

On the record - Discrimination in Employment on the basis of Criminal Record

Workshop Paper for Probation and Community Corrections Officers' Association conference, *Throughcare: Myth or Reality?* 28 July 2005

This paper will provide some information on discrimination in employment on the basis of criminal record, based on the results of a research project currently in progress at the Human Rights and Equal Opportunity Commission.

The research project

The Human Rights and Equal Opportunity Commission (the Commission) receives a significant number of complaints from people who allege they have been discriminated against on the basis of criminal record. Between 2001 and 2003 the Commission finalised 103 complaints of discrimination in employment on the basis of criminal record, mostly complaining of discrimination at the point of recruitment, followed by terminations. Many of these complaints showed a misunderstanding by employers and people with a criminal record, about discrimination and related issues.

As a result, in August 2004 Dr Sev Ozdowski, the Human Rights Commissioner, on behalf of the Commission commenced a research project to examine more closely the extent and nature of this discrimination, to clarify the rights and responsibilities of employers and employees, and to consider measures which may be taken to protect people from this form of discrimination.

In December we distributed a Discussion Paper, which asked for comments from individuals and organisations on the issue of criminal record discrimination. We received over 90 submissions, from private sector employers, government departments, community and legal groups, anti-discrimination bodies, privacy groups and ex-offenders themselves, among others. Most of these can be accessed on the project webpages at www.humanrights.gov.au/human_rights/criminalrecord/index.html. We supplemented these submissions with a range of targeted consultations with ex-offenders, employers and community groups.

These submissions and consultations highlighted that while some employers were aware of the legislation and the correct processes to follow in employing people with a criminal record, there was a lot of uncertainty about how to apply the anti-discrimination law in practice, as well as concerns about the limits of the laws themselves.

Because of this, the Human Rights Commissioner decided that guidelines for employers would be a useful practical measure to prevent discrimination. These guidelines are in the final stages of drafting at the moment. We also hope to launch some resources targeted more specifically at ex-offenders to inform them about the law in this area.

Today I will speak to you about the types of issues raised with us through the project to date, which includes some practical information for those of you who work, even indirectly, supporting ex-prisoners to find employment.

Difficulties facing people with a criminal record looking for work

As you are all highly aware, people with a criminal record - especially a prison record - often face significant barriers to full participation in the Australian community. Trying to find - and keep - a job is one of the areas of greatest difficulty for people trying to reintegrate into the community.

There is undoubtedly a connection between unemployment and criminal record.¹ Corrections Victoria estimates that about two-thirds of repeat offenders are unemployed at the time they re-offend. Independent studies have confirmed the link. A study of ex-prisoners in NSW and Victoria found that 54 percent of participants who were unemployed and were seeking work post release returned to prison whilst only 8 percent of those with employment returned.²

Research conducted by Social Exclusion Unit within the British Office of the Deputy Prime Minister in 2002 concluded that 'employment reduces the risk of re-offending by between a third and a half,' as a consequence of unemployment making it difficult to maintain stable accommodation or a legitimate income stream.³ However, 57 percent of individuals with a criminal record who were looking for work responded that they had experienced trouble finding employment post-release due to their criminal record.

Why is it so difficult for ex-offenders to find work? There are various reasons, which will be obvious to many of you.

Firstly, in some cases there are legal prohibitions against employing people with certain criminal records in certain occupations, such as lawyers, doctors and teachers. In addition, licenses and registrations for certain occupations, such as nursing or the security industry may bar people with a certain criminal record.

Secondly, even without a specific legal bar to employment, research indicates that most employers would prefer not to hire a person with a criminal record if given a chance to hire someone without a criminal record. There are many reasons for this reluctance.

Employers may feel that people with a criminal record have a higher risk of being dishonest or unreliable, or have a risk of reoffending in the workplace.

¹ Victorian Department of Justice 2000-2001 - see Ignatius Centre, Submission 28, to the Human Rights and Equal Opportunity Commission's 'Discussion Paper on Discrimination in Employment on the basis of Criminal Record', p28. See project webpages.

² E Baldry, D McDonnell, P Maplestone and M Peeters, *Ex-Prisoners and Accommodation: what bearings do different forms of housing have on social integration*, AHURI 2003 p.18.

³ Social Exclusion Unit, British Office of the Deputy Prime Minister, *Reducing Risk of Re-Offending*, 2002, p.52, cited in Ignatius Centre Submission, Submission 28.

They may also be concerned about how their clients will react if the employee's criminal record becomes known.

Further, many people with a criminal record also experience other social and economic disadvantages such as low levels of education, health problems, housing problems and lack of work experience which inhibits their employability. A flow on effect of this disadvantage is that a person may feel frightened of revealing their criminal record, leading an employer to conclude that the person has been dishonest, which further makes them reluctant to hire the person.

However, while in some cases employers may have a well-founded reason not to employ a person with a criminal record, there are also indications that many employers hold negative attitudes about people with a criminal record as a group even before they have had a chance to assess an individual on their merits.

For example, in a US study, nearly two-thirds of all employers reported that they would not knowingly hire a person with a criminal record.⁴ In fact, they were more likely to hire a welfare recipient or individual with minimal work experience than someone with a criminal record.

In Australia, a recent Australian Institute of Criminology study examined the attitudes of employers, corrective services workers, employment support workers, and prisoners and offenders towards employing ex-prisoners and ex-offenders.⁵ The study found that although attitudes of employers were far more complex than they expected, ex-prisoners and ex-offenders were rated by employers in terms of employability as second lowest of a range of disadvantaged groups (psychiatric disabilities generally being the lowest rated).

Because of these negative attitudes, many ex-offenders feel that they are not given the chance to prove themselves on their merits and are disregarded as soon as they disclose their criminal record to prospective employers.

The following is a typical experience by an ex-offender who ventures into the open employment market. This is a true story, but the identifying features have been removed.

Case study 1

⁴ H J Holzer, S Raphael and M Stoll, *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and their Determinants*, Institute of Business and Economic Research, Uni of California, Berkeley, Working Paper No. W01-005, October 2001.

⁵ J Graffam, A Shinkfield, B Lavelle and L Hardcastle, *Attitudes of employers, corrective services, workers, employment support workers, and prisoners and offenders towards employing ex-prisoners and ex-offenders*, Report to the Criminology Research Council, April 2004, in Australian Institute of Criminology's Submission, Submission 3.

Marion's only criminal conviction was in 1984 for importing drugs into Australia. After being out on bail for two years, she served four years in prison and was released in 1990. She had no further convictions since.

In 2002 she applied for a job with a government department. She completed an aptitude test along with 20 other applicants. Then because she scored in the top three for the test, she was also interviewed and ended up being given the job, which involved door to door interviewing.

She was given a number of forms to fill out and was asked about whether she had a criminal record. She understood that she wasn't obliged to disclose details of her offence because more than 10 years had elapsed since the conviction; so she said no to the criminal record question.

About a week or so later she received a training manual and some more paper work to complete. Included was another form to complete stating the law regarding who must declare criminal conviction. After reading that the relevant act stating that anyone who had served more than 30 months in prison was obliged to declare their conviction, she did declare it. She also phoned the department and discussed it with them and sent them details of her conviction along with a short summary of her circumstances at the time.

After another week the department phoned her and announced that because of her conviction she would not be able to have the job anymore. The person she spoke to said that she was too much of a risk and that people being interviewed might be upset if it ever came to light that she had a criminal record and had been in prison.

Many of you who work with ex-offenders post-release will be familiar with these types of problems, in particular the dilemma about whether to tell an employer about a criminal record or not.

However, not many people are familiar with the responsibilities of employers not to discriminate under anti-discrimination law. In the case example above, Marion was able to find out some information about her rights which helped her to convince the employer of its responsibilities to treat people with a criminal record fairly.

After hearing of the news that she had been denied the job based on her conviction, she went to see a solicitor who found the relevant Human Rights and Equal Opportunity Commission Act stating that employers should not discriminate against someone on the basis of criminal record. She wrote to the department and requested that they provide a statement of reasons for refusing to employ her, so that a review could take place. Some weeks later the department wrote to her and said that they'd decided she could have the job after all if she provided three character references to say that she was of good character. She resented doing this but did it anyway and was given the job back.

Marion's case shows that anti-discrimination laws can make some difference in educating and persuading employers to consider their responsibilities to employ people on merit.

Anti-discrimination laws

What do anti-discrimination laws say about taking a person's criminal record into account when making employment decisions?

Discrimination, according to law, generally occurs when a person is treated less favourably because of a particular characteristic.

The only Federal law that provides protection against discrimination on the basis of criminal record is the *Human Rights and Equal Opportunity Commission Act* (Cth) (HREOC Act). This brings into Australian law the International Labour Organisation *Discrimination (Employment and Occupation) Convention* (ILO 111), which Australia ratified in 1973.

The HREOC Act provisions give the Commission the authority to investigate any complaint of discrimination in employment on the basis of criminal record and resolve it by conciliation between the parties. Conciliation is a confidential process where the Commission brings the parties together - the complainant and the respondent - to try and resolve the matter. Many complaints are successfully conciliated and this complaint information and complaint handling service is free.

However, if the matter cannot be conciliated, then the Commission will present a report to federal Parliament outlining the key issues and recommendations to resolve the complaint. Thus, although employers can be publicly exposed if the complaint is not resolved, Commission recommendations for remedies cannot be enforced in a court of law. However,

When is it not discrimination under the HREOC Act?

Similar to many other areas of discrimination, the issue of criminal record involves a careful balancing of different rights. On the one hand former offenders have served their time and paid their debt to society. They have the same right to seek employment as any other member of the community. On the other hand, there may be certain circumstances where a person with a particular criminal record poses an unacceptably high risk if he or she is employed in a particular position.

To some extent this balance is reflected in the law. To avoid discrimination on the basis of criminal record under the HREOC Act, an employer can refuse to employ a person if the person's criminal record means that he or she is unable to perform the 'inherent requirements' of the particular job.

Another way of putting it is that the criminal record must be relevant to the job before an employer can deny a person employment on this basis.

For example, it may be an inherent requirement of a childcare position that children are provided with a safe environment. Someone with a history of violence towards or sexual abuse of children may not be able to meet this requirement.

However, there can be difficulties in determining what the inherent requirements of a particular job are, and whether a person's particular criminal record will necessarily disqualify him or her from satisfying those requirements. When an employer claims the inherent requirement exemption, the Commission considers all the facts at its disposal to make a decision.

The following example is a complaint about which the Commission made a report to federal Parliament which examined the inherent requirements exception.

Case study 2

Applying for a job as a bartender (Christensen's Case)

Ms Christensen applied for a job as a bartender in the Adelaide Casino. She declared her prior conviction for stealing two bottles of alcohol when she was 15 years old. She was refused employment on the basis that the inherent requirements of the job required her to be trustworthy and of good character. She complained to the Commission who investigated the complaint.

While the Commission agreed that these were inherent requirements of the job, it disagreed that there was a sufficiently close connection between Ms Christensen's conviction and the inherent requirements of the position. Several factors came into play in making this decision including:

- she was 15 when the conviction occurred
- the conviction was eight years old
- since her conviction she had held several jobs in the hospitality industry including as a bar manager/waitress which involved handling large amounts of money
- and she had references from some of those employers.

This shows that it is not good enough under the law for an employer to bar someone from a job simply because someone has a criminal record. An employer should consider a range of factors to determine whether the convictions or offences are relevant to the specific job. However, we know that this does not always occur.

Other anti-discrimination laws

In the States and Territories, only Tasmania and the Northern Territory have laws that specifically prohibit discrimination on the basis of criminal record. These make it unlawful to discriminate on the grounds of irrelevant criminal record.

Unlike under the HREOC Act, the discrimination is not limited to employment. It covers discrimination in a range of other areas such as goods and services and accommodation.

Further both in the Northern Territory and Tasmania a variety of legal remedies are available if a finding of discrimination is made. The court can order an employer not to repeat or continue the prohibited conduct, to pay compensation or to take specific action, including re-employing a person.⁶ Obviously, it is better from a complainant's perspective to have enforceable remedies. People with a criminal record alleging discrimination on the basis of criminal record in Tasmania and NT may wish to complain to their local anti-discrimination commission if they desire a remedy.

No other State or Territory anti-discrimination laws provide specific protection against discrimination on the basis of criminal record. However, in Western Australia and the Australian Capital Territory, there are provisions that make discrimination on the basis of *spent* convictions unlawful.⁷ In other States and Territories, persons who wish to complain of discrimination on the grounds of criminal record must rely on the HREOC Act.

As you can see, there are limits to the protections under anti-discrimination laws. For this reason, many of the submissions made to the Commission as part of this project recommended that the HREOC Act be amended to ensure that there are enforceable remedies for people who complain of criminal record discrimination. They also recommend that the other States and Territories introduce new provisions into their anti-discrimination laws to provide protection from discrimination on the basis of criminal record.

Other legal requirements

The other issue that has been raised in our project is the lack of knowledge of other laws which provide some protection to ex-offenders.

Spent convictions

Most of you will be familiar with spent convictions laws. However, in our consultations with employers and ex-offenders we have been surprised at the dearth of knowledge about spent convictions laws. What knowledge there is is

⁶ *Anti-Discrimination Act 1992* (NT), section 88; *Anti-Discrimination Act 1998* (Tas), section 89.

⁷ *Spent Convictions Act 1988* (WA); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT), s7; *Spent Convictions Act 2000* (ACT).

often inaccurate and uncertain. This is not surprising since the laws themselves are inconsistent and complicated.

Spent convictions laws allow the criminal records of ex-offenders to be amended after a certain period of time, usually subject to no future convictions. The idea behind spent convictions schemes is to allow people with a criminal record to 'wipe the slate clean' after a certain period of time. They assist people with a criminal record rehabilitate by providing them with a legally sanctioned means of 'moving on' with their lives and putting their past behind them.

Most States and Territories, and the Commonwealth, have statutory spent convictions schemes, although they differ considerably. Victoria and South Australia are the only two jurisdictions without spent convictions laws, although they have schemes based on police policy.

There are distinct differences between the spent convictions laws in each jurisdiction and any applicable anti-discrimination laws, so employers and ex-offenders need to be aware of which laws apply to them and the main requirements of those laws.

Under spent convictions laws employees or applicants are not required to disclose information about their spent convictions to anyone, even if asked about it, unless there is a special exemption or requirement under another law.

Further, police will not release information to an employer about a spent conviction on a criminal record check unless there is a special exemption for that particular occupation.

Even if an employer finds out about a spent conviction by means other than official police records, for example word-of-mouth, in most cases the employer is prohibited from taking that spent conviction into account in making an employment decision. There are penalties for breaches of these laws.

Spent convictions laws provide some people with criminal records with a measure of protection from discrimination by employers. The positive aspect of spent convictions laws is that a person does not have to confront a discussion about whether their criminal record is relevant or not. It can be as if the conviction never existed in the employers eyes.

However, in reality, spent convictions provide only limited protection to most people with criminal records, especially ex-prisoners.

Firstly there are a large number of exemptions from the laws. Occupations that are exempt under the laws include police, nursing and corrections. Therefore employers in these occupations can access a person's full criminal history and a person will have to disclose all convictions to them.

Secondly, spent convictions only apply to certain offences. Offences that led to a longer sentence of imprisonment - for example six months in NSW and 30

months in Commonwealth laws - or are considered serious, can never become spent.

Thirdly, you have to wait as long as ten years (and three or five years for juvenile offences) in order for the convictions to become spent. This obviously excludes many people, even those with very minor offences since that time.

A brief survey of the complaints to the Commission reveals that most people with criminal records complaining to the Commission would get no benefit from spent convictions laws at the time of their complaint.

Lastly, because there are a variety of laws and a lack of knowledge of the laws, they are either not applied at all or people make mistakes in their application, which means that bad decisions are made on that basis. For example, in Marion's case, described above, she mistakenly did not realise that her conviction, for which she spent four years in prison, was ineligible to become spent under the laws.

Typically, when a person fails to disclose a spent conviction, and the employer finds out about it later, they can be accused of being dishonest. In other circumstances people disclose their spent convictions when they don't have to, and inadvertently and unnecessarily expose themselves to possible discrimination.

Therefore, many submissions to our project recommended that there be uniformity and consistency in spent convictions laws throughout Australia, which has also been put forward as a proposal to the Standing Committee of Attorney-General's. There are also numerous recommendations about how a conviction should become spent under the laws.

Privacy laws

People are also unaware of privacy laws and how they might impact on criminal record information.

A number of people told us that although they did not disclose their criminal record to the employer, the employer subsequently found out, either through other workmates, internet sites, other employers or through social links. This situation is especially the case in small country towns.

While privacy laws cannot prevent most of this information dispersal, they do provide some protection for ex-offenders and establish best practice principles for employers.

Under the Commonwealth *Privacy Act 1988* (Cth) (the Privacy Act), for example, a person's criminal record is treated as sensitive personal information. As such, it must be collected, used, and stored in accordance with privacy principles.

However, unfortunately, the Privacy Act exempts most small businesses from its private sector provisions.⁸ Further, employee records are exempt. However, this exemption does not apply to job applicants, as their information is not yet an employee record. If the job applicant eventually becomes an employee, then the exemption applies.

These privacy principles stipulate that employers should only collect criminal record information if it is necessary, and they must collect it fairly and lawfully. Because it is sensitive personal information, they should collect it only with the consent of the person. They must use that information only for the purpose for which it was collected. They should also check its accuracy and store it carefully.

Industrial relations laws

Industrial relations laws also provide some protection for people with a criminal record, especially in the area of terminations from employment.

Under the termination from employment provisions of the *Workplace Relations Act 1996* (Cth) (WRA), an employee employed under a federal award may apply for relief to the Australian Industrial Relations Commission under the unfair dismissal provisions. In these cases the AIRC will determine whether the dismissal was harsh, unjust or unreasonable. There have been a few decisions handed down by the AIRC in circumstances where the alleged unfair dismissal was the direct result of an employer finding out about an employee's past criminal record.⁹

The law in this area may change depending on the result of the federal government's proposals on industrial relations reform.

Disclosure of a criminal record

The key area of concern raised with us by people with criminal records and community and legal groups representing them was the uncertainty over whether or not they have to disclose their criminal record to a prospective employer.

Most ex-offenders feel keenly that they are 'dammed if they do and damned if they don't' disclose. When they hide their criminal record, it is often discovered and they are then accused of being dishonest. If they decide to reveal it, employers tell them that they are unsuitable for the job.

⁸ The private sector provisions only apply to organisations (including not-for-profit organisations) with an annual turnover of more than \$3 million, with certain limited exceptions.

⁹ See, for example, *The Federated Miscellaneous Workers Union of Australia and Michell Leather [1992] AIRC Print K 1855 (Unreported, Commissioner Simmonds, 17 February 1992) 5*; *Richard Michael Parody and Australian Correctional Management Pty Ltd [2003] AIRC PR928052, (Unreported, Deputy President McCarthy, 21 February 2003)*, *FEDFEA v Shell Refining Co (1989) 31 AILR 430 [1992] AIRC Print K1855 (Unreported, Commissioner Simmonds, 17 February 1992) 5*; *Richard Michael Parody and Australian Correctional Management Pty Ltd [2003] AIRC PR928052, (Unreported, Deputy President McCarthy, 21 February 2003)*.

In these circumstances many job applicants simply avoid the jobs where they know they will be asked to disclose a criminal record, hoping that they can prove themselves on their own merits before their background becomes obvious.

Evidently this would not be successful with all employers. Further, it is becoming increasingly difficult for people to avoid disclosing their criminal record as more and more employers are asking for criminal record checks. This is partly due to the increasing focus on security in the western world.

In their submission to our Discussion Paper, JobWatch and Fitzroy Legal Service include statistics released under Freedom of Information from Victoria Police on 3 December 2004. These reveal an increase in police checks in Victoria from 3,459 in 1992/93 to 221,236 in 2003/04. That is an increase of an astounding 6,295 per cent over the period.

Does an ex-offender have to disclose their criminal record?

There is no clear cut answer to this question. Each person with a criminal record will have to decide what risks they wish to take in disclosing or not disclosing in certain circumstances. It will depend greatly on the type of job, whether the industry is regulated by legislation and what the employer asks.

However, in general an applicant or employee is not obliged to voluntarily disclose anything about his or her prior record, if they are not specifically asked to do so. In some cases legislation or licensing rules require voluntary disclosure. This is becoming an increasing phenomenon, especially with working with children checks across the country.

Even if an applicant is asked directly to disclose a criminal record, a person may not be legally obliged to answer. For example, there may be some circumstances where the applicant perceives that the criminal record is not relevant to the job. In principle a person may be entitled to refuse to answer in this situation.¹⁰ However, in practice, it is often difficult to determine whether a particular criminal record is relevant to a particular position.

Further, if a job applicant withholds information, rather than refusing to answer the question, and becomes an employee, it may cause problems later if the criminal record is discovered. There are a number of examples of complaints to the Commission where a person failed to answer a question about criminal record honestly, only to be found out later. If it is found that the reason for the job rejection, or termination was because of the person's dishonesty, not criminal record, then the Commission does not proceed with the complaint.

An employee could possibly make a complaint of unfair dismissal but the success of that is by no means certain. It would depend greatly on how relevant the criminal record was to the job.

¹⁰ S Selleck, 'Criminal Records Discrimination - When the Law Speaks with a Forked Tongue', paper presented to CSEPP consultants, Melbourne, 26 May 2004, p4.

However, an employee or applicant may not have to disclose their complete criminal record. Where there has been a finding of guilt but no conviction is recorded, there may be no requirement to disclose the guilty finding. This situation might change if an employer specifically asks about 'findings of guilt, with or without conviction'.

There is also generally no requirement to disclose a spent conviction. However, a job applicant should make sure that their conviction is spent under the law of that State. As I have already described, mistakes about whether a conviction is spent or not causes a great many misunderstandings.

Police checks

Instead of asking job applicants or employees to disclose, many employers simply run their own checks on people. Some employers use private background checking organisations. However, private providers are not able to obtain criminal history information through police services. Therefore, the most reliable sources of criminal history information are police criminal record checking services which issue National Police Certificates.

Police certificates can only be obtained with the consent of the person involved.

While a police check is the most reliable source of background checking, the information that is included on the National Police Certificate can vary from jurisdiction to jurisdiction, which causes some confusion.

Some people told the Commission in submissions that they were unaware that their unrecorded conviction would appear on a Police Certificate, as is the case in Victoria, and this is a great shock to them. Of course, if they had failed to disclose this earlier to the employer in answer to a question, they may be accused of being dishonest as well.

Police checks also occasionally include errors. We heard a few cases where an identity was incorrectly matched and someone else's criminal convictions were recorded on the certificate. It is worth double-checking the Certificate before it is given to the employer, if possible.

What if an employer finds out about the criminal history?

Clearly, it is becoming increasingly difficult for ex-offenders to avoid disclosing their criminal record. However, ex-offenders should not presume that all employers will immediately deny them a job if they find out about the record. Of course, this depends greatly on the criminal record itself, and the merits of the job applicant.

If an employer has a clear and honest process of assessing job applicants, it is better for all concerned.

A number of employers told us of the processes they have put in place to ensure that people with a criminal record are given a fair go in applying for a job. The types of measures they have put in place include

- Making sure that all job applicants know in advance that they will have to fill out a consent form for a police check
- Reassuring applicants that everyone will be assessed on a case by case basis and that only relevant convictions need to be disclosed
- Ensuring that if a criminal record is revealed that the applicant gets a chance to explain the circumstances of the offence and conviction
- Encouraging applicants with criminal records to provide supporting evidence of their good character or rehabilitation.

If these processes are in place, an ex-offender may have some hope that they can convince an employer that they have put their past behind them, so that they no longer pose a risk.

However, while this may be possible for some ex-offenders, it may be unrealistic for many ex-offenders who are lacking in confidence and communication skills to argue their case.

This is why it is important for governments to educate employers in particular about their responsibilities under the existing laws, and to examine ways of improving these laws to better protect people from discrimination.