



# Discharge without conviction: An overview

You may have the power to discharge a person without conviction who has either pleaded guilty to a crime or who has been convicted by the court after trial.

This is a very wide discretion. There are restrictions on giving discharges without conviction.

This is a power that should be rarely used. The system of criminal law relies upon the principle that those who are guilty should be accountable for the consequences. The first consequence is a conviction. The person is convicted because they have committed the crime. However, if a discharge without conviction is given, it is the same as if the person had been found not guilty. This illustrates that such a discharge must be kept for exceptional cases.

The wide discretion given to judges to discharge should be exercised based on the following principle:

***“Are the consequences of a conviction going to be out of all proportion to the crime committed.”***

There are three steps to considering this.

**Step 1** - The gravity of the offence – how bad was the offending

**Step 2** - The direct and indirect consequences of a conviction – what consequences will result from the conviction

**Step 3** - Whether those consequences are out of all proportion to the gravity of the offence.

## The gravity of the offence

This requires you to assess the seriousness of the crime. When considering the gravity of the offending under this step the sentencing court should consider all the aggravating and mitigating factors relating to the offending and the offender.

Consider:

- Age
- Employment
- Family and community support
- Good character or previous good record
- Likelihood of re-offending
- Made amends or paid reparation
- Mental health, disability or disorder
- Programme attendance
- Remorse
- Substance abuse and its associated risks.

## **The consequences of conviction**

It is for the defendant to tell the court what they say the consequences of a conviction will be. It will need to be more than just the fact the defendant does not want a conviction. It will need to be something more concrete, such as, the loss of a job, immigration difficulties, the inability to travel overseas, or a major impact on a career. Once the defendant identifies the consequences of a conviction you will need to be satisfied that what the defendant claims is true. For example, if loss of job is claimed then you will need a note from an employer or other responsible person confirming the defendant's claim. Do not just accept the defendant's word.

If the consequence is minor or non-existent, such as a conviction for a minor traffic offence, then there will be no grounds for a discharge. But if the consequence could be very serious, go onto the next consideration.

## **Is the consequence of a conviction out of all proportion to the crime committed?**

If the seriousness is low and the effect of a conviction on the defendant is high then you may discharge. For example, the theft of something worth a few dollars and the consequence of not being able to travel may mean a discharge should be given. But an assault, especially a domestic assault, is very serious and it would be difficult to imagine a consequence that would be out of all proportion to such a serious crime, for example, if a man assaulted his partner then even if a conviction meant he could not travel that consequence would not be out of proportion to the serious assault. The judge in such circumstances could not give a discharge without conviction.

In summary, discharges without conviction are rare. When considering a discharge apply the above rules and give a reasoned decision in court.