

Section 10 Dismissal

Section 10 Crimes (Sentencing Procedure) Act (NSW) 1999

Magistrates in New South Wales have a discretion to dismiss a charge against an accused despite making a finding of guilt.¹ Most clients are aware of section 10 and want the benefit of a section 10 discharge. However, most lawyers seem unaware or confused about how to get there. This article seeks assist practitioners appearing in Local Court of NSW.

Let's begin by dispelling a few of the myths surrounding section 10. Even experienced lawyers have asserted the following to me:

MYTH

FACT

You can't get s10 twice

The legislation does not limit the number of s10 discharges available – even for the same offence.

You can't get s10 if you have a criminal record

Previous offending is not a bar to a discharge provided the criteria are met. The jeopardy principle means that an offender cannot receive additional punishment for previous offences.

You can't get s10 after a not guilty plea and / or a contested hearing

The Supreme Court has held that a plea of not guilty does not preclude an accused person receiving the benefit of s10.² The offender is punished for the offending conduct and may not be penalised for the manner in which the defence was conducted.³

You can't get s10 for a 'serious' offence

Section 10 is available for all offences finalised in the Local Court provided the criteria are met.⁴

Submissions on Sentence

At the outset, every advocate should understand that no judicial officer wants to impose a punitive sanction if there is any reasonable way to avoid it. Thus, it is the advocate's job to prepare the matter properly and show the Magistrate the path to a s10 discharge with reference to the Criteria in subsection (3).

The advocate must address each of the Criteria, bearing in mind that the Magistrate is doing the same. When reading the criteria you should bear in mind that none of them is determinative in itself. It is the combination that will result in the court exercising its discretion. Failing to meet one of the criteria does not preclude the exercise of the discretion.

¹ s10 Crimes (Sentencing Procedure) Act 1999, s19B Criminal Code Act (Cth) 1914

² Matheson v Director of Public Prosecutions (NSW) [2008] NSWSC 550

³ Siganto v The Queen (1998) 194 CLR 656

⁴ R v Paris (NSW) [2001] NSWCCA 83

Age	We all made foolish mistakes when they are young (often mistakes that no-one knows about but us). An offender who is young and naïve is a suitable candidate for leniency under s10.
Character	Good character is shown by a clean record, character references and other achievements in life. The advocate should always mention that the defendant is employed and any academic or trade qualifications they hold.
Antecedents	<p>Criminal antecedents indicates bad character, but the type of offence determines its relevance – driving matters are not relevant to assault and vice versa.</p> <p>Counsel should always emphasis the length of time since the last offence of similar type to show that the client has matured and changed his ways.</p>
Health & Mental Condition	Any health problems relied on should be substantiated by evidence from a medical practitioner. This evidence must take the form of a report from the practitioner, not a mere medical certificate. Remember the burden is on you to show why the court should exercise its discretion. If you don't bring the case, you fail.
The Trivial Nature of the Offence	<p>Never suggest that an offence is trivial!</p> <p>The law is the law and everyone must obey it. A better submission is that the offence falls at the lower end of the scale of seriousness and was unintentional. Also be sure to go through the list of aggravating factors and mitigating factors in s21 Crimes (Sentence Procedure) Act.</p>
Extenuating Circumstances	<p>Before entering a plea of guilty it is essential to negotiate a set of facts that are favourable to the offender. The offender can then plead any circumstances provided they do not traverse the set of agreed facts.</p> <p>A defended hearing 'may disclose extenuating circumstances in which the offence was committed to which the court should have regard in determining whether to apply the section: s.10(3)(c)'.⁵</p>
Any Other Matter the Court Thinks Proper to Consider	<p>In addition to shame and embarrassment, a conviction can affect the employment and travel prospects of an offender. Convictions have to be disclosed in visa applications and before employment in regulated industries (including as a legal practitioner).</p> <p>Also, some driving offences incur automatic disqualification which can be disproportionate to the offence committed.</p>

In Conclusion . . .

After addressing the Criteria in turn and providing supporting documents, the submission should conclude by quoting the statute and saying that it is inexpedient to convict the offender based on the forgoing and the fact that he or she:

1. Has acknowledged guilt,
2. Has cooperated with the authorities,
3. Has sought treatment if needed, and
4. Is unlikely to commit any more offences.

Bonds & Criminal Records

A full discharge under s10(1)(a) is treated as a conviction that is immediately spent. Whereas, a discharge with a bond under s10(1)(b) is treated as a conviction that only becomes spent when the bond ends.⁶ Section 12 *Criminal Records Act 1991* provides that if a conviction 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.

So a discharge with a bond is clearly not of the same value to the offender since it has to be disclosed as a 'finding of guilt' until the bond has expired. For this reason, it is usually best to raise this concern with the court and to press for an outright dismissal under s10(1)(a).

Chris Nowlan
Barrister-at-Law
Ph: (02) 9024 9533
chris@chrisnowlan.com

⁶ s8(4)(a) Criminal Records Act 1991