



This article will discuss the rules and regulations governing a Section 10 order in criminal proceedings. It further explores the common misconceptions of the court order and when it is applicable.



**INTRODUCTION**

In New South Wales, a Section 10 order is a criminal penalty order that is imposed by a magistrate or judge during sentencing, i.e. once the criminal case has concluded that the offender is guilty of the crime in question.

This is essentially where the judicial officer decides that a criminal conviction is unnecessary upon the facts, despite the offender being found guilty. Hence, it ensures one's criminal record remains untainted.

The legislation in *Crimes (Sentencing Procedure) Act 1999* (NSW):

**Dismissal of charges and conditional discharge of offender**

- (1) Without proceeding to conviction, a court that finds a person guilty of an offence may make any one of the following orders –
  - (a) an order directing that the relevant charge be dismissed,
  - (b) an order discharging the person under a conditional release order (in which case the court proceeds to make a conditional release order under section 9),
  - (c) an order discharging the person on condition that the person enter into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program.

Under Section 10(1) of the Act, a Court may issue one of three orders:

- 1. despite a finding of guilt, dismiss the offender's relevant charge with no conviction recorded;

- 2. Enforce a conditional release order (CRO) for up to two years with no conviction recorded; or
- 3. Implement an intervention plan with no conviction, to reduce the likelihood of recidivism (tendency of a convicted criminal to reoffend).

**WHEN IS A SECTION 10 ORDER APPROPRIATE?**

Determining whether a Section 10 order is appropriate occurs on a case-by-case basis; there is no guarantee that an individual will be able to maintain a clear criminal record after committing an offence, regardless of its triviality.

The general principle is that such an order may be made if the Court is satisfied that it would reduce the likelihood of the individual re-offending and promote concepts of rehabilitation and treatment rather than deterrence or incarceration.

In accordance with Section 10(3) of the Act, the Court must consider the following factors in its decision to grant a Section 10 order;

- 1. The person's character, family background, age, health and wellbeing;
- 2. The seriousness of the offence in question – sometimes, the order may still be granted despite the offence not being considered 'trivial';
- 3. The circumstances in which the offence was committed; and
- 4. Any other necessary matter that the court thinks proper to consider.



**COMMON MISCONCEPTIONS ABOUT SECTION 10 ORDERS**

It is a popular misconception regarding the Section 10 order that the guidelines regarding **mental health** and conditions of the offender are strict. Although the Courts are not 'lenient' in a sense, they recognise and **appreciate the diminished capacity** of the individual who suffers from a mental condition.

Therefore, it is generally not necessary to show the condition of the offender to have a direct linkage with the criminal act. The **mere fact of its existence** is enough for the Court to consider it a mitigating factor in sentencing for this order. This creates less burden on the defendant and allows for the law to recognise the consequences of mental illness and its impact on one's behaviour. This is established within **Section 10(3)(a)**, where the general mental condition of the offender must be considered.

Further, it is commonly believed that Section 10 orders are only applicable to individuals, not businesses. However, the *Interpretation Act* emphasises that the term 'person' in any Act **includes corporations**, in addition to individuals.

Therefore, over the course of the years in which the Act has been operating, various businesses have been granted this dismissal but with no conditions. This is a result of the complexities associated with monitoring the adherence to such conditions and practical problems regarding the commencement of proceedings if a breach was to occur.

Moreover, Section 10 orders **may be granted twice to the same offender**, except for specific road and traffic offences. This may be hard to obtain however, as the Court will consider an individual's previous behaviour and criminal record.

**CONSEQUENCES OF BREACHING A SECTION 10 ORDER**

Section 10(1)(b) order addresses the punishment of a conditional release. This establishes the rules that a person must follow when the Court grants them a dismissal.

Despite their criminal record remaining clean, there are regulations they must abide by as a stricter form of sentence in comparison with Section 10(1)(a).

If the Court imposes conditions or intervention plan, in accordance with Section 10(1)(c), the offender is most likely to be summoned before the court for a hearing in the instance of its breach. There are multiple avenues the court may take, including no action or passing a new sentence.

In the latter scenario, it is possible that the offender may be handed a more severe punishment, due to their lack of adherence to the Section 10 dismissal. Consequently, the Judge may see fit that a harsher penalty be imposed to act as a deterrence, as intervention and rehabilitation has failed to produce satisfactory results.

**CONCLUSION**

Thus, Section 10 orders are arguably efficient and flexible methods a court may utilise to ensure one's (criminal) history remains untarnished. The eligibility and criteria for Section 10 orders to be applicable depend on a wide variety of factors and on a case-by-case basis and are likely to achieve just outcomes in sentencing. Yet, without proper advice and planning, the offender may find it difficult to obtain a Section 10 order.

**Comasters can advise clients on their likelihood of obtaining a Section 10 order and assist in corresponding proceedings.**

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