

FACT SHEET

Civil, human rights, administrative & other issues arising from criminal law proceedings

MIGRATION

Visa Cancellation

- Liable to visa cancellation, where:¹
 - Conviction of 12 months + (mandatory cancellation),
 - Sexual offending involving a child (mandatory cancellation),
 - Offence in immigration detention,
 - Escape from immigration detention,
 - Associated with criminal organisation,
 - People smuggling or people trafficking offence,
 - War crimes, crimes against humanity, etc.
- If your client's visa is cancelled, refer them for migration advice ASAP.

Work visa

- Conviction may affect work capacity, and accordingly ability to remain in Australia on work visa.

Student visa

- Where sentence would interfere with client's ability to attend university or TAFE, ability to remain in Australia on student visa may be affected.

Partner visa

- Partner visas are linked to a substantive visa (such as Permanent Residency, or temporary visas such as a work visa).
- Where the primary visa holder's visa is cancelled, their family members may be at risk of their visas being cancelled.

SOCIAL SECURITY / HOUSING

Payments stop in gaol

- Centrelink payments will stop if your client is incarcerated.
 - Affects children / financial dependents.
- May affect rental payments.
 - Those in public housing most vulnerable.

¹

See s 501 of the Migration Act. Not an exhaustive list.

Commonwealth Child Support Scheme

- Failure to pay child support can result in Child Support debt.
- Child support calculated based on previous tax returns.
- Can be automatically deducted from Centrelink payments or becomes payable at tax time based on previous income statements.
- The Child Support Agency should be contacted and notified of your client's incarceration so debt is not inaccurately accrued.
- Debt? Refer to VLA Child Support Legal Service

WORKING WITH CHILDREN CHECKS

- Range of offences can impact a WWCC, including:
 - Offences against children,
 - rape,
 - recklessly or intentionally causing injury,
 - stalking,
 - trafficking in commercial quantities of drugs, and
 - armed robbery.
- WWCC is refused (or a 'negative notice' issued), your client can appeal that decision to VCAT.²
- VCAT cannot grant a WWCC unless satisfied your client doesn't pose an unjustifiable risk to the safety of children, taking a number of factors into account.³ Relevantly, these factors include whether a finding of guilt or conviction was recorded and any sentence imposed.

POLICE TORTS

Unlawful arrest and false imprisonment

- May arise where:
 - The arrest was not reasonably necessary and a summons or would have been sufficient.
 - Particularly for trivial offences or arrests of juveniles, noting the presumption in favour of summons.
 - There was no reasonable basis to suspect an offence had been committed, for example:
 - Mistaken identity cases, or
 - Where police have clearly arrested for the purpose of investigation and questioning rather than commencing proceedings.

² Victoria Legal Aid has a useful information sheet: <https://www.legalaid.vic.gov.au/appealing-working-children-exclusion>

³ See <https://www.workingwithchildren.vic.gov.au/vcat-applications-factors-for-consideration>

Assault and battery

- Excessive force (particularly helpful where there is footage of the assault and/or the existence of injuries)
- Drawing of a firearm, use of a taser or use of OC spray
- Unlawful searches where there was no reasonable basis to stop and search
- Strip search where for example:
 - the seriousness and urgency do not warrant a strip search,
 - lack of reasonable privacy,
 - a cavity search has been conducted or,
 - any other breach of the safeguards that apply to strip searches.

Malicious prosecution

- Very difficult tort to prove.
- Successful cases include where lies/ fabricated evidence can be established.

Nervous shock cases

- Actions on behalf of family members who have lost a family member in police custody due to excessive force or a grossly negligent act.
 - Usually arise when there has been an inquest into a death in custody.

Commencing an action

- 6-year limitation period in Victoria and in some cases proceedings must be commenced within 3 years.
- In the case of a juvenile the time runs from their 18th birthday.
- Referral:
 - Get in touch with local solicitor (we can suggest some) with as much detail as possible, including any paperwork and client contact details.
 - Costs of commencing proceedings may be covered, and solicitors may act on a speculative basis as most clients are not in a financial position to fund their matters.
 - Financial circumstances or custodial status not necessarily an impediment.

POLICE COMPLAINTS

- Can make a formal complaint where:
 - Experienced rude, aggressive or violent behaviour by the police, or
 - Police have failed to adequately deal with a complaint.
- To make a complaint:
 - Completing an online complaint form, or
 - Downloading and completing a written complaint form, or

- Make a complaint in person at a police station.⁴

Police misconduct

- If it is a complaint about police misconduct and/or your client does not feel that their local police will properly deal with the matter, they can:
 - Contact IBAC directly,⁵ or
 - Contact a law firm that assists with police complaints.
- If the matter relates to mishandling or commission of family violence, can contact the Policing Family Violence Project.⁶

SPENT CONVICTIONS

- Where:
 - <15 years of age when they committed an offence, or
 - No conviction recorded (including for a sexual offence or serious violence offence),these 'convictions' will be "spent".
- Unless a specific exemption applies, these court outcomes will not show up on a police record check.
- Can apply to the Magistrates' Court for conviction to be spent where:⁷
 - Not a serious violence offence or a sexual offence and
 - a prison sentence of less than five years is imposed, and
 - your client does not re-offend for 10 years.⁹
- Conviction cannot be spent where:
 - Convicted of a serious violence offence or a sexual offence, and receives a prison sentence.
 - Conviction for any other type of offence and your client is sentenced to a prison sentence of more than five years.
- s 22 of the *Spent Convictions Act 2021* breaks down which agencies will have particular information disclosed to them and for what purpose.
 - Useful when concerned about whether or not a spent conviction will show up on a police check.

⁴ The forms and more information about behaviour the complaints may address can be found here: <https://www.police.vic.gov.au/complaints#types-of-complaints>

⁵ See <https://www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about/what-is-police-misconduct>

⁶ <https://www.flatout.org.au/beyond-survival-family-violence-policing>

⁷ <https://www.mcv.vic.gov.au/criminal-matters/spent-convictions-scheme>

⁸ The Department has issued a helpful flowchart which may assist in determining what options your client has: <https://files.justice.vic.gov.au/2021-12/Spent%20Convictions%20Act%202021%20-%20Adult%20flowchart%20v2.pdf>

⁹ Note s 10(1) of the *Spent Convictions Act 2021* (Vic): the 'conviction period' commences on the day a court makes a finding of guilt.

QUESTIONS?

Don't hesitate to get in touch.

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