

# Dispelling Myths About Section 10

## *Crimes (Sentencing Procedure) Act (NSW) 1999*

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Criminal courts in New South Wales have discretion to dismiss a charge against an accused despite making a finding of guilt.<sup>1</sup> The author recently appeared for an offender on his third Drive Disqualified within three years and obtained the benefit of s10. I have since related this fact to various legal practitioners and been met with exclamations of disbelief.

It seems that even legal practitioners are falling victim to the many myths surrounding s10. This article is designed to dispel those myths, provide some guidance for effective submissions and reduce the number of offenders being convicted unnecessarily in NSW.

Let's begin by dispelling a few of the myths surrounding section 10:

### **You can't get s10 twice**

There is nothing in the legislation that precludes an accused person receiving the benefit of s10 twice – even for the same offence - provided the criteria are met. This myth arose because the Road Transport (General) Act disallows a second s10 discharge within five years but only for the specified offences.<sup>2</sup>

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

Again, there is nothing in the legislation that precludes an accused person receiving the benefit of s10, notwithstanding a criminal history, provided the criteria are met. In fact, 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.<sup>3</sup> The offender is punished for the offending conduct and may not be penalised for the manner in which the defence was conducted.<sup>4</sup> The offender is not entitled to a discount under s22 Crimes (Sentence Procedure) Act but that is a different matter.

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

Section 10 is available for all offences provided the facts meet the criteria. One offender in a police siege who claimed to have guns and bombs and held the police at bay for 24 hours received the benefit of s10 due to extenuating circumstances.<sup>5</sup> The police appealed and a conviction was later imposed - but the court acknowledge that a s10 discharge is available even for serious offences.

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

2 s187(6) Road Transport (General) Act 2005

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

4 Siganto v The Queen (1998) 194 CLR 656

5 R v Paris (NSW) [2001] NSWCCA 83

# How to approach the Submissions

At the outset, every advocate should understand that no judicial officer wants to send someone to prison or 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).

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.

## **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**

Criminal antecedents indicates bad character, but the type of offence determines its relevance – driving matters are not relevant to assault and vice versa. 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.

## **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**

Never suggest that an offence is trivial! 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 and was unintentional. Also be sure to go through the list of aggravating factors and mitigating factors in s21 Crimes (Sentence Procedure) Act.

## **Extenuating Circumstances**

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.

Rather than disentitling an offender to s10, 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)*'.<sup>6</sup>

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<sup>6</sup> Matheson v DPP NSWSC 550 at [65]

### **Any Other Matter the Court Thinks Proper to Consider**

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 during employment in regulated industries (including as a legal practitioner). Also, some driving offences incur automatic disqualification which can be disproportionate to the offence committed.

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The submission should conclude with a submission that it is inexpedient to convict in view of the fact that the offender:

1. Has acknowledged his guilt,
2. Has cooperated with the authorities,
3. Has sought treatment if needed, and
4. Will not commit any more offences.

### **Bonds**

It is normally prudent to suggest that a bond would be appropriate as this provides the court with a sense of security that the offender has not escaped scot free. Although the court can impose a bond under s10, it cannot impose any punitive conditions such as payment of a fine.<sup>7</sup>

But here is the rub – a 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.<sup>8</sup> This means it appear on the defendant's criminal history until then. For this reason, it is always best raise this concern with the court and to press for an outright dismissal under s10(1)(a).

### **Example Cases**

	<b>Drive Disqualified</b>	<b>Assault</b>
Age	23 years old = a young man who made a foolish mistake	40 years old
Character	Works to support mother and seven year old sister	The offender has led a blameless life for 40 years
Antecedents	Driving offences for which he has just completed a three year disqualification	Never been to court before

<sup>7</sup> R v Ingrassia (1997) 41 NSWLR 447

<sup>8</sup> s8(4)(a) Criminal Records Act 1991

Circumstances	Drove to work on his night off to assist his employer (not for his own convenience)	Was twice assaulted by his partner, used excessive force to defend himself
Triviality	No dangerous driving, no alcohol and no dishonesty	No permanent injuries to the victim
Anything Else	Cooperated fully with police, gave correct details and admitted disqualification	Cooperative with police and still lives with partner
Consequences	Offender has great need for a driver licence and an automatic two year disqualification would be disproportionate	A conviction could affect his ability to travel and affect his business
<b>RESULT</b>	<b>s10</b>	<b>s10 with two year bond</b>

## Sample Submissions

### Age

The offender is a young man who has made a foolish mistake.  
Alternatively, the offender has led a blameless life for many decades.

### Antecedents

The offender has never been before the court before.  
The offender cherishes his unblemished record.  
Previous offending was many years ago.

### Circumstances

The offence falls at the lower end of the scale  
The offender was not acting for his own benefit or convenience.  
Other persons were not placed at risk.  
There was no intention to defraud anyone.  
The offender was influenced by older people he looked up to.  
The offender suffers from mental health problems but is now being treated.

### Consequences

A conviction will imperil the offender's employment or livelihood.  
The offender has substantial family commitments.  
The offender needs his licence for work.  
The offender has good prospects for rehabilitation.

## A Note about Drive Disqualified

A conditional discharge is of great interest to anyone charged with Drive Whilst Disqualified as this offence carries a mandatory disqualification – one year for a first offence and two years for subsequent offences within five years.<sup>9</sup> The only way to avoid the mandatory disqualification is to avoid the conviction - i.e. section 10. Often the Magistrate is faced with a choice of s10 or a mandatory one or two year additional disqualification – there is no middle ground.

Advocates should take note that Magistrates do not wish to impose onerous sentences, especially where the offender is young or requires a licence for their livelihood. As such, every person charged with Drive Disqualified should undertake the Traffic Offender Program and apply for the benefit of s10 – even in cases where it seems hopeless.

In the case mentioned in the introduction, the offender completed the Traffic Offender's Program and received a dismissal under s10. The Bench took pity on him since he was only 23 years old and had just completed a three year disqualification imposed for the first two offences. The Magistrate agreed with the submission that a further two year disqualification would be a crushing blow given his particular circumstances.

## Appeals

As a final word, an offender discharged under s10 has the same right to appeal the finding of guilt as if they had been convicted of the offence - and they do.<sup>10</sup>

## Recent Developments

Since 1 February 2011, dismissal of traffic offences under s10 no longer attract demerit points.<sup>11</sup> Previously, demerit points were incurred whenever there is a 'finding of guilt' – including a dismissal under s10. Since then, s10 has become an coveted outcome for all careless drivers seeking to avoid demerit points and subsequent suspensions.

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<sup>9</sup> s25A(7) Road Transport (Driver Licencing) Act 1998

<sup>10</sup> s10(5) Crimes (Sentence Procedure) Act (NSW) 1999

<sup>11</sup> s14(3A) Road Transport (Driver Licencing) Act 1998