

# CHILDREN'S CRIMINAL RECORDS AND CONVICTIONS

Legal Aid, Children's Legal Service Conference 2010

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## **INTRODUCTION**

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

Convictions and criminal records affect future court appearances, employment, opportunities for volunteer work, obtaining certain licenses, visa applications, civic duties/rights, insurance and credit, inter alia.

Often, these consequences are not even noticed and/or understood until well after a child's court proceedings are finished. It is thus incumbent on practitioners to be aware of the laws and policies surrounding criminal records and convictions, and to incorporate this into the advice we give our clients and the submissions that are made to court.

It is increasingly important to understand children's convictions and records because their access and use is becoming more widespread. In 2008-2009 CrimTrac (the national criminal record check agency) conducted 2,500, 000 criminal record checks. The agency is currently expanding its capacity to allow for 6 million checks<sup>1</sup>.

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

The main areas that this paper will address include:

- 1) what is a conviction, when can children be convicted and how can children's convictions be used in courts
- 2) the Criminal Records Act and spent convictions
- 3) Young Offenders Act records and AVOs
- 4) The Working with Children Check
- 5) The National Criminal History Record Check
- 6) Discrimination in employment

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<sup>1</sup> CrimTrac *Annual report* 2008-2009, 47, 50 <[www.crimtrac.gov.au/documents/Crimtrac\\_0809\\_full.pdf](http://www.crimtrac.gov.au/documents/Crimtrac_0809_full.pdf)> at 11 March 2010.

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

## 7) Other effects of a criminal record

# **1. CONVICTIONS**

If a person pleads guilty or is found guilty then the court may convict the person of the crime<sup>3</sup>. The conviction may come upon the finding of guilt by the court and/or the subsequent sentence<sup>4</sup>. However, there are several ways that a child offender may be diverted from a sentence and thus, arguably, avoid a “conviction” completely. For example, a child is arguably not convicted if they are dealt with under the:

- Young Offenders Act 1997 (YOA)  
the child does not need to plead guilty/be found guilty. They only need to admit the offence: ss19, 36. See below for a further discussion of the Young Offenders Act.
- Mental Health (Forensic Provisions) Act 1990  
ss 32 and 33 may be granted at any stage of proceedings.
- Children (Protection and Parental Responsibility) Act 1997  
if the court finds the child guilty of an offence it may release the child and/or parent on condition that they give an undertaking<sup>5</sup>.
- Youth Conduct Orders  
if a child has pleaded not guilty and substantially completed a Youth Conduct Order the court may order that the charge for the offence be dismissed: s 48R(2) of the Children (Criminal Proceedings) Act 1987/

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

## **1.1) Section 14, Children (Criminal Proceedings) Act 1987**

### **14 Recording of conviction**

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

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<sup>3</sup> For example, for summary matters, see Criminal Procedure Act 1986, ss 193 and 202.

<sup>4</sup> See below for a further discussion on the meaning of conviction and the timing of a conviction.

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

Section 14 of the Children (Criminal Proceedings) Act 1987 (CCPA) deals with the recording of convictions for children in the Children's Court and in other jurisdictions.

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

### ***s 14 (1) – When is the relevant time to assess the child's age?***

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

A literal reading of the section would indicate that the relevant time is the time that the court is considering whether to record a conviction: ie usually the sentence date. If the child is 16 or over at the time of the finding of guilt/sentencing then s 14(1)(b) applies. This interpretation is supported by the fact that the section reads "a child who *is* of or above the age of 16 years". However, this interpretation could lead to situations where children are not charged till many years after the offence or are not sentenced until many years after the offence, due to court delays. They may have been under 16 years old at the time of the offence but (through no fault of their own) are 16 years old at the time of sentencing and suffer the possibility of a conviction.

The alternative, and preferable, interpretation is that the relevant time to assess the child's age is the time of the alleged offence. There are a number of arguments that would support this interpretation:

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

In my experience, most Magistrates and Judges have taken the view that the relevant age is the child's age at the time of the offence. Nevertheless, there may still be some difficulties with this interpretation, particularly where there is no specificity in the indictment as to the date of the offence. For example, many sexual offences often have a wide date range.

### ***s 14(1)(b)- to convict or not to convict***

The exercise of the s 14(1)(b) discretion may be intimately tied up with sentencing proceedings. Whether the court records a conviction or not may depend on the material presented at sentencing and also may impact upon the sentence. A court that is fully

aware of the consequences of a conviction for a young person may choose to not record a conviction or, if it nevertheless records a conviction, it may adjust its sentence.

The paramount principle of rehabilitation in sentencing children (*GDP* and s 6 CCPA) favours sentencing without conviction, given that convictions impede rehabilitation. However, some magistrates may not necessarily accept this fact at face value, without evidence.

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

I could not locate much NSW case law about the s 14 discretion (except *Appeal of VPS* – see below) but Queensland legislation and case law may provide some guidance.

In *Appeal of VPS [2007] NSWDC 320*, the adult appellant received a custodial term for traffic matters from the Local Court. He was assessed as unsuitable for home detention on the basis that he had been convicted of carnal knowledge in 1970 when he was a child: s 77(1)(a)(i) Crimes (Sentencing Procedure) Act 1995. However, the District Court questioned whether he had been “convicted”. Goldring DCJ noted:

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

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

19. In 1970, children and young persons were dealt with under the Child Welfare Act 1939. Section 128 of that Act prohibited the use of the word ‘conviction’ in relation to children and young persons, but, if necessary, required the use of the expression ‘a finding of guilt’. Even under that legislation, it was not necessary, or automatic, for a Children’s Court to record a conviction, even if there was a finding of guilt.

20 In *Griffiths v Queen* (1977) 137 CLR 293, three members of the High Court, Barwick CJ, Jacobs and Aickin JJ considered the meaning of the expression ‘conviction’. It is clear that, that expression has a number of different meanings. In the context of sentencing for criminal offences, where it is not contrary to the purpose of the Act in question, the meaning most favourable to the offender should be the meaning adopted by the Court. For some purposes, a finding of guilt of an offence, or more particularly, an admission of guilt of an offence, may amount to a conviction, but does not necessarily do so.

21 In the circumstances of this case, I do not know whether the appellant pleaded guilty, or not guilty, to the offence of carnal knowledge in 1970. This could be highly relevant. If he has not been formally convicted, he may have no conviction and if so, it would be wrong in law for the Department of Corrective Services to conclude that he had been convicted of an offence, and determine that he was, therefore, unsuitable for home detention which, in fact, it has done.

In Queensland, *R v Sanders* [2007] QCA 165 involved an appeal against the recording of a conviction for a 17 year offender for assault. The Penalties and Sentencing Act 1992 (Qld) gave a discretion on whether to record a conviction. Section 12(2) provides:

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

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

The Court of Appeal cited a number of preceding Queensland Court of Appeal cases about the interpretation of s 12:

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

“Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s 12(2) of the Act say so and then there follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight.”

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

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

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

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

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

[16] Mackenzie J stated at [74]:

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

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

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

...

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

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

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

## **Youth Drug and Alcohol Court**

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

The YDAC also often deals with breaches of bonds/probation/community service order. When re-sentencing the child the YDAC has recorded no convictions, even where the Children’s Court that initially imposed the bond/probation/CSO recorded a conviction.

The YDAC (and indeed the Children's Court proper) can do this because s 41(4) CCPA and s 21A Children (Community Service Orders) Act allows the court dealing with revoked bonds/probations/CSOs to deal with the child "in any manner in which the person could have been dealt with for that offence by the Children's Court", ie including decisions under s 14.

## **s 14(2) – indictable offences**

### **Section 14**

- (2) Subsection (1) does not limit any power of a court to proceed to, or record such a finding as, a conviction in respect of a child who is charged with an indictable offence that is not disposed of summarily.

Section 14(2) applies irrespective of s 14(1). This subsection deals with the recording of convictions by superior courts (most often the District Court). If the offence is a serious children's indictable offence, it is dealt with according to law (s 17 CCPA). Other indictable offences can be dealt with either according to law or in accordance with Div 4 Pt 3 CCPA - ie under s 33 CCPA: s 18(1) CCPA. If the District Court deals with a child according to law it may convict, even if the child is under 16 years old. However, if the District Court deals with the matter under the CCPA is it "disposing of the matter summarily" such that s 14(2) does not apply?

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

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

### **32 Application**

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

The term "summarily" is used but without definition.

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

### **18 Other indictable offences**

- (1) A person to whom this Division applies shall, in relation to an indictable offence other than a serious children's indictable offence, be dealt with:
- (a) according to law, or
  - (b) in accordance with Division 4 of Part 3.
- (1A) In determining whether a person is to be dealt with according to law or in accordance with Division 4 of Part 3, a court must have regard to the following matters:
- (a) the seriousness of the indictable offence concerned,
  - (b) the nature of the indictable offence concerned,
  - (c) the age and maturity of the person at the time of the offence and at the time of sentencing,
  - (d) the seriousness, nature and number of any prior offences committed by the person,
  - (e) such other matters as the court considers relevant.

- (2) For the purpose of dealing with a person in accordance with Division 4 of Part 3, a court shall have and may exercise the functions of the Children's Court under that Division in the same way as if:
  - (a) the court were the Children's Court, and
  - (b) the offence were an offence to which that Division applies.
- (3) If a court, in exercising the functions of the Children's Court under subsection (2), makes an order under section 33 that provides for a person to enter into a good behaviour bond or that releases a person on probation, the court may, on referral from the Children's Court under section 40 (1A), deal with the order in the same way as the Children's Court may deal with it under section 40.

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

## 1.2) The use of convictions in courts – s 15 CCPA

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

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

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

However, in any other jurisdiction – the Local Court, District Court, Supreme Court – s 15(1) applies whether the person is an adult or is still a child. The record will not be admissible in any criminal proceedings if the criteria in both s 15(1)(a) and (b) are met. With regards to s 15(1)(b) it is noted that the person must not have been subjected in the past 2 years to any judgment, sentence or order of a court whereby they are punished for any other offence. This would include s 10s and s 33(1)(a)s.

In *Tapueluelu v R* [2006] NSWCCA 113, the applicant was sentenced for 2003 and 2004 robbery offences. The District Court took into account his juvenile record. Subsequently, it was discovered that he had been 15 years old at the time of his 1995 offence and that thus, no conviction should have been recorded for that matter. The applicant had been sentenced for other 2003 offences (within the 2 year time period specified in s 15 CCPA).

He nevertheless argued that the 1995 offence should not be admissible as evidence because it was committed outside the 2 year date: ie that s 15 should be construed as excluding evidence of an offence where there was no conviction and that offence occurred within the 2 year time frame. This interpretation was rejected by the Court of Criminal Appeal; Simpson J (with Howie and Grove JJ concurring) stated (at [30]):

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

### **1.3) Use of “convictions” in other statutes – the meaning of conviction**

There are several statutes which refer to convictions for previous offences. Some offences require proof of prior convictions as an element of the offence, eg:

- Summary Offences Act, s 11G: loitering by convicted child sex offender
- Crimes Act, s 546A: consorting with convicted persons
- Crimes Act, s 115: being convicted offender armed with intent to commit indictable offence.

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

#### ***HA and SB v DPP [2003] NSWSC 347***

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

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

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

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

In *Maxwell*, the accused had been charged with murder but had pleaded guilty to manslaughter on the basis of diminished responsibility. The trial judge adjourned the

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

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

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

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

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

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

### **Form 1 offences**

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

### **Other cases**

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

As mentioned above, in *Appeal of VPS*, the decision that the applicant was not eligible for home detention because they had been convicted of a sexual offence as a child was found to be in error<sup>6</sup>.

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

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

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

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

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

## **2. CRIMINAL RECORDS ACT 1991**

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

### **2.1) Meaning of "conviction" in the Act**

#### **4 Definitions**

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<sup>6</sup> Nevertheless the court did not ultimately place the applicant on home detention but rather backdated his sentence.

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

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

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

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

Section 5 is a definition of "conviction" for the purposes of the CRA. Even if no conviction has been recorded (eg under s 14(1) CCPA), a finding that an offence has been proved or that a person is guilty of an offence still constitutes a conviction for the purposes of the Act. Thus, for example, a child commits an offence (Offence A) when they are 14 years old and then commits another offence (Offence B) when 16 years old. Even if the Children's Court exercised its discretion to not record a conviction for Offence B, the offence would still constitute a conviction under the CRA to break the 3 year crime free period that is necessary for Offence A to be spent: see below for a discussion of spent convictions.

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

s 33

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

Only a Children's Court s 33(1)(a)(i) is not a conviction for the purposes of the Act.

I am uncertain as to what effect s 5(c) CRA has and my inquiries with the NSW Police Criminal Records Section have not provided clarification.

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

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

Section 5(c) suggests that a s 33(1)(a)(i) is never a “conviction” for which the spent conviction provisions of the CRA applies. Yet, s 8(3) deals with when an order under s 33(1)(a)(i) is spent. Specifically, s 8(3) deals with when an order under s 33(1)(a)(i) that involves the administration of a caution is spent<sup>7</sup>.

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

## 2.2) Spent convictions

### ***s 8 – when is a conviction spent***

#### **8 When is a conviction spent?**

- (1) A conviction is spent on completion of the relevant crime-free period, except as provided by this section.
- (2) A finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction is spent immediately after the finding is made.
- (3) An order of the Children’s Court dismissing a charge and administering a caution is spent immediately after the caution is administered.
- (4) A finding that an offence has been proved, or that a person is guilty of an offence, and:
  - (a) the discharging of, or the making of an order releasing, the offender conditionally on entering into a good behaviour bond for a specified period, on participating in an intervention program or on other conditions determined by the court, or
  - (b) the releasing of the offender on probation on such conditions as the court may determine, for such period of time as it thinks fit,
  - (a) is spent on satisfactory completion of the period or satisfactory compliance with the program (including any intervention plan arising out of the program) or conditions, as the case may require.
- (5) A conviction in respect of an offence of a kind which has ceased, by operation of law, to be an offence is spent immediately the offence ceased to be an offence, if the offence is prescribed by the regulations to be an offence to which this subsection applies.
- (6) A conviction which is spent is not revived by a subsequent conviction.
- (7) A reference in subsection (4) (a) (as substituted by the Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002 ) to a good behaviour bond includes a reference to a recognizance to be of good behaviour made before the commencement of the Crimes (Sentencing Procedure) Act 1999 .

#### **s 8(1)**

Sections 9 and 10 set out the relevant crime free periods but both sections are subject to the provisions in s 8.

#### **s 8(2)**

Where someone gets a s 10 Crimes (Sentencing Procedure) Act 1997 or where no conviction is recorded pursuant to s 14 CCPA, the “conviction” is spent immediately.

#### **s 8(3) – s 33(1)(a)(i) CCPA**

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<sup>7</sup> The legislation is poorly drafted. The section should be referring to when the conviction is spent as opposed to when the order is spent. Also, it is silent on what happens when the court deals with the matter under s 33(1)(a)(i) without administering a caution.

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

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

This includes s 10(1)(b) and s 33(1)(a)(ii) bonds.

Despite s 10(1)(b) bonds being imposed “without proceeding to conviction”, it is not spent immediately - s 8(4) CRA “overrides” s 8(2) CRA<sup>8</sup>. The CRS will not consider the s 10(1)(b) or s 33(1)(a)(ii) bond spent until it has expired.

### **s 10- crime free period for Children’s Court convictions**

#### **10 What is the crime-free period for orders of the Children’s Court?**

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

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

#### **Does the crime free period apply for bonds/probations?**

Section 10 CRA states that the 3 year crime free period applies to s 33 orders of the Children’s Court other than an order referred to in s 8(2) and (3) CRA: ie a finding of guilt without proceeding to conviction and a s 33(1)(a)(i) caution.

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

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

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

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<sup>8</sup> This issue doesn’t arise with s 33(1)(a)(ii) bonds. Even though they were meant to be the children’s equivalent of s 10(1)(b) bonds, they are not given “without proceeding to conviction”.

### ***The three year crime free period***

The crime free period starts with the making of s 33 order. It is *any* three year period after the sentence which satisfies the three requirements in s 10(1)(a)-(c):

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

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

#### **s 10(3)(a) - Not be subject to control order**

If the child is given a control order then the three year period does not start until the end of that control order<sup>9</sup>.

#### **s 10(3)(b) - Not convicted of offence punishable by imprisonment**

The crime free period is broken if a person is convicted for an offence punishable by imprisonment, whether the court imposed a conviction under s 14 or not. The s 5 CRA definition of conviction applies. It would appear that the only exception is where the person receives a s 33(1)(a)(i).

It would seem that the legislature intended for the crime free period to be broken if the child committed subsequent offences. However, on a literal reading of s 10, the crime free period could also be broken even by a subsequent conviction for an offence that predates the offence for which the crime free period relates.

#### **s 10(3)(c) - Not been in prison because of conviction for offence and not been unlawfully at large**

Section 10(3)(c) refers to sentences of imprisonment (whether given to a child by a District Court sentencing according to law or whether a subsequent adult imprisonment). It does not include a control order and does not include being on remand. Again, they could be for offences which predated the crime free period.

### ***s 9 - crime free period for sentences from courts other than the Children's Court***

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

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

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<sup>9</sup> Note: not just the end of the non parole period.

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

## **s 11 – traffic offences**

### **11 How are traffic offences to be dealt with?**

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

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

## **s 12 – consequence of spent convictions**

### **12 What are the consequences of a conviction becoming spent?**

If a conviction of a person is spent:

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

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

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

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

However, spent convictions may be disclosed:

- by the CRU or law enforcement agencies to other law enforcement agencies or to a court in compliance with a court order (eg subpoena): s 13(2) and (4) CRA
- by an archive or library to the public
- to the Commission for Children and Young Persons.

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

Section 12 does not apply to proceedings before a court and does not affect s 15 CCPA: s 16 CRA. For example, a court can still consider spent convictions when dealing with bail applications<sup>10</sup>, sentencing, evidence of character etc.

## ***Employment which will consider spent convictions***

### **15 Employment in certain occupations**

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

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

*s 15 CRA, s 68 YOA*

- Judge/magistrate
- Justice of the peace
- Police office
- Corrective Services staff

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<sup>10</sup> In particular, it is noted that s 12 does not apply in relation to a conviction for a serious personal violence offence for the purposes of applying s 9D Bail Act: Criminal Records Regulations 2004, reg 12.

- Teacher
- Teachers aide
- Provider of child care services
- Child related employment
- Fire fighting or prevention can consider convictions for arson (or attempted arson).

*Criminal Records Regulations, Regs 6-11*

- employment with the Office of the Director of Public Prosecutions
- ICAC
- Police Integrity Commission
- NSW Crime Commission
- Crown Prosecutors
- Admission as a legal practitioner

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

## **Convictions that cannot be spent – s 7**

### **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 by way of periodic detention or the detaining of a person under a control order.

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

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

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

Below is the list of defined sexual offences prescribed by s 7 and Reg 17.

<b>Legislation</b>	<b>Offence</b>
<i>Crimes Act</i> 61B-61F	Repealed
61I	sexual assault
61J	aggravated sexual assault

61JA	aggravated sexual assault in company
61K	Assault with intent to have sexual intercourse
61L	Indecent assault
61M	Aggravated indecent assault
61N	Act of indecency
61O	Aggravated act of indecency
61P	Attempt to commit offence under ss 61I-61O
65A-66	Repealed
66A	Sexual intercourse with child under 10
66B	Attempting, or assaulting with intent to have sexual intercourse with child under 10
66C	Sexual intercourse – child 10-16 yo
66D	Attempting or assault with intent to have sexual intercourse with child 10-16 yo
66EA	Persistent sexual abuse of a child
66EB	Procuring or grooming a child under 16 for unlawful sexual activity
66F	Sexual intercourse – intellectual disability
73	Sexual intercourse with child 16-18 under special care
74	Repealed
78A and 78B	Incest and attempts
78H, 78I, 78K, 78L, 78N, 78O, 78Q	Repealed offences re homosexual intercourse
79 and 80	Bestiality and attempts
80A	Sexual assault by forced self manipulation
80D	Causing sexual servitude
80E	Conduct of business involving sexual servitude
91A and 91B	Various forms of procuring for prostitution
91D-91F	Various forms of promoting, engaging in, benefiting from child prostitution
91G	Using child for child pornography
91H	Production, dissemination or possession of child pornography
578B	Repealed
578C(2A)	Publishing indecent article
<i>Summary Offences Act</i> 5	Obscene exposure
11G	Loitering by convicted child sexual offenders near premises frequented by children
21G	Repealed
21H	Repealed
	An offence which includes the commission of or intention to commit one of the above offences
	An attempt, conspiracy or incitement to commit one of the above offences

	Other offences of a similar nature in the circumstances specified in s 7(4)(g) CRA, or that is prescribed by the regulations
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### **Legislative reform**

The Spent Convictions Bill 2009 (Cth) plans to create uniform federal legislation for spent convictions. It proposes that an eligible juvenile offender is someone whose sentence was 24 months or less. These convictions would become spent after 5 years: s 3 definitions and s 7. The Bill also proposes the introduction of a “prescribed eligible offence” which allows for certain sex offences to be spent upon an order of the court: s 3 and s 9. Exclusions are set out in Schedule 2 and include the care of children (s 6) and vulnerable people (s 7).

The question of whether juvenile sexual offences should be spent was left for the States/Territories to consider and the NSW Legislative Council Standing Committee on Law and Justice is currently holding an “Inquiry into Spent Convictions and Sex Offenders”. Legal Aid and the Youth Justice Coalition made submissions.

### **3. CRIMES ACT 1900, s 579**

Where a person is convicted of an offence<sup>11</sup> and they are

- a) sentenced to a recognizance and
- b) a period of 15 years has passed since the recognizance was entered into, without:
  - i) a finding that there was a breach of any condition of the recognizance and
  - ii) the person being convicted<sup>12</sup> of an indictable offence or any other offence punishable by imprisonment.

the conviction or finding is to be “disregarded for all purposes whatsoever” and is “inadmissible in any criminal, civil or other legal proceedings as being no longer of any legal force or effect”.

### **4. LAWS THAT WAIVE THE SPENT CONVICTION PROVISIONS**

There are a host of other laws that waive the spent conviction provisions: ie spent convictions are taken into account<sup>13</sup>:

- **Casino Control Act 1992**: s 158 exempts applications for casino licences or licences for casino employees.
- **Security Industry Act 1997<sup>14</sup>**: the licence must not be granted if a person has been convicted in the past 10 years of a prescribed offence or found guilty (with no

<sup>11</sup> or the offence is found proved against them

<sup>12</sup> or the offence being proven against them.

<sup>13</sup> Privacy NSW, Office of the NSW Privacy Commission “What laws waive the spent conviction provisions” [www.lawlink.nsw.gov.au/lawlink/privacynsw/ii\\_pnsw.nsf/pages/PNGSW\\_04\\_crimrec5](http://www.lawlink.nsw.gov.au/lawlink/privacynsw/ii_pnsw.nsf/pages/PNGSW_04_crimrec5) at 4 March 2010.

conviction recorded) of a prescribed offence: s 16. In *Pearce v Commissioner of Police* [2000] NSWADT 99 an application for a licence was rejected on the grounds of a prior conviction in a Children's Court.

- **Firearms Act 1996:**

- s 11(5) and 29(3): A person is prohibited from getting a licence or permit if
  - Under 18 years old; or
  - has in the past 10 years been convicted of a prescribed offence or is subject to a final AVO (except if revoked); or
  - is the subject of a good behaviour bond for a prescribed offence; or
  - is subject to a firearms prohibition order

The prescribed offences include firearms, drugs, sexual offences, robbery, kidnapping, assaults etc<sup>15</sup>. Section 11(5A) gives the Commissioner of Police the ability to have regard to “any criminal intelligence report” of “other criminal information” when considering whether to issue a firearms licence.

- **Totalizator Act 1997:** s 109 waives spent conviction prohibitions for applicants for licences
- **Weapons Prohibition Act 1998:** s 9 waives spent conviction prohibitions for applicants for permits for prohibited weapons
- **Tow Truck Industry Act 1998:** s 96 waives spent conviction prohibitions for applicants and holders of tow truck driver certificates

## **5. YOUNG OFFENDERS ACT 1997**

### ***Not findings of guilt***

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

This may have particular importance for sexual offences. If sexual offences are dealt with under s 33 CCPA or according to law they will be disclosed on a criminal record, but if dealt with under the YOA they will not, except for certain jobs (see below). Note though, that several sexual offences are not eligible to be dealt with under YOA anyway: s 8 YOA.

Also a domestic/personal violence offence dealt with under the YOA does not lead to the automatic making of an AVO and the consequences of AVO records: see the section of AVOs below.

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<sup>14</sup> See The Shopfront Youth Legal Centre, *Getting a Security Licence*, 2009.

<sup>15</sup> The offences are prescribed by Firearms Regulation 2006, reg 5.

## **YOA Records**

YOA Records are kept on the COPS system. Record of all warnings are expunged when a child turns 21 years old: s 17 YOA. Records are to be kept of cautions (s 33 YOA) and should contain material prescribed by the Young Offenders Regulations 2004, reg 15. Records of conferences are to be kept (s 59 YOA) in accordance with Regulation 21.

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

## **s 68 – exceptional employment**

Section 68 YOA states that YOA dealings should not be disclosed and does not form part of a person's criminal history:

### **68 Interventions not to be disclosed as criminal history**

- (1) If a person has been the subject of a warning, caution or conference under this Act:
  - (a) the person is not required to disclose to any other person for any purpose information concerning the warning, caution or conference, and
  - (b) a question concerning the person's criminal history is taken not to refer to any such warning, caution or conference, and
  - (c) in the application to the person of a provision of an Act or statutory instrument, a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of any such warning, caution or conference.
- (2) In so far as a caution or conference is concerned, subsection (1) does not apply in relation to:
  - (a) an application by a person for appointment or employment as a judge, magistrate, justice of the peace, police officer, prison officer, teacher, teachers aide or a provider of child care services under Part 3 of the Children (Care and Protection) Act 1987 ,  
or
  - (b) an offence of arson or attempted arson if the person seeks to be appointed or employed in fire fighting or fire prevention, or
  - (c) proceedings before the Children's Court (including a decision concerning sentencing), or
  - (d) an application by a person for employment in child-related employment within the meaning of Part 7 of the Commission for Children and Young People Act 1998 .

However, YOA cautions and conferences may still be considered in applications for the jobs listed in s 68(2).

## **Use in court proceedings**

Section 66(2)(c) states that YOA cautions and conferences may be used in Children's Court proceedings. However, it does not refer to proceedings before other courts. Section 15(3) CCPA also restricts the use of dealings under the YOA with an exception only for the Children's Court.

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

- (3) Subsection (1) or (3) does not apply to any criminal proceedings before the Children's Court.
- (4) The fact that a person has been dealt with by a warning, caution or youth justice conference under the Young Offenders Act 1997 (being in respect of an alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to

guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence.

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

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

It is uncertain whether the legislature intended this interpretation. It leads to the ridiculous scenario where a child who might have an extensive YOA record is sentenced in the Children's Court and then appeals the sentence to the District Court but the District Court does not see the YOA record. Nevertheless, s 15(3) is quite clear and there are many DPP lawyers/DPP offices who follow it.

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

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

## **6. MENTAL HEALTH (FORENSIC PROVISIONS) ACT 1990**

If a child is dealt with under the Mental Health (Forensic Provisions) Act 1990 – eg ss 32, 33 or as a forensic patient, then they are not "convicted". Thus, matters dealt with under this Act may not constitute a criminal record under the Criminal Records Act. Section 32 and 33 applications may be made at any stage of proceedings so it may be more prudent and beneficial to make such applications before any potential guilty plea is entered. If the application is successful then there is no finding of guilt recorded at all.

## **7. APPREHENDED VIOLENCE ORDERS**<sup>16</sup>

An AVO is not a criminal matter and will not be part of a criminal record but nevertheless may affect employment and other matters (eg the obtaining of a firearms licence, security licence). Records of both police and private<sup>17</sup> AVOs are kept with the NSW Police AVO unit.

For example, if the Commissioner of Police is aware that a person has been charged with a domestic violence offence they must suspend a firearms licence: s 22 Firearms Act 1996. The licence is also suspended if an interim AVO is made: s 23. The licence is revoked if a final AVO is made: s 24. There are restrictions on the issue of a licence or permit if a person has been subject to a final AVO within the last 10 years: ss 11, 29. See *Ward v Commissioner of Police NSW* [2000] NSWADT 28.

Also, if the AVO's protected person is under 16 years old<sup>18</sup> a final AVO will appear on a working with children check (see below).

Of particular concern are sections 38, 39 and 40 of the Crimes (Domestic and Personal Violence) Act 2007.

Section 38(2) provides that where an AVO (whether final or interim) is made for the protection of an adult, the court must include as a protected person on the AVO any child (ie under 16 year old) who has a domestic relationship with the adult. The court may decline to do this if there are good reasons for not doing so but must give reasons for its decision: s 38(3). The fact that the inclusion of a child PINOP triggers a working with children check and the fact that the child PINOP would be covered under standard order 1) anyway, could constitute "good reasons".

Section 40(1) provides that when a person is charged with an offence that appears to the court to be a "serious offence" the court must make an interim AVO. It need not make the order if it is satisfied that it is not required, for example if an AVO has already been made: s 40(3). There is no other guidance as to what would satisfy the court that an order is not required. I suspect that the fact that an interim AVO may have adverse affects on the defendant's employment etc may not be relevant to whether it is required.

### **39 Apprehended violence order must be made on guilty plea or guilt finding for certain offences**

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<sup>16</sup> See also Debra Maher, *Practical Tips for Representing Children as Defendants in ADVO/AVO Applications in the Children's Court* for Legal Aid Commission, November 2003.

<sup>17</sup> Court registries send copies of the AVOs to the AVO unit so that they are aware of the AVOs in case there are allegations of breaches.

<sup>18</sup> A child is defined by the Crimes (Domestic and Personal Violence Act 2007, s 3 as a person under 16 years old.

- (1) If a person pleads guilty to, or is found guilty of, an offence against section 13 or a domestic violence offence (other than murder or manslaughter), the court hearing the proceedings must make an apprehended violence order for the protection of the person against whom the offence was committed whether or not an application for such an order had been made.
- (2) However, the court need not make an apprehended violence order if it is satisfied that it is not required (for example, because an apprehended violence order has already been made against the person).
- (3) A reference in this section to a court extends to the District Court when exercising jurisdiction apart from under section 91.

Under s 39, an AVO must be made if a person pleads guilty to or is found guilty of stalk/intimidate<sup>19</sup> or a domestic violence offence: see ss 11 and 4 for definitions of what are domestic violence offences. Again, the court need not make the AVO if it is satisfied that it is not required, for example if an AVO is already made.

The section does not require that the order be a final order. It is open for the court to make an interim AVO and/or consider that a final AVO is not required pursuant to s 39(2) because an interim AVO is already in place. For AVOs where the protected person is under 16 one option to avoid a working with children check would be to consider an interim order with the view to the order being dismissed after compliance with the interim order. Even if the interim AVO is not dismissed, but the PINOP has subsequently turned 16 years, it is arguable that a final AVO (with the PINOP no longer being a under “child”) will not appear on a working with children check: see s 33 Commission for Children and Young People Act 1998.

Also, if the child is dealt with under YOA, s 39 does not apply because the person has not “pleaded guilty or been found guilty of an offence”.

If an AVO is made, there are provisions for applications to vary or revoke the orders. Revoked AVOs will not appear on record checks. However, if one of the PINOPS is a child (at the time of the application) then applications to vary/revoke interim or final AVOs can only be made by a police officer (s 72(3)), except if the application is made after the AVO has expired: s 72(5). If the AVO has expired, the AVO defendant can apply to revoke it. A court can revoke an AVO after it’s expiry if satisfied that were the final order still in force it should be revoked: s 72(6). The “Note” attached to s 72(5) indicates that the purpose of the subsection is to deal with certain consequences that result from an AVO being made and includes the example of the Firearms Act.

The Firearms Act explicitly states that a revoked AVO should not be taken into account but other legislation (eg the working with children check) are not so specific. Nevertheless, the NSW Police Criminal Records Section indicated that they do not include revoked AVOs on their criminal records.

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<sup>19</sup> s 13

## **8. SEX OFFENDERS REGISTER**

The Child Protection (Offenders Registration) Act 2000 deals with the placing of children convicted of certain offences on the Sex Offenders Register. Section 3A defines a registrable person but a child is not a registrable person if they

- a) receive a s 10 or s 33(1)(a)<sup>20</sup>; or
- c) have committed only a *single* offence of certain offences (eg a single offence involving an act of indecency): s 3A(2).

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

If a child has committed two indecent assault on different days<sup>21</sup>, they will still be a registrable person even if:

- o They receive a s33(1)(a) for one of the offence but not the other; or
- o One of the offences is placed on a Form 1. The question is not whether they are “convicted” of the offences or given distinct sentences for the offences but whether they “committed” the offences<sup>22</sup>.

If a person is a registrable person, they are therefore a “prohibited person” under the Commission for Children and Young People Act 1998 and prohibited from child related employment (see below).

Even if a conviction is spent it does not affect the status of the offence as a registrable offence or the reporting requirements: s 21 C. As most sexual offences which would place a child on the register can never be spent, s 21C relates more to interstate offences which become spent.

## **9. WORKING WITH CHILDREN CHECK**<sup>23</sup>

The Commission for Children and Young People Act 1998 (CCYPA) governs working with children checks. The Act

- 1) prohibits certain persons from child related employment
- 2) provides for background checks by the Commission or approved employers.

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<sup>20</sup> Note – this would seem to include both s 33(1)(a)(i) and (ii).

<sup>21</sup> More than 24 hours apart.

<sup>22</sup> Also noteworthy is s 3(2):

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

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

<sup>23</sup> The Commission for Children and Young People’s website is very comprehensive and a good source of further information.

## ***Child related employment***

An employer provides child related employment if:

- 1) the nature of the work is “employment”. Employment includes volunteer work, self employment and working as a clergy/religious institution, undertaking practical training for education, inter alia: s 33 CCYPA.
- 2) the employment is child related. A child is defined as a person under 18 years old.
- 3) employees need to have direct unsupervised contact with children to do their job.

Section 33 CCYPA specifically lists various child related employments.

## ***Prohibited persons***

Section 33C makes it an offence for a “prohibited person” to:

- a) apply for, or otherwise attempt to obtain, child related employment, or
- b) undertake child related employment, or
- c) remain in child related employment<sup>24</sup>.

A “prohibited person” is:

- a) a person convicted of a serious sex offence, the murder of a child or a child related personal violence order, or
- b) a person who is a registrable person within the meaning of the Child Protection (Offenders Registration) Act 2000<sup>25</sup>: s 33B(1) CCYPA.

Note that a conviction includes a “finding that an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction”: s 33 CCYPA

Serious sex offences and child related personal violence offence are defined by s 33B CCYPA

Not only does the act prohibit the person from not applying for/remaining in child related employment it also imposes prohibits employers from employing or continuing employment of such persons: s 33E CCYPA

It further obliges employers to:

- Require the person to disclose whether they are a prohibited person: s 33D(a) CCYPA; and
- do a background check: s 37 CCYPA.

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<sup>24</sup> A person is not criminally responsible if they were not aware at the time that the employment was a child related employment: s33C(2).

<sup>25</sup> See above.

## Review of prohibition

A prohibited person may apply to the Commission for a review and a declaration that the Division does not apply for a specified offence because the person no longer poses a risk to the safety of children; s 33 H CCYPA. Applications may also be made to the Industrial Relations Commission<sup>26</sup> and the Administrative Decisions Tribunal: s 33I CCYPA<sup>27</sup>.

The following matters are considered:

- (a) the seriousness of the offences with respect to which the person is a prohibited person,
- (b) the period of time since those offences were committed,
- (c) the age of the person at the time those offences were committed,
- (d) the age of each victim of the offences at the time they were committed,
- (e) the difference in age between the prohibited person and each such victim,
- (f) whether the person knew, or could reasonably have known, that the victim was a child,
- (g) the prohibited person's present age,
- (h) the seriousness of the prohibited person's total criminal record,
- (i) such other matters as the Commission or tribunal considers relevant: s 33J CCYPA.

There are a numerous cases, many involving adults applying for, or dismissed from work, due to offences committed years ago when they were children:

- *L' and The Commission for Children and Young People and anor* [2008] NSWIRComm 195  
L was a 55 yr old man who had committed acts of indecent assault against his 4 sisters when he was 15 ½ years old. He subsequently worked 35 years as a primary school teaching and had good character references. The IRC was satisfied that he did not pose a risk and removed the prohibition on child related employment.
- See also *Commission for Children and Young People v A* [2003] NSWIRComm 6, *G v J & H* [2001] NSWIRComm 69
- For an example of a decision of the ADT, see *ZM v Commission for Children and Young People* [2007] NSWADT 148.

## Background checks

### 34 Nature of background checking

For the purposes of this Division, "background checking" is any or all of the following procedures with respect to a person who is employed or who has applied to be employed in child-related employment:

- (a) a check for any relevant criminal record of the person, for any relevant apprehended violence orders made against the person, for any child protection prohibition orders made against the person or for any relevant employment proceedings completed against the person,
- (b) any other relevant probity check relating to the previous employment or other activities of the person,

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<sup>26</sup> If the person was dismissed or is likely to be dismissed because of the operation of the Act: s 33O.

<sup>27</sup> Though multiple applications are not permitted: s 33L.

- (c) an estimate of the risk to children involved in that child-related employment arising from anything disclosed by such a check, having regard to all the circumstances of the case, including any risk arising from the particular workplace,
- (d) the disclosure of the results of any such check or estimate of risk to any person who determines whether the person is to be employed or continue to be employed in that child-related employment (or to a person who advises or makes recommendations on the matter).

Employers need to perform background checks for applicants for “primary child related employment”, ie:

- (a) paid child-related employment, or
- (b) child-related employment of a minister, priest, rabbi, mufti or other like religious leader or spiritual official of a religion, or
- (c) child-related employment involving the fostering of children, or
- (c1) child-related employment of a student that involves working in the Department of Human Services, or
- (c2) child-related employment of a volunteer that involves the mentoring of disadvantaged children, or
- (c3) child-related employment of a volunteer that involves the provision of personal care services to children with disabilities, but only if the work involves an intimate level of contact with those children (such as assistance with bathing, dressing or toileting), or
- (d) if the regulations so require-child-related employment of the kind prescribed by the regulations: s 37 CCYPA.

Any applicant would provide a consent form and the check would be conducted by the Commission or an approved employer.

### **Checks for relevant records**

The Commission receives information from CrimTrac (see below) and other sources and looks for:

- 1) any child protection prohibition orders, and
- 2) relevant criminal records
- 3) relevant AVOs
- 4) relevant employment proceedings

A child protection prohibition order is an order made under s 8(d) of the Child Protection (Prohibition Orders) Act 2004.

A relevant AVO<sup>28</sup> is a final order made for the protection of a child under 16 years old.

Relevant employment proceedings include disciplinary proceedings for reportable conduct<sup>29</sup> or an act of violence committed by the employee in the course of employment and in the presence of a child<sup>30</sup>.

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<sup>28</sup> Defined by s 33 CCYPA

<sup>29</sup> Defined by s 33 CCYPA.

<sup>30</sup> These are notified to the Commission by employers or professional bodies.

A relevant criminal record is defined by s 33 and includes:

- 1) Sexual offences or offences involving reportable conduct<sup>31</sup> (eg assault, ill treatment, neglect of, or psychological harm to a child, child related personal violence offences) which are punishable by imprisonment for 12 or more months.
- 2) Offences of attempting, or conspiracy or incitement, to commit any of the above offences.
- 3) Registrable offences under the Child Protection (Offenders Registration) Act 2000<sup>32</sup>.

The Commission's webpage provides helpful information for employers and applicant. It states that "Relevant criminal records includes spent convictions and charges which:

- may have not been heard or finalised by a court; or
- are proven but have not led to a conviction; or
- have been dismissed, withdrawn or discharged by a court

It does not include an offence:

- that was a serious sex offence when committed if the conduct constituting the offence has ceased to be an offence in NSW; or
- involving sexual activity or an act of indecency if the conduct occurred in a public place and it would not have been an offence in NSW if it did not occur in a public place"

However, I note that the definition of "relevant criminal record" in s 33 refers to a "criminal record". Charges which have not been heard or finalized by a court, are dismissed, withdrawn or discharged are *not* criminal records and thus cannot fall within the definition of "relevant criminal record" under the CCYPA. In my view they are not relevant criminal records but, nevertheless, they can be considered when considering relevant criminal records/AVOs/employment proceedings. This is because s 38(3) CCYPA provides:

(3) Information that may be disclosed under this section includes:

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

The Commission is, in fact, obtaining information about matters which are dismissed. Recently, I assisted a child client who had been charged with a common assault against his brother in a trivial domestic incident, where the brother didn't even make a statement. The charge and the AVO were dismissed in court. However, two years later when the client wanted to work as a university student representative both the dismissed charge and AVO<sup>33</sup> appeared on a working with children check.

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<sup>31</sup> Defined by s 33 CCYPA.

<sup>32</sup> s 33 CCYPA

<sup>33</sup> I argued that the AVO should not have formed part of the check.

Thus, particular care needs to be taken with Facts and the contents of AVO applications as these papers may be considered in future working with children check, even if matters are withdrawn/dismissed. For example, you could ask for prejudicial material to be deleted from Facts/AVOs before agreeing to the withdrawal of a matter. Also, if Facts have been amended on a charge, the AVO application should reflect the amended Facts. Importantly, if the Facts no longer refer to sexual allegations the AVO application should also delete reference to sexual allegations.

## **Risk estimate**

If the background check reveals that the applicant is a prohibited person the employer will be notified of this. If the background check reveals that the applicant is not a prohibited person, the Commission will conduct a risk estimate. Where there is a likely risk, the applicant will be given an opportunity to respond and explain their record and give character references. The employer may also be contacted to gain information about risk management of children in their workplace.

An approved risk estimate model is used which takes into account a number of factors including the age of the offender, date of the offence and time elapsed, type and nature of offence, whether the offence was by a child on a child, the applicant's relevant work experience and relevant training about working with children.

After applying the model the Commission obtains an outcome. The risk estimate outcomes include:

- No greater risk than anyone else
- Some risk
- Significant risk

The employer is only notified about the outcome and is not given the applicant's record or the details of their offences. The Commission may also give advice to the employer about actions that can be taken to reduce risks.

## **Legislative changes**

Recent amendments<sup>34</sup> to the NSW legislation allows for the exchange of information between States/Territories for interstate child-related employment screening: s 38A CCYPA. The information may include:

- convictions including those which are pardoned quashed and spent.
- Pending charges and non conviction charges, including acquittals and withdrawn charges

Section 13 CRA is amended by extending the disclosure of information concerning spent convictions to include s 38A CCYPA.

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<sup>34</sup> The Commission for Children and Young People Amendment Act 2009 assented on 19/11/09 and commenced 18/12/09.

Commonwealth legislation also seeks to widen the information sharing for interstate working with children checks. The Crimes Amendment (Working with Children – Criminal History) Bill 2009 Cth was introduced into parliament in 2009<sup>35</sup> but has not yet commenced. The Bill implements the Council of Australian Governments (COAG) Agreement of 29 November 2008 which seeks to facilitate the inter jurisdictional exchange of criminal history for people working with children under 18. Previously only unspent convictions were shared.

All jurisdictions (exception Victoria and the ACT) agreed to exchange information on non conviction charges. The Bill introduces a broader range of exceptions regarding Working with Children Checks under the Commonwealth spent convictions Scheme (Pt VIIC Crimes Act 1914). Those convictions will need to be disclosed to Commonwealth, State and Territory screening agencies. Agencies will be able to disclose pardoned, quashed, general spent convictions and non convictions.

In his second reading speech, the Minister for Home Affairs, the Hon Brendan O'Connor gave two reasons why a person's full criminal history and non convictions should be considered:

- (1) evidence that incarcerated sexual offenders are more likely to have previous convictions for non sexual offences than for sexual offences. This 'evidence was based on one report, published in 2001'<sup>36</sup>
- (2) indications that offences against children are often withdrawn to protect the child victim from the stress of proceedings.

Lastly, the Commission is currently under a legislative review (announced 15 April 2010) which has been brought forward to enable a comprehensive review of the Working with Children Check. Closing date for submissions is 31 May 2010.

## **10. NATIONAL CRIMINAL HISTORY RECORD CHECK**

The NSW Police Criminal Records Section (CRS) provides an opportunity for NSW residents aged 16 years<sup>37</sup> and above to apply for a National Criminal History Record Check (NCHRC) for visa, adoption, paid employment, some occupational licensing purposes and for volunteers working in Commonwealth supported aged care facilities.

The CRS does not provide NCHRC for child related employment, security industry licensing, firearms licensing, Australian permanent residency purposes or for insurance claims. Child related employment checks are conducted by the Commission for Children and Young People. Security, firearms and insurance have other specialized sections of the NSW Police which deal with relevant checks.

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<sup>35</sup> It's second reading speech was on 19 November 2009.

<sup>36</sup> Australian Institute of Criminology, *Trends and Issues No 193: Child Sexual Abuse: Offender Characteristics and Modus Operandi*, Canberra, February 2001, 2.

<sup>37</sup> The Criminal Records Section state that the age restriction is because those under 16 are not able to consent to release of their criminal record.

An applicant for a NCHRC fills out a form which provides consent for the record check. The consent is:

“I hereby consent and request NSW Police Force and other Australian police agencies to release, to the person or organization specified herein, information held by any of them regarding any convictions, findings of guilt, either with or without conviction, and any matters still outstanding against me and any other matters deemed relevant which are recorded against me, whether in my current name or a previous name”

There are two forms (Standard disclosure and Full Disclosure<sup>38</sup>). A full disclosure is necessary for certain occupations or purposes which are “exempt from the Criminal Records Act 1991” – eg they can take into account spent convictions. The forms are submitted in person to a police station.

The CRS sends the requested disclosure to CrimTrac – a national agency which manages both NCHRC for the police and the Commission for Children and Young People<sup>39</sup>. CrimTrac facilitates a check on the National Names Index (NNI) using the name, date of birth (and if applicable) fingerprints supplied by the applicant. The NNI is a national index of any convictions recorded under a name. Given that fingerprints are not taken by all Australian police in all instances it is possible that the NNI may contain information against the person but under another name/alias. The NNI will also not include

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

In the majority of checks the NNI does not produce a result. However, where the NNI produces a result(s) CrimTrac contacts the relevant State/Territory police where the result comes from and requests the relevant criminal record for the purpose of the NCHRC application. The relevant State/Territory police do an initial vetting in accordance with their State/Territory legislation. For example, NSW Police would vet NSW spent convictions for a standard disclosure request. The record is then sent back to CrimTrac which simply facilitates the transfer of that information to the requesting agency (eg NSW Police CRS or the Commission). This agency then does a final vetting according to its State/Territory legislation and in accordance with the purpose of the check.

The result is a National Police Certificate. The certificate contains relevant convictions and also contains the following:

- Future court appearances
- Outstanding matters if they are still before a court with no result<sup>40</sup>
- Traffic matters only if they are criminal
- It does not contain police intelligence.

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

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<sup>38</sup> A full disclosure needs the approval of the CRS Manager.

<sup>39</sup> The Commission has a direct link with CrimTrac as do certain approved agencies.

<sup>40</sup> Even though these are obviously not convictions they form part of the National Police Certificate because the applicant has given consent to their release.

The applicant states on their application form whether they wish the check to be returned to themselves or forwarded (eg to an employer). If there is concern about what will appear on the National Police Certificate it is prudent to ask for it to be returned rather than forwarded. Any disputes about the certificate (or indeed any dispute about a child's criminal history) may be addressed to the CRS<sup>41</sup>.

## **11. EMPLOYMENT**

Employment is significant for the successful reintegration into the community, especially for children who are starting their careers. Employment provides financial independence, structure, routine, a social network and a sense of contributing, which leads to improved self esteem and confidence. Importantly, evidence exists that employment reduces recidivism, benefiting the community and reducing the costs associated with court procedures and incarceration. It is estimated that 60-70% of people who re-offend are unemployed at the time they re-offend.<sup>42</sup>

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

- only 12% of employers agreed that they were willing to hire an ex-prisoner.<sup>43</sup>
- 66% of employers reported that they would not knowingly hire a person with a criminal record.<sup>44</sup>
- 20% said they would hire a person with a criminal record, 66% would hire a person with a chequered work history, 80% with a history of unemployment, 97% with no high school diploma and 93% who were current welfare recipients.<sup>45</sup>

In Australia it was found that having been arrested reduced the probability of employment by 10% and 20% for males and 7% and 17% for females for indigenous Australians<sup>46</sup>. Complaints of discrimination in employment based on criminal record outnumbered complaints of discrimination in employment on the basis of religion, age, trade union activity or sexual preference<sup>47</sup>.

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<sup>41</sup> The CRS is contactable on (02) 88357 888. The Assistant Manager is Stephen McKnight.

<sup>42</sup> Victorian Department of Justice 200-2001, *Output Group: Correctional Services*. Victoria Department of Justice Annual Report <[www.justice.vic.gov.au/irla1dd5/1/hilite](http://www.justice.vic.gov.au/irla1dd5/1/hilite)> at 12 December 2002.

<sup>43</sup> S. Albright, F. Denq, 'Employer attitudes toward hiring ex-offenders (1996) 76 *Prison Journal* 118, 137. See also Joe Graffman, Alison Shinkfield, Barbara Lavelle and Lesley Hardcastle, 'Attitudes of Employers, Corrective Services Workers, Employment Support Workers, and Prisoners and Offenders Towards Employing Ex-Prisoners' (Report to the Criminology Research Council Grant 26/02-03 April 2004, Deakin University) 1, 2.

<sup>44</sup> H. Holzer, 'What employers want: job prospects for less-educated workers' (1996) New York: Russell Sage Foundation.

<sup>45</sup> H. Holzer, S. Raphael and. Stoll 'Employer demand for ex-offenders: recent evidence from Los Angeles: (2003) *The Urban Institute*.

<sup>46</sup> Jeff Borland, Boyd Hunter, 'Does Crime Affect Employment Status? The Case of Indigenous Australians' (2000) 67:265 *Economica* 1.

<sup>47</sup> Human Rights Commission Annual Report 2003?

Employment in the NSW Public Sector requires a criminal record check. Increasingly employment in the private sector also requires a check. Even where there is no legislative obligation to request a criminal record check, an employer may still ask a job applicant for a check<sup>48</sup>. Whilst an applicant needs to give consent to a record check, if they refuse to give consent they are not likely to get the job<sup>49</sup>.

Similarly, once employed, an employee is not under a duty (unless, for example, they are a prohibited person) to volunteer facts about their criminal history<sup>50</sup>. However, if an employee is not honest about their criminal record an employer may suggest that they have terminated the employees position as a result of ‘dishonesty’ as opposed to ‘discrimination’.<sup>51</sup>

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

Legitimate reasons do exist for employer’s concern for hiring people who may pose some risk. Employers have a<sup>52</sup>:

- Right to make their own business judgments: *X v The Commonwealth* (1999) 200 CLR 177, 189-190 per McHugh J
- Duty of care to their other employees and to their customers:
  - *Hollis v Vabu* (2001) 207 CLR 21: Duties to employees enforceable by an action for breach of contract encourages employers to seek to minimise risks.
- Vicarious liability for the acts of their employees:
  - *French v Sestili* [2007] SASC 241 (Unreported, Debelle, Sulan and Layton JJ, 28 June 2007) [72] (Debelle J): An employer is liable for the dishonesty and fraud of an employee if it occurs during the course of their employment
- Responsibilities for the occupational health and safety of their employees
  - *X v Commonwealth* [1999] 200 CLR 177: It is permissible to have regard to the health and safety of others when considering the requirements of employment. Considerations are the degree of risk to others, the

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<sup>48</sup> The Human Rights and Equal Opportunity Commission state that the request should only be where there is a connection between the inherent requirements of a particular job and a criminal record. However, NSW has not legislated this principle. Only the Northern Territory and Tasmania has Anti Discrimination legislation in relation to criminal records.

<sup>49</sup> In *Hosking v Fraser Central Recruiting* (1996) EOC 92-859 the Northern Territory Anti Discrimination Commission found that an employment agency should not have sought criminal record information from all applicants for a nursing position because it was not relevant to the inherent requirements of the position.

<sup>50</sup> *Stock v Narrabri Nominees*, WA Industrial Relations Commission, No 1122 of 1990.

<sup>51</sup> *Stock v Narrabri Nominees*, WA Industrial Relations Commission, No 1122 of 1990: The subject of a criminal record was not raised and the applicant did not volunteer the information. In a complaint to the Commission it was found that there had been no discrimination, the employer said that the absence of a criminal record was not an inherent requirement but that he had dismissed the applicant due to a lack of honesty.

<sup>52</sup> Bronwyn Naylor, Moira Paterson and Marilyn Pittard ‘In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks’ (2008) 32(1) *MULR* 6.

consequence of the risk happening, the legal obligations to co-employees and others, the employee's role and the organisation of the workplace.<sup>53</sup>

- Legal responsibilities to comply with legislative requirements or licensing requirements for some occupations (see above and below).

## **Protections**

There are very limited legislative protections for employees against discrimination on the basis of their criminal record.

### **NSW Legislation**

**The Anti Discrimination Act 1977** does not provide protection for discrimination on the basis of an irrelevant criminal record.

**Privacy and Personal Information Protection Act 1998:** Damage suffered as a result of a privacy breach, including discrimination, is beyond the remedial processes of privacy legislation<sup>54</sup>.

### **Federal Legislation**

#### **Fair Work Act 2009**

Fair Work Australia administers the act and is responsible for most Australian employees. An unfair dismissal action is possible for discrimination based on criminal record (despite the fact that it is not expressly stated) if:

- the employee was dismissed, and
- the dismissal was harsh, unjust or unreasonable, and
- the dismissal was not a case of genuine redundancy, and
- the dismissal was not consistent with the Small Business Fair Dismissal Code, where the employee was employed by a small business

However, there is nothing to prevent discrimination during a job application.

#### **Australian Human Rights Commission Act 1986 (formerly HREOC Act)**

This is the only legislation which expressly addresses discrimination in employment based on criminal record. The Act is administered by the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission).

The employer may refuse employment if there is a “tight correlation”/”logical link” between an “inherent requirement” of the particular job and a criminal record<sup>55</sup>. For

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<sup>53</sup> Human Rights Commission, ‘Guidelines for Employers: On the record; Guidelines for the prevention of discrimination in employment on the basis of criminal record’ November 2005, Minor revision September 2007 Pinpoint

<sup>54</sup> Privacy New South Wales *Discussion Paper: Discrimination in Employment on the Basis of Criminal Records* Submission by Privacy NSW to the Human Rights and Equal Opportunity Commission (2005), p 4.

<sup>55</sup> *Christenssen’s v Adelaide Casino Pty Ltd* (2002) HREOC Report No 20, *Hall v SNW Thoroughbred Racing Board* (2002) HREOC Report No 19, and *Walls Case*.

example a financial consultant should not be convicted for fraud. However, if a person suffers discrimination<sup>56</sup> on the basis of their criminal record they may make a complaint to the Human Rights Commission to be investigated<sup>57</sup>.

Unfortunately, the Human Rights Commission can only make recommendations which do not have any legal effect. Thus, in *Ottiaviano's*<sup>58</sup> case the Commission found that Mr Ottiaviano had been discriminated against and recommended that South Australian police pay \$20,000 compensation. Despite HREOCs repeated follow ups, the police indicated that they were not compelled to pay the compensation and did not even have to disclose what (if any) action they took<sup>59</sup>.

## **12. DEFENCE FORCE**<sup>60</sup>

Many of our young clients wish to enter the Defence Force. During recruitment, the Defence Force assesses whether:

- there are any current restrictions to the applicant providing service and
- whether there are character issues preventing service

The Defence Force will request a NCHRC and look at each matter on a case by case basis. Some applications will be refused immediately, including:

- where there is a sentence of imprisonment of 30 months or more<sup>61</sup> (not including control orders)
- where there are repeat offences
- sexual offences – unless exceptional circumstances apply (eg the offence is obscene exposure or “consensual” sex between children)
- serious offences (eg high range PCA)
- where there is an outstanding bond/probation order etc.

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

For those who are currently on a bond, they may be kept on a waiting list until the bond expires, although the waiting list itself expires after 12 months.

The applicant is always given a chance to respond and the age at the time of the offence(s) and the time elapsed since the offence will be taken into account.

If an applicant is successfully enlisted they will also undergo security checks (eg for fraud/bankruptcy) and may not be able to work in some areas requiring international service if their record prevents them from obtaining a visa.

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<sup>56</sup> Eg refused a job, dismissed from employment, denied training opportunities, denied promotion, subjected to less favour conditions.

<sup>57</sup> Australian Human Rights Commission Regulations 1989 (Cth), s 4(1)(iii).

<sup>58</sup> *Mr Ottiaviano v SA Police*(2007) HREOC Report No 38.

<sup>59</sup> *Mr Ottiaviano v SA Police*(2007) HREOC Report No 38, [115].

<sup>60</sup> Enquiries can be directed to the Candidate Relationship Centre Flight Lt Shannon Monk.

<sup>61</sup> Ie the head sentence not the non parole period.

## **12. OTHER EFFECTS OF A CRIMINAL RECORD**

### ***Occupational licences/registrations/admissions***

Some licences etc require a criminal record check. There needs to be a clear relationship between the individual's criminal record and the licensing rules and regulations. There should be the opportunity for an individual assessment of the particular criminal record and the inherent requirements of the particular job<sup>62</sup>. Individuals should have the opportunity to state their case and appeals to the relevant tribunals do exist where applicants have been discriminated against on the basis of a criminal record.

**Security Licences:** See discussion above under laws to waive spent convictions

### **Health professionals**

The NSW Department of Health must issue a 'Clearance for Clinical Placements Card' prior to commencing a placement. Anyone employed with a NSW Public Health facility, as an employee or in any other capacity, must first undergo a criminal record check. They consider charges and/or convictions relating to serious offences - an offence punishable by imprisonment for 12 months or more. Where there is a criminal record, a risk assessment is undertaken to determine if the offence committed poses a threat to the working environment of the health facility and to clients relying on its services<sup>63</sup>.

Furthermore, nurses, dentists, opticians, optometrists and medical practitioners, inter alia, must be also be registered. The relevant registration board may refuse to register people who are convicted of an offence: Medical Practice Act 1992, s 15. There are also special legislative provisions for different medical practitioners<sup>64</sup>.

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

Ms Hosking refused consent for a criminal record check, even though her record was clear, on the basis that professional registration was a record of her professional conduct and integrity. She was refused employment. The Northern Territory Anti-Discrimination

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<sup>62</sup> Human Rights Commission, 'Guidelines for Employers: On the record; Guidelines for the prevention of discrimination in employment on the basis of criminal record' November 2005, Minor revision September 2007, 23.

<sup>63</sup> NSW Department of Health <[http://www.health.nsw.gov.au/jobs/student\\_clearance/index.asp](http://www.health.nsw.gov.au/jobs/student_clearance/index.asp)> 28 March 2010.

<sup>64</sup> Eg. Chiropractors Act 2001, Chiropractors Regulation 2007, Dental Practice Act 2001, Dental Practice Regulation 2004, Dental Technician Registration Act 1975, Dental Technician Registration Regulation 2008, Health Professionals (Special Events Exemption) Act 1997, Medical Practice Act 1992, Medical Practice Regulation 2008

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

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

Commission found that there was *no direct correlation* between the duties of a nursing position and a clean criminal record and therefore the policy requiring criminal record checks for all nurses violated the Northern Territory Anti-Discrimination Act<sup>65</sup>. Note however, that these protections only exist in the Northern Territory and Tasmania.

### **Legal Profession admission**

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

### **Thoroughbred Racing Board**

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

## ***Immigration***

Visas may be cancelled if a person does not pass the character test. A person fails the character test if they have a substantial criminal record which may be constituted by a:

- Sentence of imprisonment for 12 months or more
- Sentence of life imprisonment
- Sentence of two or more terms of imprisonment
- Acquittal of an offence due to unsoundness of mind, as a result of which the person is detained in facility or institution: Migration Act 1958, s 501(6).

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

- The protection of the community
- Whether the person was a minor when they began living in Australia
- Time in Australia before commencing criminal activity
- Relevant international obligations.

Once a person is removed on character grounds they will never be allowed to re-enter Australia<sup>66</sup>.

## ***Insurance***

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

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<sup>65</sup> Anti Discrimination Act 1992 (NT), s 26.

<sup>66</sup> Refugee and Immigration Legal Service and Immigration Advice and Rights Centre: *Legal Information Kit: Visa Cancellation under s5 01 of the Migration Act 2009*.

Many policies will require disclosure about the existence of a criminal record especially where it relates to fraud or theft.<sup>67</sup>

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

### ***Jury Service***

Persons are disqualified from jury service if:

- Imprisoned in the last 10 years
- Detained in a juvenile detention centre on sentence within the last 3 years
- Currently subject to remand/bail, an AVO, traffic disqualification, good behaviour bond, or parole: Jury Act 1977, Sch 1.

### ***Accommodation***

Many homeless children struggle to find accommodation either in rental property and/or refuges because they are asked to disclose their criminal records. The Homeless Persons Legal Service is currently advocating in relation to this issue.

## **CONCLUSION**

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

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

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

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29 April 2010

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