GILSHENAN & LUTON
LEGAL PRACTICE



How courts determine if a criminal conviction should be recorded or not

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In Queensland, when a court convicts an offender, one important question arises: should a formal ‘criminal conviction’ be recorded against the individual? Very often, the court, has a discretion whether or not to record a conviction.

The decision is governed by section 12 of the *Penalties and Sentences Act 1992* (Qld) (**PSA**), which provides the court with guidance and flexibility to consider the unique circumstances of each case before determining whether a conviction should be recorded.

Framework for how courts decide to record a conviction or not

Section 12 of the PSA sets out the framework for how courts decide whether to record a conviction.

Discretion to record or not record a conviction

Under section 12(1), a court *may* exercise its discretion to either record a conviction or decide not to record one. In other words, the court is not obliged to automatically record a conviction every time a person is found guilty.

Factors the court must have regard to

Subsection (2) says the court must have regard to *all the circumstances of the case*, including (but not limited to):

- the nature of the offence;
- the offender's character and age; and
- the impact that recording a conviction will have on the offender's economic or social wellbeing, or chances of finding employment.

These factors ensure that the decision is made with a view to both fairness and proportionality. For instance, a youthful first-time offender might be treated differently from someone with a significant criminal history.

How the discretion is applied in practice

In *R v Brown* [1994] 2 QD R 182; (1993) 68 A Crim R 367 at 193, Lee J said, by reference to the discretion conferred by s 12(2) of the PSA:

"The discretion is at large. The considerations are not limited to matters contained…s12(2). They are inclusive. There is nothing in the [Penalties and Sentences Act 1992] which requires more weight to be given to any one factor than the others. Relative weight depends on the circumstances of each case."

This means there is no fixed formula when a court is considering whether or not to record a conviction. The court must assess the individual case before it: the seriousness of the offence, the person's background, their prospects for rehabilitation, and the practical impact a recorded conviction would have on their life.

When convictions must be recorded

The PSA also sets out circumstances where a court **must** record a criminal conviction. In these cases, the discretion under section 12 does not apply, meaning that your lawyer cannot argue against the recording of a conviction, even if you would otherwise meet the section 12 criteria.

If the court imposes a sentence of imprisonment, whether that sentence is to be served immediately, suspended, or as an intensive correction order, the Act **requires** that a conviction be recorded. The court cannot make these orders without recording a conviction.

Why it matters – consequences of having a conviction recorded

Whether or not a conviction is recorded can have lasting consequences. A recorded conviction forms part of an individual's criminal history and may affect employment, travel, licensing, or other opportunities.

It is important to note that even if a conviction is *not* recorded, the person is still found guilty and sentenced, but the offence generally will not appear as a conviction on most criminal history checks (except in certain professional or occupational contexts). This can be critical for those trying to move forward after a single mistake.

Some common implications of having a conviction recorded

- International travel – some countries do not issue visas if you have a criminal record
- Employment prospects – many employers, and particularly those in regulated industries, do not employ workers with a criminal record
- Blue cards – applications may be more complex if you have a criminal record
- Visas – if you are not an Australia citizen, it may impact your visa and/or ability to remain in Australia

Getting help from a criminal lawyer

Gilshenan &Luton are highly experienced criminal defence lawyers who regularly represent clients facing the risk of a conviction being recorded.

if you have been charged with a criminal matter and are concerned about a criminal conviction being recorded against you, you should contact Gilshenan &Luton for legal advice and assistance. We are available 24/7.

Contacting Gilshenan &Luton Lawyers

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This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.