decency offences (mostly no longer offences)**

Not all offences can be spent

- **Adult convictions with 12m+ jail**
- **Youth offences with 24m + jail**
- **Sexual offences that are not “designated sex related offences”**

Is a “Spent Conviction” gone?

- Kinda... sort of... but not really.
- Spent convictions must not be disclosed there are penalties... bla bla
- BUT Division 2 Exclusions as sets out Schedule 1 Exemptions (s1-9)
 - Justice Agencies
 - Commonwealth Agencies (AFP, ASIO, AUSTRAC etc)
 - Judicial Authorities
 - Parole Board
 - Judicial and associated officers
 - Care of Children
 - Care of Vulnerable People
 - Activities Associated with a character test
 - Firefighters, police and correctional services

Part 3: Work Checks

What are the different types of work checks

Let's zoom in on these

- **Care of Children**
- **Care of Vulnerable People**
- **Activities Associated with a character test**

Types of work checks

- **Standard Polic Check**
- **Working with Vulnerable person-related employment checks (WWVPC)/Activities associated with character tests (AAWCT)**
- **Working with Children Check (WWCC)**
- **NDIS Worker Check (NDISWC)**

- **Other checks eg**
 - **Police officer, firefighters, corrections officers**
 - **Working for Commonwealth including Military, ASIO etc**

Standard Police Check

- Check done through SAPOL, ANCC or other similar agencies
- Unspent convictions shown
- For medium risk jobs ie: office jobs, retail
- Note: new offences may reset the 10-year timer

WWVPC and AAWCT

- Check through SAPOL, ANCC or other similar agencies
- Unspent Convictions and Spent Convictions shown
- Purpose to work with older people, or people with disabilities
- Licensing purposes and jobs requiring high level of character
- Usually, nothing can be done about Unspent Convictions
- Spent Convictions Exemptions apply to Magistrates Court
 - Form 1Ye – Originating Application - Spent Convictions Act - Exemption Order
 - Form 7e – Affidavit
- Address change in life circumstances and circumstances relating to offending at time of offence

WWCC

- **Application done through DHS**
- **Factors considered - Pretty much anything!**
 - Un/spent convictions
 - Convictions Withdrawn
 - IOs
 - DCP investigations
 - SAPOL investigations
 - disciplinary investigations
 - misconduct etc
- **Factors balanced against likely risk to children not on any balance of probability of event having occurred. No regard for impact on applicant**
 - Example of cases - Tennis Coach and Fencing Contractor
- **If unsuccessful – internal appeal process → SACAT → Supreme Court**

WWCC Internal Appeal process

- **Review the DHS alleged events set out in rejection letter**
 - May need to give client the hard truth
- **Get instructions on each alleged event and address it with client**
- **Familiarise yourself with “Working with Children Check Guidelines”**
 - https://www.sa.gov.au/_data/assets/pdf_file/0004/812515/WWCC-Guidelines-July-2024.pdf
- **Balance each alleged event against Table 1 and Table 2 and other relevant factors**
- **Address factors in letter to DHS within appeal time frame**

NDISWC and Internal Appeal process

- Operates very similar to WWCC
- Review the DHS alleged events set out in rejection letter
 - May need to give client the hard truth
- Get instructions on each alleged event and address it with client
- Familiarise yourself with “NDIS Worker Check Guidelines”
 - https://www.sa.gov.au/data/assets/pdf_file/0003/812514/NDIS-Worker-Check-Guidelines.pdf
- Balance each alleged event against Table 1 and Table 2 and other relevant factors
- Address factors in letter to DHS within appeal time frame

Other checks

- Discretionary to agency and assessment of risk profile
- Strays into employment law

Activity! – Model Criminal –Mr. Spikey Plea

- **Pair up or small group**
- **Look at the criminal record provided and consider the following**
- **Assuming no further convictions when will all of Spiky's matters become spent**
- **Which convictions will appear on WWVPC?**
- **What will be considered for a WWCC?**
- **Is it likely that Spiky will be able to work with Children?**
- **Bonus Question! Spiky now wants to work for ASIO what might they consider in his application?**



Questions?

Thank you