

Human Rights and Equal Opportunity Commission

**DISCRIMINATION IN
EMPLOYMENT ON THE BASIS OF
CRIMINAL RECORD**

**Discussion paper
December 2004**



*Human Rights and
Equal Opportunity
Commission*

DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF CRIMINAL RECORD

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1 Introduction

Australians who have a criminal record often face significant barriers to full participation in the Australian community. Trying to find a job is one of the areas of greatest difficulty for former offenders. This discussion paper explores one potential barrier to employment: discrimination in the workplace on the basis of criminal record.

A person may suffer this kind of discrimination if, because they have a criminal record, they are:

- refused a job
- dismissed from employment
- denied training opportunities
- denied promotion
- subjected to less favourable working conditions or terms of employment
- harassed in the workplace.

The principle of non-discrimination is all about removing stereotypes and allowing individuals to participate in society on the basis of their individual merits rather than be judged by the characteristics that are attributed to them through generalisations. It is about ensuring that they have the same opportunities as others to participate in society.

Like many other areas of discrimination, the issue of discrimination on the basis 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.

While the principle of non-discrimination aims to provide people with criminal records with equal opportunities to gain work, it does not prevent some differentiation between people with and without a criminal record. Similarly the principle of non-discrimination does not prevent differentiation between people with different types of criminal records. However, it does require that any differentiation that excludes a person with a criminal record from employment be made on an objective and appropriate basis.

In order to determine whether it is appropriate to exclude people with criminal records from certain areas of employment, the 'inherent requirements' of a particular job must be identified and there must be careful consideration about whether a particular person's criminal record would disqualify him or her from properly meeting those requirements.

There have been a significant number of complaints to the Human Rights and Equal Opportunity Commission (the Commission) in recent years from people

with a criminal record alleging discrimination in employment. The complaints indicate that there is a great deal of misunderstanding by employers and employees as to what amounts to discrimination on the basis of criminal record. The Commission conducted a review of these complaints which indicated that further research and discussion in this area would be useful.

Accordingly, the goals of this discussion paper are to:

1. identify the law and policy in the area of discrimination on the basis of criminal record
2. ascertain some of the practical difficulties faced by both employers and employees when a person with a criminal record seeks to participate in the workplace
3. seek the views and ideas of all stakeholders as to what needs to be done to eliminate instances of discrimination.

1.1 Terms of reference

The Commission has a variety of functions to foster equality of opportunity in employment. The Commission may undertake activities to promote an understanding and acceptance of equal opportunity in employment; it may report to the Attorney-General about laws that should be made by the Commonwealth Parliament; and it may prepare and publish guidelines that aim to prevent discrimination in employment.¹

Taking into account these various functions, the Human Rights Commissioner will conduct, on behalf of the Commission, research into discrimination in employment and occupation on the basis of criminal record. In particular, the Commissioner will examine:

- the extent and nature of discrimination in employment on the basis of criminal record
- the rights and responsibilities of employers and employees in relation to employment and criminal records
- the adequacy and effectiveness of anti-discrimination and other laws to protect against discrimination in employment on the basis of criminal record
- measures which may be taken to protect people against discrimination in employment on the basis of criminal record.

The terms 'discrimination', 'employment', 'occupation' and 'criminal record' are to be interpreted with reference to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) and associated regulations and International Labour Organisation Convention 111 (ILO 111).

¹ *Human Rights and Equal Opportunity Commission Act* (Cth) (HREOC Act), s11(1)(d), s31(c), (e), (h).

1.2 Methodology

The Commission's research into discrimination in employment on the basis of criminal record will involve the following elements:

- a review of complaints received by the Commission pursuant to section 31 of the HREOC Act
- a literature review
- an examination of relevant State and Commonwealth legislation and policy
- early consultation with employer groups and unions on a draft discussion paper
- distribution of this discussion paper for public comment
- consultations with employer groups, unions, prisoner action groups and other organisations and academics who work with people who have a criminal record

1.3 Goals

The Commission's primary goal is to work with stakeholders to help develop practical solutions to the real problems faced by employers and employees in this sometimes confusing area of human rights law.

At this early stage, the Commission envisages that a likely outcome of this research will be a set of guidelines for employers and employees, to clarify the various rights and responsibilities in this difficult area.

If the consultations show that there is a need for further legal clarity and protection against discrimination on the basis of criminal record, the Commission will produce a separate report recommending legislative change to the Federal Attorney-General pursuant to section 31(e) of the HREOC Act.

The Commission would also welcome suggestions from stakeholders about other practical measures that could come out of this consultation process.

1.4 Your comments

There are a variety of discussion questions throughout this paper. The Commission encourages you to provide response to any or all of these questions, based on your personal experience or expertise.

In addition, the Commission welcomes comments on any aspect of the issue of discrimination in employment on the basis of criminal record. In particular, the Commission is interested in hearing about:

- personal experiences of people with a criminal record regarding discrimination in employment

- strategies currently used by employers to prevent discrimination on the basis of criminal record
- views about the adequacy of anti-discrimination law in the area of discrimination on the basis of criminal record
- ideas and suggestions regarding appropriate strategies to address the issue of discrimination in employment on the basis of criminal record.

Comments can be provided to the Commission in any format, including writing, email, audio or video tape. Comments may also be submitted in any language. If you would like your comments to be kept confidential, please indicate this clearly at the time you provide your comments.

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Comments are due: Friday 18 February 2005

2 What impact might a criminal record have in the area of employment?

2.1 What do the studies say?

There have been a large number of academic, sociological, criminological and government studies examining the connection between persons with a criminal record and unemployment.² While this discussion paper does not

² See for example, F Duffy, *An analysis of the policies programs and practices developed and implemented to assist ex-prisoners gain employment in Australia*, thesis, University of New South Wales, 2004 p12, 14 (F Duffy); HJ Holzer, S Raphael and M Stoll, *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and their Determinants*, Institute of Business and Economic Research, University of California, Berkeley, Working Paper No W01-005, October 2001 (HJ Holzer, S Raphael and M Stoll); Justice (Society) with The Howard League for Penal Reform, *Living It Down- The Problem of Old Convictions: The Report of a Committee set up by JUSTICE, The Howard League for Penal Reform [and] The National Association for the Care and Resettlement of Offenders*, Stevens and Sons, London, 1972; H Metcalf, T Anderson and H Rolfe, *Barriers to employment for offenders and ex-offenders*, Research Report No 155, Department for Work and Pensions, 2001 pp110-113 (H Metcalf, T Anderson and H Rolfe); D Pager, 'The Mark of a Criminal Record' *American Journal of Sociology* 108(5) 937 (March 2003); J Waldfogel, The Effect of Criminal Conviction on Income and the Trust "Reposed in the Workmen", *The Journal of Human Resources* 1 (1993) XXIX; B Western and JR Kling and DF Weiman (July 2001) The Labor Market: Consequences of Incarceration, *Crime and Delinquency*, 47(3) p410.

seek to include the results of all those studies it is useful to have some context in which to assess the issue of discrimination on the basis of criminal record.

Research indicates that employers prefer not to hire a person with a criminal record, if given the chance to hire someone who does not have such a record.³ There can be a variety of reasons for this.

Some professions and occupations explicitly prohibit by law the participation of persons with certain criminal records. For example, a certain kind of criminal record will prevent people working with children. A criminal record may also prevent registration as a lawyer, doctor, optometrist, physiotherapist or architect.

A past conviction may also have an impact on someone seeking an occupational licence in industries like building, real estate and security. A person with a criminal record may also be prohibited from holding management positions in certain corporations and community organisations or from running for parliament⁴ (see further section 5.3 on *Persons applying for admission, licenses or registration in certain occupations*).

Even where there is no explicit limitation on hiring a person with a criminal record, employers may perceive that those persons pose a higher risk of dishonesty, unreliability, irresponsibility or undesirable character.⁵ Some employers may be concerned about how their clients or their other employees might react if an employee's criminal record becomes known.⁶

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 make it difficult for them to find employment.⁷ All of these factors place people with a criminal record at a significant disadvantage when applying for jobs.

Sometimes the flow-on effect of this disadvantage – be it actual or perceived – is that a person may hide or be dishonest about their criminal record.⁸ If this dishonesty is discovered it may be, in itself, a reason not to hire the person or to dismiss him or her if already hired.

Research also suggests that the disadvantages felt by people with a criminal record can lead to recidivism – because they feel hopelessly tarnished by their past and that there is no point in applying for a job.⁹

³ See for example HJ Holzer, S Raphael and M Stoll, p11.

⁴ For more examples, see The Law Reform Commission, *Criminal Records*, Discussion Paper No 25 (December 1985) 77 (The Law Reform Commission).

⁵ H Metcalf, T Anderson and H Rolfe, 110-113.

⁶ R Giguere and L Dundes, 'Help Wanted: A Survey of Employer Concerns about Hiring Ex-Convicts' (December 2002) 13(4) *Criminal Justice Policy Review* 396.

⁷ H Metcalf, T Anderson and H Rolfe, 25-26.

⁸ See The Law Reform Commission, 5; also, H Metcalf, T Anderson and H Rolfe, 36.

⁹ See Law Reform Commission, 11; also, F Duffy, 12, 14.

The impact of a criminal record on job prospects and professional opportunities is of particular concern for juveniles with a criminal record. Acquiring a criminal record at a young age can affect a person throughout their entire working life.

It is also important to note that the over-representation of Indigenous people in the criminal justice system contributes to an over-representation of Indigenous people in the unemployment figures.¹⁰

The Commission is aware that some Australian employers have a successful track record of employing people with a criminal record, and is interested in hearing about their experience.

2.2 What do the complaints made to the Human Rights and Equal Opportunity Commission indicate?

The Commission has jurisdiction to receive complaints about discrimination in employment on the basis of actual or imputed criminal record (see section 3.2.1, *The Human Rights and Equal Opportunity complaints process*).

The Commission has reviewed 103 complaints received on this ground and finalised between 2001 and 2003. Examples from complaints received by the Commission are used throughout this paper to illustrate the issues that arise regarding discrimination in employment on the basis of criminal record. A statistical analysis of the complaints finalised by the Commission is provided in *Attachment A: Complaints Review*.

The following extracts indicate some of the concerns expressed by people who have lodged complaints with the Commission:

- *My biggest concern is that my future is being assessed by my past. I know I was silly and reckless in the past but I have changed since then.*
- *I have taken responsibility for my actions, through a legal process. ... it does not matter how hard you try to prove that you are rehabilitated, the majority of people out there are not prepared to be the ones that give you a chance.*

One complainant said that his employer insinuated that he was responsible for goods that had gone missing on a number of occasions because he had previously been convicted for entering and stealing. The complaint was resolved by conciliation, with the employer offering the complainant a redundancy package. However, the complainant expressed the following frustrations:

It has caused me a tremendous amount of stress and worry. I am left anxious, angry and confused about my future work prospects. I feel

¹⁰ F Duffy, 11.

that I'll never be accepted within the workplace and that my efforts were not recognised or rewarded. It has made me feel alienated, targeted and different. It has made me just want to give up working ever again to avoid the stress, worry, humiliation that I've endured..

The concern that employers have about employing a person with a criminal record, or someone who has been dishonest about their record, is also shown in their responses to Commission complaints. For example one employer noted:

On most occasions, the nature of the applicant's criminal record is not relevant to the position for which they have applied. However, it needs to be recognised that trust is an essential element of any successful employer-employee relationship and it is expected that an applicant be honest and 'up-front'.

Questions for discussion – What impact might a criminal record have in the area of employment?

2 (a) Do you know of any employers with a successful track record of employing people with criminal records?

2(b) What practical difficulties face people with criminal records who are seeking employment?

2(c) How do people with criminal records address the difficulties they encounter in seeking employment?

2(d) What special difficulties face juveniles with criminal records?

2(e) What special difficulties face Indigenous people with criminal records?

2(f) Why might employers be reluctant to employ someone with a criminal record?

2(g) What strategies might address ongoing stereotyping of people with criminal records in the workplace?

3 What do discrimination laws say about taking a person's criminal record into account in employment?

Discrimination, according to law, generally occurs when a person is treated less favourably because of a particular characteristic. Anti-discrimination provisions regarding discrimination in employment on the basis of criminal record are found in international, Federal, and some State and Territory laws.

3.1 International law

3.1.1 ILO Convention 111

In 1973 Australia ratified the International Labour Organisation Convention 111, the *Discrimination (Employment and Occupation) Convention 1958* (ILO111).

ILO 111 requires all countries who are party to the Convention to:

...declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

While the Convention specifies certain grounds of non-discrimination, including race, colour, sex, religion, political opinion, nationality and social origin, it also leaves room for parties to add further grounds of non-discrimination.

In 1989 Australia added a variety of grounds, including criminal record.¹¹

Article 1(1)(a) of ILO 111 defines 'discrimination' in employment as:

Any distinction, exclusion or preference made on the basis of ... [criminal record] ... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

Article 1(2) provides for an exception to this general definition, known as the inherent requirements exception, which states:

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

Article 1(3) defines 'employment' and 'occupation' to include:

... access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

¹¹ *Human Rights and Equal Opportunity Commission Regulations 1989*. Other grounds of discrimination added by this regulation include: age; medical record; impairment; marital status; mental, intellectual or psychiatric disability; nationality, physical disability; sexual preference; and trade union activity.

3.1.2 Other international human rights treaties

In 1975 Australia ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); in 1980 Australia became a party to the *International Covenant on Civil and Political Rights* (ICCPR); and in 1990 Australia ratified the *Convention on the Rights of the Child* (CRC).

These three treaties prohibit Australia from discriminating against any person on grounds including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any 'other status'.¹²

International jurisprudence indicates that discrimination on the grounds of criminal record would fall into the 'other status' category.¹³

3.2 Federal discrimination legislation

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). The ILO 111 is scheduled to the HREOC Act and therefore forms part of HREOC's jurisdiction. The 1989 *Human Rights and Equal Opportunity Commission Regulations* extended the definition of discrimination in the HREOC Act to include criminal record.

The HREOC Act mirrors the language of ILO 111 in its definition of discrimination as any 'distinction, exclusion or preference' that 'has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.

As with ILO 111, the HREOC Act provides a general exception to discrimination in employment, known as the inherent requirements exception. Neither the HREOC Act nor ILO 111 define what is meant by 'inherent requirements', however it is generally understood that there is no discrimination if an applicant does not get a job or promotion because they cannot fulfil the essential aspects of a particular job. The concept of 'inherent requirement' is discussed in greater detail in section 5, *When might a criminal record be relevant to employment?*

It is important to note that while certain conduct may be found to constitute discrimination by the Commission, the HREOC Act does not make the conduct unlawful. If the Commission finds that an act or practice constitutes discrimination, and the complaint is unable to be conciliated, then the

¹² See ICESCR article 2(2); ICCPR articles 2(1), 26; CRC article 2(1).

¹³ The European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record: see *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97. See also S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights; Cases, Commentary and Materials*, Oxford University Press, 2nd ed, 2004, p689 which discusses UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'.

Commission's actions are limited to preparing a report with recommendations, to the Attorney-General for tabling in parliament. The Commission does not have the power to make respondents to a complaint comply with or implement its recommendations.

For example, there have been two cases before the Commission where the Commission has made a finding of discrimination on the basis of criminal record. In both cases the Commission has reported its findings to the Federal Parliament, as required by the HREOC Act.¹⁴ In both cases the recommendations made by the Commission were ignored by the employer. As these recommendations are not legally enforceable the employers were not bound to comply.

This situation is quite different to complaints of discrimination based on sex, race or disability where a complainant can seek a legal remedy in the Federal Court or the Federal Magistrates Service if the matter is terminated by the Commission's President.

3.2.1 The Human Rights and Equal Opportunity Commission complaints process

Under the HREOC Act, the Commission is able to investigate complaints of discrimination in employment on the basis of criminal record.

There are two parties to a complaint: the complainant and the respondent. The complainant is the person who lodges the complaint with the Commission and is generally the person who has been directly affected by the alleged discrimination. The complaints process involves the following steps:

1. A complaint must be made in writing.
2. The Commission makes an initial assessment of the complaint and decides whether it is covered by the HREOC Act. If it is covered a recommendation is made to the President of the Commission to commence an inquiry into the complaint.
3. An Investigation/Conciliation officer then commences an investigation and may contact the complainant for further information. The President writes to the respondent to seek comments on the complaint, ask questions regarding the circumstances of the complaint and seek relevant employment documents. The respondent is also invited to make submissions in relation to any exemption, exception or defence that may apply.

¹⁴ Human Rights and Equal Opportunity Commission, Reports of inquiries into complaints of discrimination in employment on the basis of criminal record, Mr Mark Hall v NSW Thoroughbred Racing Board, HREOC Report No. 19 (Hall's Case) and Ms Renai Christensen v Adelaide Casino Pty Ltd, HREOC Report No. 20 (Christensen's Case).

4. Once all of the relevant information and documentation has been gathered, the President will decide to either:
 - a. Decline the complaint for any of the reasons outlined in the HREOC Act including: if an exception applies and therefore the alleged acts are not discriminatory; if the complainant does not wish the inquiry to continue; if the complaint is out of time; if the complaint is lacking in substance; if an alternative remedy has been sought and the Commission feels the matter has been adequately dealt with; or if another remedy can more effectively deal with the matter.
 - b. Attempt to settle the complaint through conciliation where both parties have an opportunity to discuss and resolve the matter on their terms.
5. If the complaint is declined, the President advises the complainant of this in writing and explains the reasons for the decision. The respondent will also be notified.
6. If the complaint is to be conciliated, the Investigation/Conciliation Officer assists the parties to try to reach an agreement. The Officer may call a conciliation conference. The conference gives the parties the opportunity to talk through the situation with the help of someone independent and settle the matter on their own terms. If the matter is conciliated, then the matter is considered to be finalised.
7. If a complaint that has not been declined for one of the statutory reasons cannot be conciliated, the President may undertake further Inquiry. The President will make a tentative finding which is given to the parties. They are asked to make submissions in relation to the tentative finding, either orally or in writing.
8. If, after receipt of these submissions and further consideration of the matter, the President finds that the practice does not constitute discrimination, he issues a report containing his findings and reasons. This report is given to the parties.
9. However, if the President finds that the practice does constitute discrimination, he will inform the respondent of his findings, the reasons for his findings and any recommendations made as a result of the findings. The respondent will be given 28 days to reply and state what action they have taken or propose to take in response to the findings and recommendations.
10. The President will then forward a report to the parties and the Attorney-General, which will include his findings and recommendations as well as any action taken or proposed to be taken by the respondent.
11. The Attorney-General tables the report in Federal Parliament.

3.3 State and Territory discrimination legislation

Only Tasmania and the Northern Territory have laws that specifically prohibit discrimination on the basis of criminal record.

Under the Northern Territory *Anti-Discrimination Act 1992*, it is unlawful to discriminate against a person on the grounds of 'irrelevant criminal record'. The definition of 'irrelevant criminal record' incorporates the inherent requirements exception by recognising that there will be times where 'the circumstances relating to the offence for which the person was found guilty' may be 'directly relevant'.¹⁵ The legislation also includes an exemption to discrimination where the work principally involves the care, instruction or supervision of vulnerable persons, including children.¹⁶

The Tasmanian *Anti-Discrimination Act 1998* has very similar provisions to the Northern Territory legislation. A person must not discriminate against another on the basis of 'irrelevant criminal record' and there is a specific exemption for discrimination in relation to the education, training or care of children.¹⁷

In both 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.¹⁸

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.¹⁹ The operation of spent conviction legislation is described in *Attachment C: Spent conviction schemes*.

In other States and Territories, persons who wish to complain of discrimination on the grounds of criminal record must rely on the HREOC Act.

Questions for discussion – What do discrimination laws say about taking a person's criminal record into account in employment?

3(a) Are there currently sufficient legal protections against discrimination in employment on the basis of criminal record?

¹⁵ Section 4.

¹⁶ Section 37.

¹⁷ Section 50.

¹⁸ *Anti-Discrimination Act 1992* (NT), section 88; *Anti-Discrimination Act 1998* (Tas), section 89.

¹⁹ *Spent Convictions Act 1988* (WA); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT), s7; *Spent Convictions Act 2000* (ACT).

3(b) *If there needs to be additional protection against discrimination in employment on the basis of criminal record, what form should it take and what elements should be included?*

3(c) *What remedies should be available for people who have experienced discrimination on the basis of criminal record?*

3(d) *What difficulties might face a person with a criminal record who wishes to use the current anti-discrimination legislation? What can be done to overcome these difficulties?*

4 What does a 'criminal record' include?

Criminal records are kept by police services in each jurisdiction in Australia. While the information that is kept by the police and the manner in which it is kept differs between jurisdictions, it generally includes:

- court appearances
- court convictions, including any penalty or sentence
- findings of guilt with no conviction
- good behaviour bonds or other court orders
- charges
- matters awaiting court hearing
- matters currently under investigation
- police intelligence (records of investigations)
- traffic infringements.²⁰

An individual can obtain a copy of his or her own criminal record, and an employer can request a police check if they have the consent of the person. In most jurisdictions it is possible to obtain a check of the records held by the State police service, or to obtain a National Police Certificate which includes a check of all records held in all jurisdictions.²¹ For further information about this process see *Attachment B: Conducting a criminal record check*.

The information that may be disclosed in a criminal record check will vary from jurisdiction to jurisdiction and from case to case depending on the purpose of the check, the agency requesting it, the types of offences, the spent conviction legislation and the required level of disclosure in the relevant legislation.²²

Spent conviction legislation allows the criminal records of offenders to be amended by removing some offences after a certain period of time. The idea

²⁰ This is governed by the police legislation in each jurisdiction, for example, the *Police Service Administration Act 1990* (Qld).

²¹ The process of completing a National Criminal History Record Check is managed through a national agency called CrimTrac.

²² The CrimTrac Agency, *Guide to National Criminal History Record Checking Services*, March 2004.

behind spent convictions schemes is to allow former offenders to ‘wipe the slate clean’ after a certain period of time, depending on the offence. In Australia, a Commonwealth spent convictions scheme was introduced in 1990.²³ Spent conviction legislation also exists in all States and Territories²⁴ except South Australia²⁵ and Victoria, where there are administrative guidelines about the disclosure of criminal convictions. Spent conviction legislation varies significantly across jurisdictions. The main features of spent conviction legislation throughout Australia are described in *Attachment C: Spent conviction schemes*.

In some circumstances a person’s complete criminal record, including charges, will be provided to an employer. For example, the New South Wales ‘Working With Children Check’ requires the disclosure of all convictions, whether or not they are spent, and all charges which:

- may have not been heard or finalised by a court
- are proven but have not led to any conviction
- have been dismissed, withdrawn or discharged by a court.

Applications for positions requiring a high degree of integrity can also mean that all of the information held in police records can be viewed in some instances. This is the case in applications for positions in police services.

Commission complaint: ‘Criminal record’ can include police records regarding charges which were not proven

Summary of complaint: The complainant alleged that his application to join the police service was rejected due to charges of which he had been acquitted. He had been charged seven years previously for assault occasioning bodily harm and deprivation of liberty, but was subsequently acquitted.

Response: The police service argued that applicants must have a high level of integrity, emotional stability and professionalism as well as the mental and physical stability to perform operational requirements. The police service reported that they examined the past charges, the circumstances in which they took place, witness statements from the time, as well as the complainant’s work history. They considered that he did not meet the high standard of integrity required by the police force.

²³ The Australian Law Reform Commission recommended the introduction of spent conviction legislation in Report No. 37, *Spent Convictions*, 1987.

²⁴ *Crimes Act 1914* (Cth), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), *Spent Convictions Act 1988* (WA), *Criminal Records Act 1991* (NSW), *Criminal Records, (Spent Convictions) Act 1992* (NT), *Spent Convictions Act 2000* (ACT), *Annulled Convictions Act 2003* (Tas).

²⁵ Spent conviction legislation is currently under consideration in South Australia. See Attorney-General’s Department South Australia, ‘Spent Conviction Legislation – Discussion Paper’, Adelaide, 2004.

Outcome: The Commission declined the complaint on the basis that there had been no discrimination. The Commission decided that the police service had demonstrated that a high standard of integrity was an inherent requirement of the position, which justified their decision to not employ the complainant.

The Commission has found that a 'criminal record' includes not only the actual record of conviction but also the circumstances of the conviction.²⁶ This means that when an employer is considering whether a person's criminal record justifies exclusion from a position, an assessment should be made of the circumstances surrounding a conviction, in addition to the conviction itself. For example, factors such as the age of an offender and the length of time since the conviction should be taken into account in assessing the relevance of that conviction to the nature of the employment.

Questions for discussion – What does a criminal record include?

4(a) Do employers and employees understand the categories of information that might be included or excluded on a criminal record check provided by police?

4(b) When requesting a criminal record check, do employers seek information about specific offences or do they request a general review?

4(c) What difficulties, if any, have employers and employees encountered in obtaining criminal record checks?

4(d) Have there been instances where a criminal record check has been completed without an individual's consent?

5 When might a criminal record be relevant to employment?

To avoid discrimination on the basis of a criminal record, an employer can only 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. The anti-discrimination legislation in Tasmania and the Northern Territory uses the words 'irrelevant criminal record' to express the same concept.

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.

²⁶ Hall's Case, p20.

Some States and Territories have decided that there are particular types of employment, for instance in working with children, where people with a certain criminal record will not be able to be employed (see section 5.2, *Persons working with children*).

In addition, some professional and occupational licensing bodies have considered the special characteristics of their field and developed licensing and registration rules which address the relevance of a person's criminal record to the conduct of that profession (see section 5.3, *Persons applying for admission, licences or registration in certain occupations*).

In other fields there is very little guidance for employers as to what the inherent requirements of a particular job might be and how to assess whether a particular person meets those requirements.

In any event, it is important to keep in mind that no matter what the inherent requirements of a position are, and no matter what a person's criminal record, each person's ability to fulfil those requirements should be assessed on a case-by-case basis to avoid discrimination.

5.1 How do you determine the 'inherent requirements' of a particular job?

Since each job and each person's criminal record is different, there is no steadfast rule in determination the inherent requirements of a particular job. The inherent requirements exception has been considered by the International Labour Organization, the Australian courts and by the Commission in its consideration of complaints. While the cases do not reveal any simple test, the following principles appear to represent the current state of the law:

- An inherent requirement is something that is 'essential' to the position rather than incidental, peripheral or accidental.²⁷
- The burden is on the employer to identify the inherent requirements of the *particular* position and consider their application to the *specific* employee before the inherent requirements exception may be invoked.²⁸
- The inherent requirements should be determined by reference to the specific job that the employee is being asked to do and the surrounding

²⁷ See for example *X v The Commonwealth* [1999] HCA 63 (2 December 1999) (X's Case), *Qantas Airways v Christie* (1998) 193 CLR 280 (Christie's Case) or Hall's Case p32, 34.

²⁸ Hall's Case p36, S Selleck, 'Criminal Records Discrimination – When the Law Speaks with a Forked Tongue', paper presented to CSEPP consultants, 26 May 2004, p10 (S Selleck); *Zraika v Commissioner of Police, NSW Police* [2004] NSWADT 67.

context of the position, including the nature of the business and the manner in which the business is conducted.²⁹

- There must be a ‘tight correlation’ between the inherent requirements of the particular job and an individual’s criminal record. There must be more than a ‘logical link’ between the job and a criminal record.³⁰
- The inherent requirements exception will be interpreted strictly so as not to defeat the purpose of the anti-discrimination provisions.³¹ The Full Federal Court of Australia described the purpose and operation of the HREOC anti-discrimination laws as follows:

Respect for human rights and the ideal of equality – including equality of opportunity in employment – requires that every person be treated according to his or her individual merit and not by reference to stereotypes ascribed by virtue of membership of a particular group... These considerations must be reflected in any construction of the definition of ‘discrimination’ ... because, if they are not, and a construction is adopted that enables the ascription of negative stereotypes or the avoidance of individual assessment, the essential object of the [Human Rights and Equal Opportunity Commission] Act to promote equality of opportunity in employment will be frustrated.³²

The ILO has indicated that it is reluctant to apply the ‘inherent requirement’ exception to an entire profession.³³

While these broad principles offer some guidance as to how the inherent requirements exception may be applied in the courts, they provide little practical guidance for employers making day-to-day decisions.

Some categories of employment require a high level of integrity amongst employees. For example, many police services have a policy that requires a completely clean criminal record for prospective employees. Thus even minor charges can mean that an applicant may not be able to fulfil the inherent requirements of a position. The Commission has received several complaints about the requirements of police services.

²⁹ X’s Case, Christie’s Case, Hall’s Case p33, S Selleck p10.

³⁰ Hall’s case p35-36, S Selleck p13.

³¹ See also Hall’s case p34-5, S Selleck p10.

³² *Commonwealth v Bradley* (1999) 95 FCR 218 at 235 per Black CJ. See also *Commonwealth v Human Rights and Equal Opportunity Commission and Ors* (1998) 158 ALR 468 at 482, per Wilcox J.

³³ International Labour Organization, *Fundamental rights at work and international labour standards*, Geneva, International Labour Office, 2003. See also Hall’s Case, p31.

Commission complaint: Applying for a job as a police officer

Summary of complaint: The complainant alleged that his application to join the police service was rejected due to his drink driving offences. The complainant had convictions for drink-driving in 1991 and driving whilst disqualified in 1992, approximately ten years before making the complaint. He served two days in prison out of a 14 day sentence.

Response: The police service said that the offences and imprisonment, no matter how short, automatically disqualify him from becoming a new recruit.

Police service: It is an inherent requirement of the job of police officer as an individual and the police service as a whole cannot be effective without the respect, trust and confidence of the community.

Outcome: The Commission declined the complaint on the basis that there had been no discrimination. The Commission decided that the police service had demonstrated that a high level of integrity is required of police officers and it is an inherent requirement that they do not have a criminal record.

Complainant: I understand [the police service's] concern, however, I am sincere when I state that these are isolated incidents and ones I deeply regret ... I believe there comes a time when people are deserving of a chance, especially when they have demonstrated their aptitude and determination.

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

In 2002, the Commission made a report to the Attorney-General finding that discrimination on the basis of criminal record had occurred in the case of Ms Christensen.

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.

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.³⁴

³⁴ Christensen's Case pp20-21.

5.2 Persons working with children

All jurisdictions in Australia have made a policy decision that the protection of children is so important that the criminal records of persons working with children should be closely scrutinised.

There are different approaches in each jurisdiction to criminal record checks for people working with children. In some States there are legislative requirements for criminal record checks and in other States there are policy guidelines recommending such checks.

When examining a person's criminal record for a position in which they will be working with children, one of the overriding factors is to ensure that the safety and well-being of children is protected. In this circumstance, it could be said that an 'inherent requirement' of the job is that the individual can be trusted to work with children, and this may be a high threshold to meet.

However, as discussed previously, another important principle is to ensure that a person's ability to fulfil the inherent requirements be assessed on a case-by-case basis. Thus, while a certain type of criminal record may weigh heavily against a person's suitability to work with children, the inherent requirements principle still requires an assessment of a person's individual circumstances to be weighed against the particular job being performed.

Both Queensland and New South Wales have developed comprehensive legislative approaches to this issue. Both States have a scheme of mandatory criminal record checks for all persons wishing to work with children. All convictions and all charges from all jurisdictions in Australia may be reviewed in the process of conducting these checks – including convictions that would otherwise be protected by spent conviction legislation (See *Attachment C: Spent conviction schemes*). Certain convictions, for instance convictions relating to child sex offences, will generally result in automatic disqualification. However, both schemes permit an individual to make submissions regarding their ability to ensure the safety of children despite their specific criminal record.³⁵

³⁵ *Child Protection (Prohibited Employment) Act 1998* (NSW); *Commission for Children and Young People Act 1998* (NSW); New South Wales Commission for Children and Young People, *The Working With Children Check Guidelines*, April 2004; www.kids.nsw.gov.au; *Commission for Children and Young People Act 2000* (Qld); www.childcomm.qld.gov.au.

5.3 Persons applying for admission, licences or registration in certain occupations

There are a number of professions and trades which seek to restrict the participation of people with a criminal record or, at the very least, examine a person's criminal record prior to their admission, registration or licensing.

While the rules and regulations of the various agencies, statutory bodies, professional associations and trade groups differ between States and Territories, some of the professions and trades which examine a person's criminal record prior to admission, registration or licensing include:

- persons working with children (see above)
- police and corrections officers (see example above)
- security professionals (including bouncers, security guards, locksmiths) and private investigators
- lawyers, public notaries, justices of the peace
- doctors, dentists, nurses, pharmacists and other health professionals
- members of Parliament and certain public office holders
- company managers and officer holders in certain associations
- conveyancers, real estate and land agents
- building work contractors, plumbers and gas fitters
- taxi and other public passenger licences
- bookmakers and gaming licence holders
- liquor sellers and publicans
- second hand dealers and pawnbrokers.³⁶

Some of the professions and trades are quite specific about the types of convictions which may disqualify applicants for a licence. For example, in New South Wales an applicant is prohibited from obtaining a security industry licence if he or she has committed an offence involving firearms, drugs, assault, fraud, dishonesty or stealing within ten years of making the application.³⁷

Other professions, for example the legal profession, apply a more general 'good fame and character' or 'fit and proper person' standard.

Where there are 'good character' requirements, the case law states that the mere fact of a criminal record does not determine a person's character and that the passage of time can heal past wrongdoing.³⁸ As one judge put it:

...each case will necessarily turn on its own facts. The nature of the initial misconduct, the subsequent attitude of the person disqualified towards it, that person's behaviour during the period of disqualification,

³⁶ See Attorney-General's Department South Australia, 'Spent Conviction Legislation – Discussion Paper', Adelaide, 2004; S Selleck p2.

³⁷ See *Security Industry Act 1997* (NSW), s 16; *Security Industry Regulations 1998* (NSW), reg 11.

³⁸ See *Z v Director General, Department of Transport* [2002] NSWADT 67 at [30]-[32].

*and the passage of time itself, are all factors which will be relevant in determining whether a person has demonstrated that they are currently of good character.*³⁹

It seems that as the Australian community becomes more security conscious, the number of professions and occupations seeking to include a provision for 'good character' or other forms of licensing may grow. For example, in 2003 the Office of Transport Security introduced regulations requiring all maritime and aviation staff to obtain security identification cards in order to 'reduce the risk of criminals and potential terrorists infiltrating the maritime sector'. All staff must undergo background checks conducted by the Australian Security and Intelligence Organisation, the Australian Federal Police and the Department of Immigration, Multicultural and Indigenous Affairs. Information about the checks states that '[a]nyone with an adverse criminal history or security assessment ... will be precluded from obtaining a card.'⁴⁰

It is important to note, however, that just because there are rules requiring a criminal record to be examined prior to licensing, it does not mean that every person with a criminal record will, or ought to be, excluded. There still needs to be a clear connection between the individual's criminal record and the licensing or registration requirements.

Further, in order to avoid discrimination under ILO 111 and the HREOC Act, there should be an opportunity for an individual assessment of (a) a person's *particular criminal record* (b) the *inherent requirements* of the *particular job* and (c) the correlation between the criminal record and the inherent requirements of the particular job.

This does not necessarily prevent a licensing body from developing criteria concerning the admission of people with certain criminal records. However, licensing rules and regulations ought to ensure that there is an opportunity for individuals to state their case.

Further, it may be necessary to take into account the fact that a wide variety of 'particular jobs' may exist within a profession. For example a person with a security industry licence could be a personal bodyguard, a pub bouncer or a person monitoring security videos in a control room. Each of these positions may require a security licence but the inherent requirements of the particular job may be quite different. Therefore it may be necessary for licensing rules to permit some distinction between different jobs within an industry. The case of *Z v Director General Transport* is one example where it was found appropriate to give a restricted passenger licence after taking into account an individual's criminal record.

³⁹ *Aavelaid v Dental Board of Victoria* [1999] VSC 255 at [28] per Coldrey J. See also *Good v Medical Board of Western Australia*, unreported, Supreme Court of Western Australia, 6 December 1994 at p4 per Anderson J; *In re Davis* (1947) 75 CLR 409 at 416 per Latham CJ.

⁴⁰ See Office of Transport Security, *Fact Sheet 6- Maritime Security Identification Cards*, Department of Transport and Regional Services, Canberra, http://www.dotars.gov.au/transsec/maritime/fact_sheet/fact_sheet6_20_07.aspx, viewed 21 September 2004.

Example: Applying for a public passenger licence (*Z v Director General Transport*)⁴¹

Z had a long history of criminal offences including carnal knowledge (with a consenting under-age girl); larceny; shop break; break with intent; drunk and disorderly behaviour; illegal use of motor vehicle; assault occasioning actual bodily harm, stealing, kidnapping, rape, and false pretences.

The Police Service in another State provided information that Z had been convicted of several traffic offences, namely: exceeding the speed limit, driving motor vehicle without due care and attention/careless driving, demerit point suspension, driving while suspended, not being the holder of an appropriate valid drivers licence, giving information that he knew to be false/misleading.

Z sought a licence to drive a public passenger vehicle. The NSW Administrative Decisions Tribunal considered whether or not there was a time when Mr Z could 'step out from the shadow of a criminal history' and be accepted as a different person whose character can be assessed afresh.

The Tribunal stated that:

*a person's authority should not be refused or cancelled solely because of a person's criminal convictions without any proper consideration of whether those convictions prevent the Director General from asserting that the person is of good repute and in all other respects a fit and proper person to be the driver of a public passenger vehicle.*⁴²

After considering the facts the tribunal found Z a fit and proper person to be the driver of a public passenger vehicle authorised to drive long distance and tourist buses, but not to drive route buses or private hire cars.

Commission complaint: Applying for a licence as a stable hand (Hall's Case)

In 2002, the Commission made a report to the Attorney-General regarding this case, finding that discrimination on the basis of criminal record had occurred.

Mr Hall was required to be licensed by the Thoroughbred Racing Board in order to work as a stable hand. When he made his licence application he failed to disclose his prior convictions, which included traffic offences and

⁴¹ *Z v Director General, Department of Transport* [2002] NSWADT 67.

⁴² *Z v Director General, Department of Transport* at [31].

wilful and obscene exposure. When his record was discovered he was stood down from his job and was subsequently refused a licence by the Board.

In addition to concerns about Mr Hall's honesty and candour, the Board argued that it was an inherent requirement of a job in the racing industry that a person not have a criminal record as that that could bring the industry into disrepute.

The Board referred to the 'good fame and character' requirements that had to be fulfilled for a licence and highlighted that maintaining the reputation, integrity and public confidence in the racing industry had to be taken into account in making these decisions. The Board submitted that in such circumstances it was not necessary to make a direct link between the requirements of the job and the criminal convictions of the individual because it was the industry itself which had the overriding requirements.

The Commission found while 'fitness and propriety' provisions may form part of the inherent requirement of a job in the racing industry, the precise content of those requirements depends on the nature of the specific job. In the case of a stable hand there was no evidence to suggest that Mr Hall's criminal record made it inappropriate for him to be issued a stable hand's licence.

Example: Applying the 'good fame and character' test in admitting a lawyer (*Re B*)⁴³

Legal professional bodies apply a 'good fame and character' test prior to admitting someone to practice.

B was a well-known political activist, involved in a number of social and political movements in the 1960s and 1970s. She was arrested and convicted of street offences on a number of occasions, both before and during her law studies, and had declared her contempt for the law in a published article. This history was disclosed to the Court at the time of application for admission as a barrister.

The NSW Court of Appeal found that in this case, D's radicalism had extended beyond her youth and was on-going at the age of 35, constituting a sustained course of conduct evidencing disrespect for the law and its institutions. This was found to be incompatible with being a barrister.

⁴³ [1981] 2 NSWLR 372.

Example: Deciding whether a legal practitioner is a ‘fit and proper’ person⁴⁴

In the High Court case, *A Solicitor v The Council of the Law Society of New South Wales*, a solicitor appealed against a decision of the Court of Appeal of New South Wales which found that he was guilty of professional misconduct and was not a fit and proper person to be a legal practitioner.

The solicitor was convicted of aggravated indecent assault of two of his stepdaughters in 1998 and informed the Law Society of those convictions. However, he failed to disclose to the Law Society of New South Wales that he had been convicted of further charges of aggravated indecent assault in 2000, at a time when the Law Society was considering whether disciplinary action should be taken against the solicitor in regard to the first convictions. The second set of convictions was eventually quashed.

The Court held that while the solicitor was guilty of professional misconduct due to his failure to disclose the second set of convictions, he remained a fit and proper person to be a legal practitioner.

The Court said that:

The conduct of the appellant in committing the acts of indecency towards the two complainants in 1997 did not occur in the course of the practice of his profession, and it had no connexion with such practice ... the nature of the trust and the circumstances of the breach, were so remote from anything to do with professional practice that the characterisation of the appellant’s personal misconduct as professional misconduct was erroneous.

Questions for discussion – When might a criminal record be relevant to employment?

5(a) *In what occupations might a criminal record be a relevant ground for excluding a person from employment, licensing or registration? For these specific occupations what criminal record would be relevant and why?*

5(b) *In what occupations would a criminal record never, or almost never, be relevant?*

5(c) *Are there any examples where criminal record checks are conducted unreasonably (ie go beyond the inherent requirements)?*

5(d) *Are there examples of licensing, admission or registration rules that go beyond the inherent requirements of the position?*

⁴⁴ *A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1 (4 February 2004).

Consider the following questions in your particular field of employment:

5(f) *What guidance is available to help employers determine the inherent requirements of the job in the context of employees with a criminal record?*

5(g) *What information should be available to actual or prospective employees regarding the inherent requirements of the job?*

5(h) *What mechanisms are available to appeal disqualification from employment, licensing or registration?*

5(i) *What examples do you have of possible discrimination on the basis of criminal record?*

5(j) *Do licensing or registration rules allow for individual assessment of a person's criminal record and its relevance to the inherent requirements of a particular job within the industry?*

6 What must actual or prospective employees disclose about their criminal record when asked?

6.1 Do employees have to voluntarily disclose a criminal record?

The Commission has received a number of complaints from people who were not asked directly about their criminal record at the time of their job application, but when it came to light later, were dismissed because of dishonesty.

There is no universal duty on a prospective employee to volunteer anything about his or her prior record, even if those facts are likely to affect the employer's willingness to employ him or her.⁴⁵

Example: Duty to voluntarily disclose? (*Stock v Narrabri Nominees, WA Industrial Relations Commission, 1990*)

Mr Stock was employed as a tyre fitter in May 1990. He was not asked about his criminal record in his application. When launching the business the owner placed an advertisement in a local newspaper, including a photograph of the

⁴⁵ *Andrew Gordon Stock v Narrabri Nominees Pty Ltd trading as Tyre Mart Bunbury*, Western Australian Industrial Relations Commission, 16 August 1990. See also S Selleck citing *Bell v Lever Brothers Ltd* [1932] AC 161; *Concut Pty Ltd v Worrell* (2000) 176 ALR 693; *Gordon & Gotch (Australasia) Ltd v Cox* (1923) 31 CLR 370; *Hands v Simpson Fawcett & Co Ltd* (1928) 44 TLR 295.

staff. The owner received several phone calls from people who had seen the advertisement and were concerned that he had employed Mr Stock who had been convicted of stealing, amongst other dishonesty offences. The owner dismissed Mr Stock.

The Industrial Relations Commissioner stated that:

*It is clear ... that an employee is not under any duty to volunteer facts regarding his personal antecedents even if such facts are likely to affect the employer's willingness to employ him.*⁴⁶

The Commissioner found that Mr Stock had been unfairly dismissed.

In some cases, however, legislation and registration or licensing rules require disclosure. In other cases the specific circumstances of the position may require disclosure.

In the following example, from a complaint made to this Commission, it was decided that dismissal for lack of disclosure where the complainant was not asked about her criminal record, did not constitute discrimination.

Commission complaint: Impact of failing to volunteer information about criminal record

Summary of complaint: The complainant alleged that she was dismissed from her position as an accounts clerk due to her criminal record for fraud against an employer. The complainant was convicted in 1997 and served a prison sentence of eight months.

The complainant discussed with her parole officer before an interview for the position whether she should disclose her criminal record during the interview. They decided that she should not, as she was under no legal obligation to do so and that if she did so she would not get the job.

During the interview the subject of criminal record was not raised. The complainant alleged that she was only asked what she had been doing over the last few years, to which she replied that she had held two positions, looked after family and had done volunteer work. She did not disclose that four years earlier she had been imprisoned for fraud and stealing.

A week after she started work, she was called into the employer's office and asked whether she would like to provide more information about what she had been doing in the past. A third party had told the employer about her criminal record. She revealed what had happened and the employer informed her that she should resign or be dismissed because she had deceived them by not telling them about her record in the interview. She resigned from the position.

⁴⁶ *Stock v Narrabri Nominees*, WA Industrial Relations Commission, No.1122 of 1990, citing *Cambourn v A.E. Leer and B.A. Leer* (1979) AR (NSW) 523.

Response: The employer stated that the absence of a criminal record was not an inherent requirement of the position and that he was disappointed only by the lack of disclosure. He said that he expects employees to be honest and would give people a go as a result. He claimed that the complainant was dismissed for her lack of honesty.

Outcome: The Commission declined the complaint on the basis that there had been no discrimination. The Commission decided that the complainant was dismissed due to the lack of disclosure rather than her criminal record.

6.2 Do employees or job applicants have to disclose their criminal record when asked?

Where there is a clear legal requirement that an employee should not have a criminal record, or that they should be of good character, generally speaking employers should ensure that they ask the employee about his or her criminal record or obtain consent for a criminal record check.

Even where there is no external obligation on an employer to inquire about a person's criminal record, the employer can still ask a person if he or she has a criminal record. It is best practice, however, to only ask about a criminal record where there is some connection between the requirements of the particular job and the criminal record.

This principle has been put into legislation in the Northern Territory where requesting information on which unlawful discrimination may be based is not permitted.⁴⁷ In *Hosking v Fraser*, the Northern Territory Anti-Discrimination Commission found that an employment agency should not have sought criminal record information from all applicants for a nursing position because it was not relevant to the inherent requirements of the position.⁴⁸

While there is no absolute obligation to answer an appropriate question about a criminal record, an employer may be entitled to refuse to hire a person on the basis of failure to answer a reasonable question. When an employee does answer a question about criminal record, the response should be honest and fully candid.

There may be some circumstances where the applicant perceives that there is no link between the position for which they are applying for and their criminal record. In principle an employee may be entitled to refuse to answer in this situation.⁴⁹ However, in practice, it is often difficult to determine whether a particular criminal record is relevant to a particular position. Further, if an employee withholds information, rather than refusing to answer the question,

⁴⁷ *Anti-Discrimination Act 1992 (NT)*, s26.

⁴⁸ *Hosking v Fraser Central Recruiting* (1996) EOC 92-859.

⁴⁹ S Selleck, p4.

and a criminal record is later discovered, they may be dismissed for dishonesty rather than their criminal record.

Commission complaint: Failure to disclose a conviction on the basis that it seemed irrelevant

Summary of complaint: The complainant who obtained a position and commenced training as a security officer in a detention setting in South Australia alleged that he was dismissed from his position due to his criminal record. The application form asked whether the applicant had ever been charged, pleaded guilty, been convicted of an offence or had an offence proved. The complainant had a conviction for possession of marijuana 15 years earlier, which he did not declare as he did not think that it was relevant. His employment was conditional on a criminal record check, which revealed the conviction.

Response: The employer argued that the complainant failed to gain employment because he provided false information and because he failed to satisfy the inherent requirements of the position due to his criminal record.⁵⁰

Outcome: The Commission declined the complaint on the basis that it was lacking in substance. The Commission found that the decision not to employ the complainant was made because of his dishonesty, and in any event, it was an inherent requirement of the particular position to have no criminal record.

Complainant: *The relevancy of the charge to the job, the time frame when it was committed and the fact that it was recorded as no conviction leaves me bewildered as to why I can't start work. Why should I be prejudiced for what happened so long ago?*

6.3 How much is an employee required to disclose?

If a criminal record is relevant to a position, and an employee decides to volunteer information or is asked, he or she still may not have to disclose the complete criminal record. Exactly what information they are required to disclose depends on a variety of circumstances.

Generally, where there has been a finding of guilt but no conviction is recorded (for example when the offender is placed on a good behaviour bond instead of recording a conviction) there may be no requirement to disclose the guilty finding, depending on the circumstances.⁵¹ The terms of the question

⁵⁰ In South Australia there is no spent conviction legislation, although the police service has an information release policy that mirrors Federal spent conviction legislation. However, a company employing security officers would be exempt from spent conviction legislation.

⁵¹ S Selleck, p17.

are important, as the situation may change if an employer specifically asks about 'findings of guilt, with or without conviction'.⁵²

In addition, there is generally no requirement to disclose a spent conviction. Spent conviction schemes allow criminal record checks to be amended to remove references to some offences after a period of non-offending. Spent conviction schemes also generally excuse a former offender from disclosing that information. However, there are some offences that never become spent, for example sex offences in some jurisdictions. Further, some kinds of employment, for example employment where people will be working with children, are exempt from spent conviction legislation. This means that employers are able to receive an employee's complete criminal record.

There are substantial differences between spent conviction schemes across Australia and it can be quite confusing for employers and employees to know what convictions can and cannot be taken into account. However, as one of the purposes of the spent convictions schemes is to permit former offenders to 'wipe the slate clean', it is important for all parties to be aware of the relevant legislation (see *Attachment C: Spent conviction schemes*)

6.4 What happens if an employee hides or makes a mistake about his or her criminal record?

Applicants with a criminal record may be extremely hesitant to disclose convictions to a potential employer. They often fear that the criminal conviction will count against them, even if the offence is irrelevant to the position for which they are applying.

However, while an applicant may not have a duty to voluntarily disclose his or her criminal record, all answers to specific questions should be complete and candid.

The Commission's review of complaints indicates that failure to fully disclose on being asked is considered seriously by employers and may lead to a refusal to hire or dismissal on the basis of dishonesty.

Commission complaint: Dishonesty results in unsuccessful application

Complaint: The complainant was successful in obtaining a wardsperson position in a hospital pending the result of a criminal record check. He alleged that he was refused employment because of a conviction for stalking, for which he received three months imprisonment in 1998.

⁵² S Selleck, p17.

The complainant consented to a criminal record check, but indicated on his application form that he had not been convicted of a criminal offence. In an interview with the employer he denied he had a criminal conviction.

Response: The employer reported that the complainant was not offered the job as he had falsified his application for employment and because he was evasive and uncooperative. Further, it is the policy of the State health service to conduct criminal record checks of all staff, and the complainant's criminal history was considered relevant to the position for which he had applied.

Outcome: The complaint was declined on the basis that it was lacking in substance.

Commission complaint: Partial disclosure on the basis of incorrect assumptions about the relevance of prior convictions

Summary of complaint: The complainant was ten days into his job with a credit union when his employment was terminated. He was escorted out of the building. He alleged that his dismissal was due to his criminal record.

The complainant claimed that he disclosed his 1991 conviction for credit card fraud. However, he did not disclose 1995 convictions for theft and assault because he did not consider them relevant to the position. The company employed him even after his disclosure of his earlier conviction and asked him whether there were any further convictions. He did not reveal his further convictions. The police record check revealed all of his convictions.

Response: The credit union says that the employment was terminated because the complainant failed to correctly advise the company about his criminal record. They also claimed that the convictions were inconsistent with the inherent requirements of the position.

Outcome: The complaint was declined on the basis that there had been no discrimination. The Commission concluded that the convictions were relevant to the position and that the theft and assault prevent the complainant from meeting the requirements of trustworthiness and integrity.

Complainant: My only mistake was not disclosing all of my convictions. I tried to explain my case but they did not want to listen. I feel very hurt by what has happened and would like to get my job back. My biggest concern is that my future is being assessed by my past. I know I was silly and reckless in the past but I have changed since then.

Questions for discussion

Questions for employers:

6(b) Do you expect employees to voluntarily disclose their criminal record?

6(c) How do you respond if an employee refuses to answer questions about their criminal record?

6(d) How do you respond if an employee is dishonest about their criminal record?

6(e) How should employers make sure that they comply with the requirements of spent conviction legislation?

Questions for applicants/employees

6(f) Do you have any examples of a person voluntarily disclosing their criminal record and then experiencing discrimination?

6(g) Do you have any examples of instances where an employee has been dishonest about their criminal record? What were the reasons? What was the result?

6(h) Do you have any examples of an employee refusing to answer questions about their criminal record?

7 Making decisions about actual or prospective employees on the basis of criminal record

Once an employer has gathered information about a person's criminal history, he or she will engage in a process of making decisions on the basis of that information. The kind of process used may have an impact on whether or not there is discrimination.

The procedures for reviewing and considering criminal records are likely to be very clear in the case of mandatory legislative checks. Some agencies have also developed policies that set out selection procedures for job applicants, the requirements regarding criminal record checks and the criteria used to assess the relevance of those criminal records checks.⁵³

However, the complaints before the Commission illustrate that there are many instances where recruitment or employment procedures are inadequate to

⁵³ See for example NSW Health Department.

ensure that people with a criminal record are assessed in an appropriate non-discriminatory manner.

As discussed previously (section 5, *When might a criminal record be relevant to employment?*), whether a criminal record is a relevant consideration in making a decision about a particular job is often a difficult question. An unclear process for considering the issue can make the task much more challenging. It can also increase the risk of discrimination because it reduces the likelihood that careful consideration has been put into whether a criminal record is truly relevant to the job.

When assessing the application of a person with a criminal record, questions an employer may need to address might include:

1. Has the applicant or employee been informed about the possible relevance of criminal record?
2. Does the organisation have clear procedures for making decisions about applicants with a criminal record? For example, who makes the decision and when is it made?
3. Does the applicant or employee's specific criminal record mean that he or she cannot fulfil the inherent requirements of the particular job?
4. Has the applicant or employee been given the opportunity to explain the circumstances surrounding any criminal record?
5. Is there an avenue for the employee to appeal the decision?

It is also important to ensure that the process is transparent and provides an individual with procedural fairness.

One important issue to keep in mind is that different jobs will have different requirements, even when they are in the same industry. This means that where there are positions for which a certain criminal record may be irrelevant, a blanket policy of criminal record checks across the industry may be inappropriate and increase the risk of discrimination.

Example: Applying for a job as a nurse (*Hosking v Fraser*)

Ms Hosking was a registered nurse who was looking for work through an employment agency in the Northern Territory. The agency required a police record check for all applicants. Ms Hosking refused consent despite the fact that she had no criminal record, pointing out that her professional registration was a record of her professional conduct and integrity. The agency, in turn, refused to enter her onto the recruitment database. The agency argued that a police check was necessary to screen 'criminal elements' away from the Aboriginal communities in which she was seeking to work. The Northern Territory Anti-Discrimination Commission found that there was no direct correlation between the duties of a nursing position and a clean criminal record and therefore the policy requiring criminal record checks for all nurses violated the Northern Territory *Anti-Discrimination Act*.⁵⁴

⁵⁴ *Hosking v Fraser Central Recruiting* (1996) EOC 92-859.

This case demonstrates that the guiding principle in all decisions relating to employment is that each person applying for or working in a particular job must be considered on his or her own merits rather than as a member of a group of 'former offenders'.

The Commission is aware that procedures will differ in small and large businesses and is interested to hear of practice and experience from businesses of all sizes. The Commission is also interested to receive examples of any human resources training materials that may address these issues.

7.1 Is there a clear process for examining an individual job applicant's criminal record?

Complaints to the Commission indicate that in some instances employers do not have clear procedures for making decisions about the relevance of a criminal record to a particular position. Further, even where there is clarity about the relevance of a criminal record, there may be insufficient specificity as to the type of criminal record that may be relevant.

The complaints also indicate that there is not always clarity about how an organisation should make decisions about specific applicants. For example, it may not be clear who in an organisation makes the decision or at what stage of the recruitment process a criminal record check will be conducted.

There have been several instances where successful applicants have commenced work only to be dismissed later when details of their criminal record become known or the relevant person in the organisation becomes aware of their criminal record. In some instances, a criminal record check is conducted after a successful applicant has commenced work.

Commission complaint: Confusion about the relevance of a criminal record for a council field worker

Summary of complaint: The complainant alleged that he was dismissed four weeks after commencing work as a council field worker due to his criminal record. He had informed his employer of his record prior to being hired (he was convicted of assault in 1995 after a fight in a bar following a perceived threat to his wife) and was told that his criminal record was not an issue.

The CEO was not informed of the criminal record until the complainant was three weeks into the job. The complainant was then asked to provide a statement outlining the details of the incident. He was dismissed two days later. He did not receive a personal hearing and none of his referees were contacted.

Outcome: The respondent did not make a formal response to the complaint. The complaint was conciliated and the parties settled the matter with a private agreement for financial compensation.

Complainant: I believe I have been treated extremely unfairly and been discriminated against. I was completely upfront in telling the council about my history, and I was told this was not an issue.

Commission complaint: Lack of clarity about the inherent requirements of the job

Summary of complaint: The complainant alleged that he was dismissed from a position as a project officer with a community arts organisation due to his criminal record. He claims that during the interview process for this position he was not asked about his criminal record nor asked to fill out a criminal record check. He did not disclose any convictions.

After about ten weeks of employment the complainant was told that one of his projects involved visiting detention centres and prisons. In order to do so, a person must obtain a security clearance from corrective services. When the security clearance was sought, the employer realised that the complainant had a criminal record and told him that his position was to be terminated for this reason.

Response: The employer argued that because visits to prisons are part of the project, passing a security clearance is an inherent requirement of the position. The employer also argued that the complainant was told about this aspect of the work in the interview and did not indicate that gaining a security clearance for visits to prisons would be a problem.

Outcome: The Commission declined the complaint on the basis that there had been no discrimination. The Commission found that passing the security clearance – and therefore not having a criminal record – were inherent requirements of the position.

Commission complaint: No chance to explain the circumstances of the offence

Summary of complaint: The complainant alleged that he was dismissed from employment three weeks into a six week contract with a Commonwealth agency due to his criminal record of assault and intentional wounding about eighteen months previously (the offence occurred in relation to an intruder in his house). He claimed that the employer said that they had no problem with his work but would have to dismiss him as they had a duty of care.

The complainant alleged that although he was not asked about his record at the interview, he filled in a form consenting to a police check. He was

dismissed when the police check came back, but was not given an opportunity to explain the circumstances of the offence.

Response: The employer claimed that the complainant did not disclose his record to them. However, the employer reported that they should probably have dealt with the situation differently and that if they had obtained an earlier explanation of the offence they may not have dismissed him.

Outcome: The complaint was conciliated, with the respondent paying out the complainant's contract, as well as \$5000.

Complainant: I have been working well and felt that I was doing a good job. I believe that the conduct of my dismissal was unfair; they failed to take into consideration my employment after the incident and failed to give me the opportunity to provide any further information.

7.2 Is there a clear review process for persons concerned about discrimination?

Procedural fairness is an important aspect of making a decision about a person's employment. The complaints before the Commission indicate that there are rarely any clear internal review processes for job applicants or existing employees who are concerned that adverse decisions have been made on the basis of their criminal record.

In the Northern Territory and Tasmania, someone who feels that there has been discrimination on this ground may make a complaint to the Anti-Discrimination Commission. In addition, anyone in Australia can make a complaint to the Human Rights and Equal Opportunity Commission.

Where employment is sought in a government body there may be an opportunity to take an adverse employment decision to an administrative decisions tribunal. There may also be an opportunity to bring an unfair dismissal claim in a court or industrial tribunal.

In most cases where there are legislative or licensing requirements for criminal checks, various appeal mechanisms exist. However, in some cases the disqualification is mandatory – leaving no discretion to overturn a decision to refuse the relevant licence. In other cases the criteria may be so ill-defined and the discretion so broad that it may be difficult to effectively challenge the original decision. Some licensing bodies do not provide reasons for refusing an application, making it even more difficult to challenge a decision.⁵⁵

In many cases it may be more useful if there were internal appeal mechanisms available to individuals. At the very least there should be an opportunity for a person with a criminal record to explain the circumstances

⁵⁵ See Hall's case para 8.2.

surrounding their convictions, if that conviction becomes relevant to the decision making process.

Questions for discussion

Questions for employers

7(a) Do you have any examples of clear procedures for examining an applicant's criminal record? Are there currently guidelines in your organisation or industry?

7(b) What would further assist you in understanding your responsibilities and in what form would the information be most useful?

7(c) Do you have any examples of confusion about whether a criminal record is relevant to the job?

7(d) What review or appeal processes should there be for decisions made on the basis of criminal record?

7(e) Does your organisation have any training materials that address these issues?

Questions for applicants/employees

7(f) What information should you have about how your criminal record might be considered by an employer?

7(g) Do you have any examples where employers have not had clear or fair procedures for considering an applicant's criminal record?

7(h) What opportunities should be given to an applicant to explain their criminal record?

7(i) Do you have any examples where dishonesty has resulted in dismissal even when the criminal record is not relevant to the job?

8 Conclusion

A criminal record can have a significant impact on a person's employment prospects. Eliminating discrimination on this basis is an important step towards enhancing equality of employment opportunity for people with a criminal record. At the same time, it is often appropriate to differentiate between people when the inherent requirements of a job require that a person does not have particular convictions.

This paper has sought to outline the key issues relating to discrimination on the basis of criminal record and be used as a starting point for further discussion about the issue. The Commission is particularly interested in hearing from key stakeholders on issues such as:

- the impact of a criminal record on employment prospects
- the operation of discrimination law in this area
- what is understood to constitute a criminal record
- the practical operation of the inherent requirements exception to discrimination in employment on the basis of criminal record
- what employees should disclose about their criminal record
- how employers should make decisions about individual employees on the basis of criminal record

Complaints received by the Commission indicate that this is a complex and difficult area and that both prospective and current employees and employers often misunderstand their respective rights and responsibilities.

Through this research the Commission aims to explore further this kind of discrimination, and to assist both employees and employers to understand their rights and responsibilities. The Commission's intention is for the project outcomes to be of practical assistance to all stakeholders.

The Commission welcomes your input to this discussion.

Attachment A

Review of complaints of criminal record discrimination received by the Human Rights and Equal Opportunity Commission in 2001, 2002 and 2003

Between 2001 and 2003 complaints of discrimination in employment on the basis of criminal record under the HREOC Act made up a considerable proportion of the complaints received by the Commission.

In the 2001-2002 financial year, criminal record complaints made up 37 out of 242 complaints under the HREOC Act (18 percent of total HREOC Act complaints). In 2002-2003 they constituted 30 out of 199 complaints under the HREOC Act (15 percent of total HREOC Act complaints). Between 1 January 2004 and 30 August 2004, 13 complaints were received on the basis of criminal record.

In addition, there were 238 enquiries made to the Commission in 2002-2003 about criminal record discrimination (making up about 2 percent of total inquiries).

Complaints of discrimination in employment on the basis of criminal record outnumbered complaints of discrimination in employment on the basis of religion, age, trade union activity or sexual preference.⁵⁶

The Commission conducted a review of complaints about discrimination in employment on the basis of criminal record that were finalised between 2001 and 2003. The information below is presented by calendar year.

While the complaints to the Commission illustrate some of the problems facing people with criminal records in the area of employment, the number of complaints to the Commission should not be relied on to indicate the prevalence of discrimination on the basis of criminal record. Like many other areas of discrimination, often the problems are hidden because those who have experienced discrimination feel disempowered or are unaware of their right to non-discrimination. Further, people may not be aware of their right to complain to the Commission and some may not complain because the recommendations of the Commission are not enforceable at law.

⁵⁶ The above statistics are from the Commission's Annual Report. The remainder of the statistics are from a review done by calendar year.

What are the general characteristics of complainants?

Age of complainants

The Commission is unaware of the age of most complainants.⁵⁷ The largest number of complaints in which age was reported was from complainants aged in their thirties followed by those in their forties.

Year/ age	15-20	21-30	31-40	41-50	51 and above	Unknown	Total complaints
2001	1	2	2	3	0	28	36
2002	1	2	6	3	1	23	36
2003	0	2	12	7	5	5	31
Total	2	6	20	13	6	56	103

Sex of complainants

The complainants considered in the review were overwhelmingly male as indicated by the following table:

Year	Number of female complainants	Number of male complainants	Total complaints
2001	5	31	36
2002	5	31	36
2003	8	23	31

What were the alleged acts of discrimination?

The majority of complaints received were about discrimination at the recruitment stage of employment. This includes application for licences and registration with professional bodies, employment, work-related training, work experience and voluntary work.

Complaints about termination of employment include termination of new appointments made pending criminal record checks, suspension pending outcome of a criminal trial, termination while on probation or trial and termination of contract work.

⁵⁷ During 2003 the demographic intake form included a question about the age of complainants. Prior to 2003 the complainant's age was only obtainable if provided by the complainant.

	Rejection of application for employment or licence	Termination of employment	Denial of other work conditions	Harassment	Total
2001	17	17	1	1	36
2002	24	8	1	3	36
2003	17	11	3	0	31
Total	58	36	5	4	103

In which industries has discrimination most often been alleged?

The following table indicates the industry areas from which complaints of discrimination are most frequent.

Industry ⁵⁸	2001	2002	2003	Total
Health and Community Services	10	5	7	22
Personal and Other Services	4	5	6	15
Transport and Storage	5	7	1	13
Government Administration and Defence	3	6	3	12
Retail Trade	2	3	2	7
Other	12	10	12	34
Total number of complaints from all industries	36	36	31	103

In which types of occupation has discrimination most often been alleged?

The following table indicates the occupational areas from which complaints of discrimination are most frequent.

Occupation ⁵⁹	2001	2002	2003	TOTAL
Intermediate Production and Transport Workers	7	11	5	23
Associate professionals	8	3	10	21
Intermediate Clerical, Sales and Service Workers	9	6	5	20
Labourers and Related Workers	7	4	2	13
Elementary Clerical, Sales and Service Workers	3	4	3	10

⁵⁸ Industry classification of respondent defined by ANZSIC Division (Australian Bureau of Statistics, 'Australian and New Zealand Standard Industrial Classification (ANZSIC)', ABS No. 1292.0, 1993).

⁵⁹ Occupations defined by Australian Bureau of Statistics, 'ASCO – Australian Standard Classification of Occupations Second Edition', ABS No. 1220.0, 1997.

Professionals	0	5	3	8
Other	2	3	3	8
Total number of complaints from all occupations	36	36	31	103

These Australian Bureau of Statistics classifications of industries and occupations are too broad to allow for detailed analysis of the common types of jobs where complaints of criminal record discrimination have been made. However, an examination of 2001, 2002 and 2003 complaints reveal some occupations in which there have been complaints:

- police recruits
- detention officers
- taxi drivers
- truck drivers and delivery workers
- stable hands
- disability and aged support workers
- youth workers and social workers
- child care workers and primary school teachers
- waiters and bar staff
- sales assistants
- contract cleaners

Characteristics of the criminal record

The following table indicates the convictions contained in complainant's criminal records. The total number of complaints from all types of offence is greater than the total number of complaints because many complainants have a criminal record constituting more than one offence. In addition, the offence was not clear in a number of complaints.

Offence⁶⁰	2001	2002	2003	Total
Acts intended to cause injury	7	10	8	25
Theft and related offences	9	4	9	22
Deception and related offences	9	6	5	20
Public order offences	4	5	6	15
Road traffic and motor vehicle regulatory offences	6	5	2	13
Illicit drug offences	5	6	0	11
Dangerous or negligent acts endangering persons	5	4	1	10
Offences against justice procedures, government security and government operations	2	4	3	9

⁶⁰ These include charges and convictions. The types of offences have been defined according to ASOC Divisions from the Australian Bureau of Statistics, Australian Standard Offence Classification (ASOC), ABS No.1234.0, 1997.

Sexual assault and related offences	3	4	1	8
Robbery, extortion and related offences	5	0	3	8
Other	13	9	12	34
Total number of offences	68	57	50	175
[Total complaints]	[36]	[36]	[36]	[36]

What is the length of time between the complainant's last offence and their complaint to the Commission?

The majority of complaints were made about alleged discrimination occurring within ten years of the offence occurring.

	Less than 1 year	1 – 5 years	5-10 years	More than 10 years	Unknown	Total
2001	6	13	7	3	7	36
2002	5	12	4	3	12	36
2003		5	10	7	9	31
Total	11	30	21	13	28	103

What were the outcomes of the complaints?

If a complaint is conciliated it means that there has been some type of agreement between the parties. It does not mean that there has been no discrimination nor that discrimination occurred. Conciliated outcomes can include a variety of outcomes including apology, reinstatement and financial compensation.

A complaint is reported when the matter is unable to be conciliated and the Commission finds that there has been discrimination. The Commission then makes a report to the Federal Attorney-General who tables it in parliament.

A large majority of complaints made to the Commission on this basis were declined.

Year	Conciliated complaints (percentage of finalised complaints)	Reported complaints	Declined complaints	Total finalised complaints
2001	3	2	31	36
2002	7	0	29	36
2003	6	0	25	31
Total	16 (15.5%)	2 (1.9%)	85 (82.5%)	103

Why were complaints declined?

The main reasons that complaints have been declined by the Commission include:

- the complaint is lacking in substance (ie, there is not enough evidence to support a claim of discrimination)
- an alternative remedy is sought or is available
- the alleged act is not discrimination (eg, where an inherent requirements exception applies or where lack of disclosure by the applicant meant that an employer's decision is reasonable).

Year	Not discrimination under the HREOC Act	Lacking in substance	Withdrawn, lost or unable to contact complainant	Another remedy available or sought	Total declined complaints
2001	15	7	9	0	31
2002	10	9	8	2	29
2003	10	8	6	1	25
Total	35	24	23	3	85

How many employers claimed that it was an inherent requirement of the job not to have a criminal record?

Employers claimed that it was an inherent requirement of the job to not have a criminal record in 49 of the complaints finalised between 2001 and 2003. Of these, the Commission found that the employer had made out the inherent requirements exception and declined the complaint because there was no discrimination on 31 occasions.

Two complaints, the Hall case and the Christensen case, were unable to be conciliated, and upon further investigation, the Commission found that there had been discrimination. The Commission subsequently made a report on these complaints to the Federal Attorney-General.

Of the remaining complaints, where employers claimed the inherent requirements exception, six were conciliated, six complainants did not pursue the complaint, and four were declined because they were lacking in substance.

Attachment B

Conducting a criminal record check

Who maintains criminal history information?

The Courts

Courts maintain records of cases heard before them and their outcomes, including convictions and sentences. Records identify offenders and may be searched by members of the public. However, they are not generally consolidated for individual offenders.

The Police

Australian police services maintain the most comprehensive collection of criminal history information. Each police service has its own processes for recording details of court convictions and storing this information in its systems. Police systems also record charges and other offence information which may be relevant, or disclosable, in some circumstances. The format and components of the criminal history record varies from jurisdiction to jurisdiction.

Crim Trac

Crim Trac is a Commonwealth agency that assists police services in each Australian jurisdiction to share information. Crim Trac coordinates the process of completing a National Criminal History Record Check. Crim Trac maintains an index of personal records held by all police services around Australia, known as the National Names Index (NNI). The NNI indicates whether an individual is known to the police as a person of interest, and if so, in which jurisdictions the individual's records are held. The NNI stores only sufficient information to provide an acceptable standard of identity matching, but not criminal history details. The NNI can, however, indicate that an individual's personal details have not matched against the database.

Private Providers

Private providers can collect, collate, store and make criminal history information available publicly, provided police jurisdiction restrictions on disclosure are observed (see *Attachment C: Spent conviction schemes*).

Private providers typically offer criminal record check services for profit. They may also provide press clippings, sentencing statements and other published or public domain materials with the criminal history information. Private providers are not able to obtain criminal history information through Crim Trac or police services.

Therefore, the most reliable source of criminal history information is police services. Most employers access criminal history information by obtaining National Police Certificates, through their local police service.

What does a 'criminal record' or 'criminal history' include?

Information kept by police services can include:

- court appearances
- court convictions, including any penalty or sentence
- findings of guilt with no conviction
- good behaviour bonds or other court orders
- charges
- matters awaiting court hearing
- matters currently under investigation
- police intelligence (records of investigations)
- traffic infringements.

However, criminal history information that is kept and the manner in which it is kept differs between jurisdictions.⁶¹

In some cases a criminal record can include charges as well as convictions, and in some cases information such as police intelligence or investigation reports may be disclosed. In addition small misdemeanours like traffic offences may also be kept on criminal records and could be disclosed to employers.

How is a criminal record check conducted?

Criminal record checks may only be completed with the consent of the person concerned.

As noted above, Crim Trac coordinates the process of national police checks. Government agencies who conduct more than 500 checks per year may conduct these with Crim Trac directly. Individuals, smaller government agencies and the private sector must request criminal record checks through their state police service who then contacts Crim Trac.

An application for a criminal record check must outline the purpose of the check (eg, if it is for employment, and for what kind of employment), and an individual's identity must be verified when a form is submitted.

The process of conducting a criminal record check involves the following steps:

⁶¹ This is governed by the police legislation in each jurisdiction, for example, the *Police Service Administration Act 1990* (Qld).

1. An individual's name is given to Crim Trac, which searches the National Names Index (NNI), a list of persons of interest to police which is held and managed by CrimTrac.
2. Police services compare NNI matches with state police criminal history records to determine if the subject of the check is the person in question.
3. Police services identify any relevant convictions (subject to legislation and policy in each jurisdiction governing what information may be released).
4. Police services then issue a National Police Certificate.

The National Police Certificate

Individuals and organisations seeking national criminal history record checks through police services will be provided with a National Police Certificate. The National Police Certificate will provide basic identity data: full name, date of birth and gender as a minimum.

The certificate will either indicate that no record is held or contain disclosable criminal history details. Criminal records will generally include disclosable court outcomes.

In all Australian jurisdictions there is either legislation or a policy limiting the disclosure of some convictions, generally old and minor offences (spent convictions, see *Attachment C: Spent conviction schemes*).

The rules regulating what convictions may become spent differ in every jurisdiction, except in the case of:

- some kinds of convictions, like sex offences, that generally may never be spent.
- checks for particular occupations, like for people working with children, that are exempt from spent conviction rules.

This means that some old convictions may appear on criminal records.

Generally the police service that is managing the check will apply the spent conviction legislation of each state to convictions that occurred within that state in deciding which convictions are disclosable.

National Police Certificates may also include information other than convictions. For example, the Victoria Police National Police Certificate Form states that:

- findings of guilt without conviction and good behaviour bonds may also be released.
- recent charges or outstanding matters under investigation that have not yet gone to court may also be released.⁶²

⁶² Victoria Police, Consent to check and release National Police Record, VP Form 820A.

However in some other states, charges will not be released. Therefore, the information that is included on the National Police Certificate varies from jurisdiction to jurisdiction.

Can a partial criminal record check be undertaken?

In many situations only certain kinds of convictions will be relevant to an employer. It appears that it is not possible to limit a criminal record check to certain kinds of convictions.

However, in New South Wales and Queensland employers who initiate a 'Working With Children Check' are not provided with individual criminal records. Instead, in New South Wales they receive a 'risk assessment' from the screening agency indicating whether the person poses any risk to children. In Queensland, a 'Blue Card' is issued to people who are designated suitable to work with children.

What criminal history information should an employer retain?

Crim Trac's recommended procedure is that employers should keep criminal history information on an employee's file for no more than three months. The only documents that they should retain permanently are completed informed consent forms, information that the check has been conducted, the result of the check and how the information affected any subsequent decision making processes. Criminal history information that is not retained should be securely destroyed.

In addition the *Privacy Act 2000* (Cth) has implications for the manner in which organisations both keep and use personal information, including criminal history information. Commonwealth and ACT government agencies are bound by the Information Privacy Principles. In general, this means that these organisations must make sure that the information is:

- stored securely and is safe from unauthorised access
- used only for the purpose for which it was sought; and
- not disclosed to any other party.⁶³

Private sector organisations, except for some small businesses, are bound by the National Privacy Principles. However, there is an exemption for acts or practices directly related to a current or former employment relationship.⁶⁴

⁶³ *Privacy Act 2000* (Cth), The CrimTrac Agency, Guide to National Criminal History Record Checking Services, March 2004.

⁶⁴ Section 7B(3).

State privacy legislation and non-legislative schemes may also provide protection for personal information collected by employers.⁶⁵

How much does a criminal record check cost?

The cost of obtaining a criminal record check varies between jurisdictions. Crim Trac charges a standard amount for all checks that it completes, at \$22.00 for commercial checks, \$18.50 for government or individual checks and \$5.00 for volunteer checks:

However police services in each jurisdiction set their own costs for conducting criminal record checks. The following table sets out these costs as at September 2004:

	National check	State only check
New South Wales	N/A	\$30.00
Queensland	\$37.30	\$36.50
Victoria	\$27.60	N/A
South Australia	\$49.00	
Western Australia	\$44.00	\$15.00 (Traffic)
Tasmania	\$49.50	\$22.00
Australian Capital Territory	\$36.00	
Northern Territory	\$28.00	
Australian Federal Police	\$36.00	N/A

⁶⁵ *Personal Information Protection Act 1998* (NSW), *Information Privacy Act 2000* (Vic), *Information Act 2002* (NT). Non-legislative privacy schemes operate in Queensland, South Australia and Tasmania.

Attachment C

Spent Conviction Schemes

Spent conviction legislation allows the criminal records of offenders to be amended after certain periods of time. The idea behind the spent convictions schemes is to allow former offenders to 'wipe the slate clean' after a certain period of time, depending on the offence.

In Australia, a Commonwealth spent convictions scheme was introduced in 1990.⁶⁶ Spent conviction legislation also exists in all States and Territories⁶⁷ except South Australia⁶⁸ and Victoria, where there are administrative guidelines about the disclosure of criminal convictions. The table at the end of this attachment outlines the features of each jurisdiction's spent conviction legislation.⁶⁹

How do you determine which spent conviction legislation applies?

The differences in spent conviction legislation across jurisdictions can lead to confusion about which convictions can be spent, especially if a person has convictions recorded in a number of jurisdictions.

Generally each jurisdiction applies the rules governing its own scheme in deciding whether to release information to police in other jurisdictions about spent convictions. For example, if the New South Wales police service requests information regarding a record of conviction held in Western Australia, the Western Australian police service will apply the Western Australian spent conviction legislation in deciding whether to disclose the record of conviction.

Which convictions can be spent?

There are differences across jurisdictions as to which convictions can become spent.

⁶⁶ The Australian Law Reform Commission recommended the introduction of spent conviction legislation in Report No. 37, *Spent Convictions*, 1987.

⁶⁷ *Crimes Act 1914* (Cth), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), *Spent Convictions Act 1988* (WA), *Criminal Records Act 1991* (NSW), *Criminal Records, (Spent Convictions) Act 1992* (NT), *Spent Convictions Act 2000* (ACT), *Annulled Convictions Act 2003* (Tas).

⁶⁸ Spent conviction legislation is currently under consideration in South Australia. See Attorney-General's Department South Australia, 'Spent Conviction Legislation – Discussion Paper', Adelaide, 2004.

⁶⁹ Table provided by Attorney-General's Department, South Australia.

In all jurisdictions except for Western Australia, spent conviction legislation only applies to less serious offences. In Western Australia, spent convictions legislation applies to all offences, except those for which the penalty is or includes a sentence of life imprisonment.

In New South Wales, the Australian Capital Territory, the Northern Territory and Tasmania, only convictions for which a sentence of imprisonment of six months or less has been imposed, can become spent.

Under the Commonwealth and Queensland legislation, only convictions for which a sentence of imprisonment of 30 months or less has been imposed, can become spent.

In some jurisdictions there are categories of convictions that can never be spent and are excluded from spent conviction schemes. For example, in New South Wales, the Australian Capital Territory, the Northern Territory and Tasmania, convictions of sexual offences can never become spent.

When do convictions become spent?

All jurisdictions in Australia have adopted a 10-year waiting period before a conviction of an adult offender may become spent. Most jurisdictions apply the same qualifying period irrespective of the seriousness of the offence. However, in Queensland, the qualifying period for (adult) indictable offences is ten years, while it is five years for summary offences.

The waiting period applicable to juvenile offences varies from jurisdiction to jurisdiction. Under the Commonwealth, Queensland, Australian Capital Territory, Northern Territory and Tasmanian legislation, the waiting period is five years, while it is three years in New South Wales and two years in Western Australia.

The date on which the qualifying period commences also varies between jurisdictions. In the Commonwealth, Queensland and Tasmanian legislation time starts running from the date of conviction. In New South Wales, Western Australia, Australian Capital Territory and the Northern Territory time starts on the date of release from imprisonment (or the conclusion of any sentence).

How do convictions become spent?

In every jurisdiction, except Western Australia, convictions become spent automatically upon the expiration of the specified qualifying period.

In Western Australia, once the qualifying period has expired, minor convictions are spent by the Commissioner of Police with the non-discretionary granting of a certificate. Serious convictions will only become

spent upon application to and approval by the District Court where the making of an order is at the discretion of the judge.

What happens if a person with a spent conviction re-offends?

In New South Wales, the Australian Capital Territory and Western Australia, once a conviction becomes spent it stays spent, regardless of whether a former offender re-offends at a later date. However, in Queensland, a spent conviction is revived following any further offence and the qualifying period commences from the date of conviction of the second offence. In the Northern Territory, a spent conviction is revived by a further conviction, but only in a case where a sentence of imprisonment is imposed. Under the Tasmanian legislation, a spent conviction can only be revived by order of a court, in a situation where the further offence was the same or a similar offence and it is in the public interest to do so.

The situation is different if a person re-offends during the qualifying period for the initial offence. In the Northern Territory, Queensland, the Australian Capital Territory, Western Australia, New South Wales (except minor traffic offences) and Tasmania, the qualifying period stops and commences again upon the second conviction no matter what type of offence.

If a person is convicted of a further Commonwealth or Northern Territory offence, either during or after the waiting period, then the earlier conviction will not be spent until the waiting period for the later offence has ended (automatically for a minor offence, by a court order for a more serious offence). If a person is convicted of a further State or foreign offence, then the earlier conviction is not spent until the waiting period for the later offence has ended.

Are there any exemptions to spent conviction legislation?

In all jurisdictions that have spent conviction schemes, there are exemptions. Where an exemption exists, it allows an employer to take into account all convictions that a person has ever had recorded. These exemptions amount to recognition that at times there may be circumstances that require the disclosure of a person's full criminal record.

For example, policy makers have decided that employers appointing people to positions involving the care of children should know whether an applicant has a history of sexual offending no matter how long ago an offence occurred.

Exemptions to spent conviction schemes include:

- appointments to sensitive positions and positions of particular public responsibility (eg, judges, magistrates, justices of the peace)

- employment in sensitive occupations (eg, police, prosecutors, prison officers, parole officers)
- employment dealing with vulnerable people (eg, teachers, child-care workers, youth workers, care-workers dealing with the intellectually disabled and elderly)
- applications for certain licences (eg, child-care or child-minding services, gaming and liquor).⁷⁰

Exemptions in these categories are found in all spent conviction legislation, although the specific exemptions differ slightly from jurisdiction to jurisdiction.

What protection does spent conviction legislation offer in the context of employment?

There are significant differences in spent conviction schemes in different Australian jurisdictions. These differences may contribute to confusion amongst police services in making decisions about what criminal history information they may release, especially when they receive requests for information from other jurisdictions. The differences also may contribute to confusion for employers and employees about what questions may be asked and what must be disclosed with regard to criminal history.

In every jurisdiction in Australia, unless an exemption applies, once a conviction has been spent an employee is not required to disclose the conviction to an employer and a criminal record check will not reveal spent convictions. Further, in most jurisdictions, a person is not entitled to take a spent conviction into account in assessing a person's character.

In some jurisdictions it is an offence for a person who has access to conviction records kept by a public authority to disclose spent conviction information.⁷¹ In other jurisdictions it is an offence to unlawfully or improperly obtain spent conviction information from the records of a public authority.⁷²

In Western Australia and the Australian Capital Territory, spent conviction legislation contains provisions that make discrimination on the basis of spent convictions unlawful.

Commonwealth spent conviction legislation is enforced through the Federal Privacy Commissioner. A person who believes the standards dealing with disclosure and use of protected old conviction information have been breached may complain to the Federal Privacy Commissioner, who can investigate the complaint and order a wide range of remedies if a breach of the law is shown. In the last financial year, only six complaints on this basis were received by the Privacy Commission, out of a total of 1276 complaints.

⁷⁰ Attorney-General's Department South Australia, 'Spent Conviction Legislation – Discussion Paper', Adelaide, 2004, p22.

⁷¹ Australian Capital Territory, Northern Territory, New South Wales and Tasmania.

⁷² New South Wales, Australian Capital Territory, Western Australia and Tasmania.

COMPARATIVE TABLE OF LEGISLATION ON SPENT CONVICTIONS

(Table from Attorney-General's Department (South Australia), 'Spent Conviction Legislation', discussion paper, Adelaide 2004)

FEATURES:	CTH:	NSW:	QLD:	ACT:	NT:	WA:	TAS:
	Crimes Act 1914	Criminal Records Act 1991	Criminal Law (Rehabilitation of Offenders) Act 1986	Spent Convictions Act 2000	Criminal Records (Spent Convictions) Act 1992	Spent Convictions Act 1988	Annulled Convictions Act 2003
Definition of conviction	<ul style="list-style-type: none"> Conviction whether summary or on indictment. Finding of guilt. No finding of guilt but matter taken into account re: sentence for another offence. 	<ul style="list-style-type: none"> Conviction whether summary or on indictment. Finding of guilt/that offence proved. Order that person be of good behaviour. Order made by the Children's Court. 	<ul style="list-style-type: none"> Conviction by or before any Court. 	<ul style="list-style-type: none"> Conviction whether summary or on indictment. Person charged, charge proved but disposed of without conviction. 	<ul style="list-style-type: none"> Any conviction. Finding that offence proved. Any other order made without proceeding to conviction which constitutes a criminal record under the Act. 	<ul style="list-style-type: none"> Any Conviction. Charge disposed of without conviction. <p>The definition does not include:</p> <ul style="list-style-type: none"> Life sentence. Children's conviction. 	<ul style="list-style-type: none"> Conviction whether summary or on indictment. Finding of guilt.
Conviction capable of becoming spent	<ul style="list-style-type: none"> Sentence with no imprisonment. 30 month sentence or less. Pardon for reason other than that a person was wrongly convicted. 	6 month sentence or less (subject to exceptions for sexual offence, body corporate and prescribed convictions).	<ul style="list-style-type: none"> Sentence with no imprisonment. 30 month sentence or less. 	6 month sentence or less (subject to exceptions for sexual offence, body corporate and prescribed convictions).	6 month sentence or less (subject to exceptions for sexual offence, body corporate and prescribed convictions).	<p>Serious conviction</p> <ul style="list-style-type: none"> sentence of more than 1 year or for an indeterminate period. fine of \$15,000 or more. By application. <p>Lesser conviction</p> <ul style="list-style-type: none"> sentence less than 1 year and not for an indeterminate period. 	6 month sentence or less (subject to exceptions for sexual offence and prescribed convictions).
Waiting period	10 years (adult). 5 years (child).	10 years (adult). 3 years (child). Certain convictions spent before this including: <ul style="list-style-type: none"> A finding without conviction & order in Children's Court dismissing charge and cautioning are immediate. Good behaviour bond spent upon satisfactory completion of conditions. 	10 years (adult indictable). 5 years (other offences/offenders).	10 years (adult). 5 years (child). Certain convictions spent before this include: <ul style="list-style-type: none"> A finding without conviction & order in Children's Court dismissing charge and cautioning are immediate. Good behaviour bond spent upon satisfactory completion of conditions. 	10 years (adult). 5 years (child). Certain convictions spent before this include: <ul style="list-style-type: none"> Conviction not recorded and person discharged is immediately spent. Where offence proved and no conviction, conviction spent subject to completion of certain conditions. 	10 years (adult). 2 years (child).	10 years (adult). 5 years (child).

FEATURES:	CTH:	NSW:	QLD:	ACT:	NT:	WA:	TAS:
Means by which convictions become spent	Automatic – upon expiration of waiting period (subject to no further conviction).	Automatic - upon expiration of waiting period (subject to no further conviction).	Automatic - upon expiration of waiting period (subject to no further conviction).	Automatic - upon expiration of waiting period (subject to no further conviction).	For adult offenders and juvenile offenders convicted in the Juvenile Court, automatic - upon expiration of waiting period (subject to no further conviction). For Juvenile Offenders convicted in an adult Court, upon application to the Police Commissioner.	Upon application to district court judge who will exercise discretion (serious offence) and application to the Commissioner of Police (lesser offence).	Automatic - upon expiration of waiting period (subject to no further conviction).
Commencement of time period	From the date of conviction.	At the end of the period of imprisonment served.	From the date of conviction.	At the end of the period of imprisonment served.	At the end of the period of imprisonment served.	At the end of the period for which the person is sentenced regardless of amount of time served.	From the date of conviction.
Consequence of conviction becoming spent	You are not required to disclose to any person for any purpose that you have been charged with/convicted of that offence.	You are not required to disclose information regarding a spent conviction. Your criminal history is taken to refer only to convictions which are not spent.	You are not to disclose your spent conviction to another person unless you wish to do so.	You are not required to disclose information regarding a spent conviction. Your criminal history is taken to refer only to convictions which are not spent.	You are not required to disclose information regarding a spent conviction. Your criminal history is taken to refer only to convictions which are not spent.	Reference in any law to conviction does not include spent conviction. You are not required to disclose or acknowledge a spent conviction.	You are not required to disclose information regarding a spent conviction. Your criminal history is taken to refer only to convictions which are not spent.
Consequences of disclosing spent convictions	A person who knows, or could reasonably be expected to know that a person's conviction is spent should not disclose that fact to any other person without consent and should not take the spent conviction into account. A person may complain to Privacy Commissioner about act or practice of a person/agency that may be in breach of the Act.	A person is not entitled to take a spent conviction into account in assessing a person's character. It is an offence to disclose spent conviction information without lawful authority. It is an offence for a person to fraudulently or dishonestly obtain spent conviction information.	It is an offence to contravene any provision of the Act. This includes disclosing the spent conviction (unless it is under authority or permit) and disregarding any spent conviction.	A person is not entitled to take a spent conviction into account in assessing a person's character. It is an offence to disclose spent conviction information without lawful authority. It is an offence for a person to fraudulently or dishonestly obtain spent conviction information.	A person is not entitled to take a spent conviction into account for an unauthorised purpose. It is an offence to disclose spent conviction information without lawful authority and for a person with access to spent conviction information, who knows or should reasonably be expected to know that a conviction is spent, to disclose the information other than in accordance with the Act. It is an offence for a person to fraudulently or dishonestly obtain spent conviction information.	A person is not entitled to take a spent conviction into account in assessing a person's character. It is unlawful to discriminate against a person on the ground of a spent conviction. A person is not to disclose or acknowledge matters relating to the spent conviction of another person. It is an offence to obtain spent conviction information without lawful authority.	A person is not entitled to take a spent conviction into account in assessing a person's character or for an unauthorised purpose It is unlawful to threaten to disclose spent conviction information It is an offence to disclose spent conviction information without lawful authority It is an offence for a person to fraudulently or dishonestly obtain spent conviction information

