ON THE RECORD

Guidelines for the prevention of discrimination in employment on the basis of criminal record

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Human Rights and Equal Opportunity Commission

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On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record

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Preface

Every employer has the right to employ someone of their own choosing, based on a person's suitability for a job. Employers best understand the main requirements of that job and what qualities are needed in an employee to meet those requirements. Yet it is also in employers' interests to treat job applicants and employees fairly and in accordance with legal obligations.

Some employers are unaware that discrimination in employment on the ground of criminal record can be a basis for a complaint of discrimination under the *Human Rights and Equal Opportunity Commission Act 1986* and may also be unlawful under state and territory anti-discrimination laws. Others are aware of these responsibilities but are unsure of their practical application. These Guidelines aim to assist employers and others to eliminate discrimination against people with criminal records and assist employers meet their obligations under anti-discrimination law.

There are a number of reasons why discrimination on the basis of criminal record is an issue for employers to address.

Firstly, there are a sizeable number of people with criminal records in our community, many of them seeking, or in, employment. At least 30,000 adult offenders are being returned to the Australian community from prison each year. However, the real number of people with a criminal record will be even higher than this, since many people with a criminal record have never been to prison.

Secondly, more and more employers are asking job applicants to undergo criminal record checks. While in some cases it is crucial that appropriate selection procedures are used to screen out people with certain criminal records, some employers automatically bar from employment anyone with a criminal record, regardless of the offence or the type of job.

This wastes human resources at a time when skill and labour shortages are becoming a key feature of the Australian workplace. It also means that people with criminal records are increasingly vulnerable to prejudice, which locks them out of the workforce.

The introduction of anti-discrimination and spent convictions laws are ways in which legislators have tried to protect people from discrimination when looking for a job. These laws provide a proper balance between the legitimate concerns of employers and people with a criminal record.

A basic principle of these laws is to enable an employer to refuse to employ someone if their criminal record is genuinely relevant to the essential requirements of the job. However, if a person's criminal record doesn't impact on the inherent requirements of the job, and that person is the best candidate for the job in every other way, these laws are designed to protect a person from being denied equal opportunity because of their criminal record. I hope

that these Guidelines will assist employers to apply these principles in their own workplaces.

Dr Sev Ozdowski OAM
Human Rights Commissioner

Glossary

AIRC	Australian Industrial Relations Commission
Commission	Human Rights and Equal Opportunity Commission
conviction	a conviction of an offence by a court of law
CrimTrac	Commonwealth agency which provides information and investigative tools for policing services across Australia, including police record checking services
HREOC Act	*Human Rights and Equal Opportunity Commission Act 1986* (Cth)
ILO 111	International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958*
inherent requirements	the essential requirements of a particular job or position
National Police Certificate	an official police record listing a person's criminal history
police check	the check undertaken by police services resulting in the issue of a police certificate
spent convictions	old convictions determined to be 'spent' under spent conviction and offender rehabilitation laws and schemes
unfair dismissal laws	industrial relations laws which provide protection against unfair dismissal from employment
unrecorded conviction	a finding of guilt by a court of law where no conviction was recorded, usually an indication that the offence was not considered serious enough to record a conviction, taking into account the nature of the offence and the likely impact of the recorded conviction on the offender's economic or social well-being

Guidelines for the prevention of discrimination in employment on the basis of criminal record

The following Guidelines form the basis for best practice workplace policy and practice on employing people with a criminal record. They are described in more detail in *On the Record – Guidelines for the prevention of discrimination in employment on the basis of criminal record.*

Guidelines for the prevention of discrimination in employment on the basis of criminal record

1. Employers should create an environment which will encourage an open and honest exchange of criminal record information between an employer and job applicant or employee.

2. Employers should only ask job applicants and employees to disclose specific criminal record information if they have identified that certain criminal convictions or offences are relevant to the inherent requirements of the job.

3. Oral and written questions during the recruitment process should not require a job applicant or employee to disclose spent convictions unless exemptions to spent conviction laws apply.

4. Advertisements and job information for a vacant position should clearly state whether a criminal record check is a requirement of the position. If so, the material should also state that people with criminal records will not be automatically barred from applying (unless there is a particular requirement under law).

5. Criminal record checks should only be conducted with the written consent of the job applicant or current employee.

6. Information about a person's criminal record should always be stored in a private and confidential manner and used only for the purpose for which it is intended.

7. The relevance of a job applicant's or employee's criminal record should be assessed on a case-by-case basis against the inherent requirements of the work he or she would be required to do and the circumstances in which it has to be carried out. A criminal record should not generally be an absolute bar to employment of a person.

8. If an employer takes a criminal record into account in making an employment decision, in most cases the employer should give the job applicant or employee a chance to provide further information about their criminal record including, if they wish, details of the conviction or offence, the circumstances surrounding the offence, character references or other information, before determining the appropriate outcome in each case.

9. If criminal record information is considered relevant, an employer should have a written policy and procedure for the employment of people with a criminal record which can be incorporated into any existing equal opportunity employment policy, covering recruitment, employment and termination.

10. If criminal record information is considered relevant, an employer should train all staff involved in recruitment and selection on the workplace policy and procedure when employing someone with a criminal record, including information on relevant anti-discrimination laws.

1 Introduction

Under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the HREOC Act), the Human Rights and Equal Opportunity Commission (the Commission) has various functions aimed at fostering equality of opportunity in employment, including preparing and publishing guidelines to prevent discrimination in employment.[1]

In recent years there have been a significant number of complaints to the Commission from people alleging discrimination in employment on the basis of criminal record. The complaints indicate that there is a great deal of misunderstanding by employers and people with criminal records about discrimination on the basis of criminal record.

As a result, in August 2004 the Human Rights Commissioner on behalf of the Commission commenced a research project to examine more closely the extent and nature of this discrimination, to clarify the rights and responsibilities of employers and employees, and to consider measures which may be taken to protect people from this form of discrimination. In December 2004 the Commissioner issued a *Discussion Paper on Discrimination in Employment on the basis of Criminal Record*, calling for submissions. These submissions, together with a series of consultations on the issue of criminal record discrimination, highlighted further the need for practical guidance for employers and employees in this area. These Guidelines are a result of this research and consultation process.

These Guidelines are not legally binding. They are not intended to be (and should not be) relied on for legal advice. The Guidelines provide practical guidance on the rights and responsibilities relating to discrimination in employment on the basis of criminal record that arise under the HREOC Act.

These Guidelines also cover some areas of workplace practice and policy which at first sight do not appear to be directly related to discrimination on the basis of criminal record under the HREOC Act. However, Commission research shows that there are a complex set of intersecting laws with a direct impact on criminal record discrimination. For example, misunderstandings and incorrect application of spent convictions laws by employers and employees can lead to complaints of discrimination. As a result, these Guidelines provide some limited information and guidance on spent convictions laws, privacy laws, industrial laws and police record policies in order to assist employers avoid the pitfalls of discrimination.

The Commission has also published a short document outlining some *Key Points* from these Guidelines, for ease of reference.

[1] *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* (HREOC Act), s31(h).

2 Discrimination in employment on the basis of criminal record under the HREOC Act

Under the HREOC Act, the Commission can handle complaints about discrimination in employment or occupation on the basis of criminal record.

The Commission's powers and functions in relation to discrimination in employment on the ground of criminal record are contained in Part II – Division 4 (sections 30, 31 and 32) of the HREOC Act and the *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) reg 4.

The Commission's jurisdiction to handle these complaints is underpinned by the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO111), which Australia has ratified, and which is scheduled to the HREOC Act.

Under section 31 of the HREOC Act the Commission has the authority to 'investigate any act or practice, including any systemic practice that may constitute discrimination and where appropriate try to resolve the complaint of discrimination by conciliation.' A summary of the Commission's complaints process is set out in Appendix 1 of these Guidelines.

Although the Commission may find that certain conduct is discriminatory, if the complaint is unable to be conciliated, then the Commission's actions are limited to preparing a report with recommendations to the Attorney-General, for tabling in federal Parliament. The Commission does not have the authority to implement its recommendations or make respondents to a complaint comply with them.[2]

2.1 Definition of 'discrimination' under the HREOC Act

Discrimination is defined in Section 3 of the HREOC Act as follows:

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction, exclusion or preference that:

[2] There have been two cases where the Commission has made a finding of discrimination on the basis of criminal record. In both cases the recommendations made by the Commission were not followed by the employer. 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), 2002.

(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

Examples of such 'distinction, exclusion or preference' which may nullify or impair equality include rejection of job applications, termination from employment, lack of promotion, harassment in the workplace and lack of training for employment or promotion purposes.

Although not specifically defined, indirect discrimination is also discrimination under the HREOC Act. Indirect discrimination occurs when an apparently neutral condition, required of everyone, has a disproportionately harsh impact on a person with an attribute such as criminal record.[3] An intention to discriminate is not necessary for a finding of discrimination.

2.2 Definition of 'criminal record' under the HREOC Act

Under the HREOC Act, there is no definition of what constitutes 'criminal record'. However, it has been interpreted broadly to include not only what actually exists on a police record, but also the circumstances of the conviction.[4]

This means that a complaint of discrimination under the HREOC Act is not limited to an allegation of discrimination based on what appears on a police record check only. A criminal record for the purposes of the HREOC Act can include charges which were not proven, investigations, findings of guilt with non-conviction and convictions which were later quashed or pardoned. It also includes imputed criminal record. For example, if a person is denied a job because the employer thinks that they have a criminal record, even if this is not the case, a person may make a complaint to the Commission.

The HREOC Act does not specifically protect someone against discrimination on the basis of a criminal record held by association, for example against a family member or friend. However, if a person was imputed to have a criminal record simply because a family member or friend had a criminal record, they may be protected under the HREOC Act.

The interpretation of 'criminal record' under the HREOC Act does not mirror the meaning of criminal record when discussing police checks in various police jurisdictions. Criminal record in this context refers to what is recorded and what is released on official police records. However, this can differ by state and territory, and according to who the information is released to. The information contained in police records is discussed in Section 5.6.

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[3] International Labour Conference, Equality in Employment and Occupation: General Survey by the Committee of Experts on the Application of Conventions and Recommendations ILO, Geneva, 1988.

[4] Hall's Case, p20.

2.3 Who is covered by the HREOC Act (for criminal record discrimination)?

The HREOC Act covers employers and employees in all states and territories. This includes Commonwealth government employers, state and territory government employers, private sector employers, non-government community sector employers and employment agencies, as well as authorities for the licensing and registration of employees. Small business employers are also covered under the HREOC Act.

The HREOC Act includes all types of employees and prospective employees: temporary, casual, full-time and part-time workers, apprentices and trainees.

Volunteers are not covered unless the voluntary work is related to training or work experience leading directly to employment, or pursuing a particular occupation. For example, the HREOC Act may provide some protection from discrimination if a social work student was denied the opportunity to participate in a community placement because of their criminal record.

2.4 What employment areas does the HREOC Act apply to (for criminal record discrimination)?

The HREOC Act defines 'employment' and 'occupation' to include:

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

As a result, the Commission has investigated allegations of discrimination on the basis of criminal record in relation to:

- recruitment
- vocational training
- promotion
- conditions at work
- termination
- employment-related licensing or registration.

Most complaints received by the Commission have been in relation to the recruitment process. This category is closely followed by terminations of employment.

2.5 What is <u>not</u> discrimination on the basis of criminal record under the HREOC Act?

The HREOC Act provides a general exception to discrimination in employment, known as the *inherent requirements* exception.

It is not discrimination if the person's criminal record means that he or she is unable to perform the inherent requirements of the particular job.[5]

The anti-discrimination legislation in Tasmania and the Northern Territory uses the words 'irrelevant criminal record' to express the same concept.

The HREOC Act does not define what is meant by 'inherent requirements', however in case law 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.

'Inherent requirement' is discussed in greater detail in Section 4 – Determining the inherent requirements of the job.

The HREOC Act also provides an exception for any distinction, exclusion or preference that is in connection with employment in a religious institution, as long as it is made in good faith in order to avoid injury to religious beliefs.[6]

Further, if an employer is carrying out their obligations in direct compliance with a law, it is likely that the Commission will discontinue its inquiry into the complaint. However, the Commission can examine a Commonwealth law for its discriminatory aspects and recommend its amendment to the federal Parliament.

[5] Section 3, HREOC Act.
[6] Section 3, HREOC Act.

3 What other relevant laws do employers have to comply with?

3.1 State and territory anti-discrimination laws

Tasmania and the Northern Territory have laws that specifically prohibit discrimination on the basis of criminal record. The laws cover discrimination in other areas as well as employment, including the provision of goods and services, education and accommodation.

Under the **Northern Territory's** *Anti-Discrimination Act 1992*, it is unlawful to discriminate against a person on the grounds of 'irrelevant criminal record'.[7] The legislation also includes an exemption to discrimination where the work principally involves the care, instruction or supervision of vulnerable persons, including children.[8] It also prohibits asking another person to supply information on which unlawful discrimination could be based.[9]

The **Tasmanian** *Anti-Discrimination Act 1998* has very similar provisions to the Northern Territory's legislation. A person must not discriminate against another person 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.[10]

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.[11]

Persons in the Northern Territory and Tasmania may choose to make a complaint under the HREOC Act instead.

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.[12]

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[7] Section 4.
[8] Section 37.
[9] Section 26,NT Anti-Discrimination Act 2004. It does not apply if the person proves on the balance of probabilities that the information was reasonably required for a purpose that did not involve discrimination. It also does not apply to a request that is necessary to comply with a law of the Territory or Commonwealth, order of a court, provision of an order of court or tribunal having the power to fix minimum wages and other terms of employment, a provision of an industrial agreement, an order of the Commissioner.
[10] Section 50.
[11] *Anti-Discrimination Act 1992* (NT), section 88; *Anti-Discrimination Act 1998* (Tas), section 89.
[12] *Spent Convictions Act 1988 (WA); Equal Opportunity Act 1984 (WA); Discrimination Act 1991 (ACT)*, s7*; Spent Convictions Act 2000 (ACT).*

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

3.2 Spent convictions laws

Purpose and application of spent convictions laws

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

Spent convictions schemes usually apply to certain convictions only, mostly offences with short custodial sentences or lesser penalties. The schemes exclude people sentenced for more serious crimes or for long periods of imprisonment. There are exemptions from the requirements of the law for certain categories of employment and certain offences. For example, sex and violence offences are usually required to be disclosed to the employer when the work involves working with children.

Most states and territories, and the Commonwealth, have statutory spent convictions schemes, although they differ considerably.[13] Victoria and South Australia are the only two jurisdictions without spent convictions laws, although they have schemes based on police policy.

Employer responsibilities under spent convictions laws

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

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

Police will not release information to an employer about a spent conviction on a criminal record check unless there is a special exemption for that particular occupation. Generally each police jurisdiction applies the rules governing its own scheme in deciding whether to release information to police in other jurisdictions about spent convictions.

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[13] *Crimes Act 1914 (Cth); Criminal Records Act 1991 (NSW); Criminal Law (Rehabilitation of Offenders) Act 1986 (QLD); Spent Convictions Act 2000 (ACT); Criminal Records (Spent Convictions) Act 1992 (NT); Spent Convictions Act 1988 (WA); Anulled Convictions Act 2003 (TAS)*.

Even if an employer finds out about a spent conviction by other means, for example word-of-mouth, the employer is prohibited from taking that spent conviction into account in making an employment decision.

Because of confusion over the different laws, some job applicants and employees may either mistakenly disclose a spent conviction because they do not understand the provisions of the specific law, or fail to disclose convictions to employers because they believe their conviction to be spent. These types of misunderstandings can result in complaints of discrimination if the employer takes action to the detriment of the employee on the basis of what is revealed.

3.3 Privacy laws

Under privacy laws, a person's criminal record is treated as sensitive personal information. An employer should respect the privacy of job applicants and employees with criminal records.

Although exemption from privacy laws may apply to some private sector employers and to some criminal record information, it is best practice for employers to follow privacy principles as closely as possible. Breaches of privacy in relation to criminal record can end up complicating relations between an employee and employer, and may lead to claims of discrimination and breaches of the *Privacy Act 1988 (Cth)* (the Privacy Act).

Employers may also face a potential claim under common law for breaches of privacy and wrongful disclosure of confidential information.

Who is covered by Commonwealth privacy laws?

In an employment context, the Privacy Act protects the privacy of personal information of Commonwealth and ACT public sector employees and certain private sector employees.

In certain cases, individual job applicants and employees may complain of a breach of privacy to the Privacy Commissioner who can investigate the complaint, conciliate the complaint and make recommendations should the complaint prove unable to be resolved by conciliation. These recommendations can be enforced by the federal courts.

However, the private sector provisions only apply to organisations (including not-for-profit organisations) with an annual turnover of more than $3 million, with certain limited exceptions (see http://www.privacy.gov.au/publications/IS12_01.html).

States and territories also have privacy laws and administrative schemes which operate to the extent that they are not indirectly inconsistent with the

Privacy Act.[14] These vary in content and coverage, especially in regard to private sector coverage. State and territory public sector employees are covered by these laws and schemes. However, the coverage is inconsistent. Information on these schemes can also be found on the Privacy Commission's website at http://www.privacy.gov.au/privacy_rights/laws/index.html#5.

Are employee records covered by the Privacy Act?

The private sector provisions of the Privacy Act, where they apply, allow for an exemption for employee records in some circumstances.[15] Criminal record information that relates directly to the employment relationship between an employer and current or former employee, and is held by the employer in an employee record, is exempt from the operation of the privacy principles.

However, this exemption *does not cover future employment relationships.* This means that an employer that is covered by the Privacy Act (eg. with an annual turnover of more than $3 million) must comply with the Privacy Act when it collects, uses, stores and disposes of criminal record information from *job applicants.* If the job applicant eventually becomes an employee, then the exemption applies. If not, then the information must be treated according to privacy principles.

More information on the employee records exemption can be found at http://www.privacy.gov.au/publications/IS12_01.html.

What are the privacy principles of the Privacy Act?

The key provisions of the *Privacy Act* which relate to private sector employers and employees are called the National Privacy Principles (NPPs). When handling criminal record information from job applicants and employees, private sector employers are reminded to follow the NPPs.

A summary of the National Privacy Principles obligations under the Privacy Act, relevant to criminal record information, is included in Appendix 2.

Commonwealth and ACT public sector employers and employees are required to comply with the Information Privacy Principles (IPPs), which differ slightly from the NPPS.

The NPPs and IPPs can be found at http://www.privacy.gov.au/publications/npps01.html and http://www.privacy.gov.au/publications/ipps.html. Advisory information on the

[14] State and Territory privacy laws are: *Privacy and Personal Information Protection Act 1998 (NSW); Information Privacy Act 2000 (VIC); Personal Information Protection Act 2004 (TAS); Northern Territory Information Act 2002 (NT).* The Commonwealth *Privacy Act 1988* applies to the ACT.

[15] At the time of writing, the scope of this exemption is currently under review by the federal Department of Employment and Workplace Relations and Attorney-General's Department.

application of the principles can be found at http://www.privacy.gov.au/act/guidelines.

3.4 Industrial relations laws

State and federal industrial laws may also protect people with a criminal record from unfair treatment at work, specifically from unfair dismissal.

Some employees covered by the federal industrial relations regime[16] can lodge a complaint of unfair dismissal with the Australian Industrial Relations Commission (AIRC) under the *Workplace Relations Act 1996* (Cth) (WRA).

The unfair dismissal provisions of the WRA cover dismissals and demotions involving significant reductions in remuneration or duties, but do not cover recruitment. The AIRC determines whether a dismissal was 'harsh, unjust or unreasonable'. There have been a number of decisions handed down by the AIRC in circumstances where the alleged unfair dismissal was the direct result of an employer finding out about an employee's past criminal record.

Many employees are excluded from lodging an unfair dismissal application under the WRA, including:[17]

- those in workplaces of less than 100 employees
- those who are serving a qualifying period of employment (six months) or a probationary period (three months, or longer if reasonable in all the circumstances)
- casual employees who have not worked at least 12 months on a regular systematic basis
- trainees
- fixed term or fixed project employees
- employees engaged on a seasonal basis
- non-award employees who earn in excess of a 'specified rate' ($94,900 per annum as at 2006)
- employees terminated where termination was for a reason including 'operational reasons'.

Each of the states (other than Victoria) also have unfair dismissal jurisdictions which are accessible to some employees who are not covered by the WRA.[18]

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[16] In broad terms, the federal industrial relations regime covers Commonwealth employees, employees working for trading and financial corporations and certain other types of employees, such as those working as flight crew or as maritime or waterside workers: see ss 5 and 6 of the *Workplace Relations Act 1996* (Cth).

[17] See *Workplace Relations Act 1996* (Cth), ss 638, 642(6), (8), (10).

[18] *NSW Industrial Relations Act 1996* (NSW); *Industrial Relations Act 1999* (QLD); *Industrial Relations Act 1984* (TAS); *Industrial and Employee Relations Act 1994* (SA); *Industrial Relations Act 1979* (WA).

3.5 Laws requiring employers to check criminal records

Some employers, licensing and registration bodies are legally required to screen employees and job applicants for their criminal record, and to take that record into account in employment decisions.

Example of legal requirements for criminal record checks: working with children laws

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

In some states there are legislative requirements for criminal record checks and in other states there are policy guidelines recommending such checks.

Both NSW and Queensland have schemes of mandatory criminal record checks for all persons wishing to work with children. 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.[19]

Some examples of occupations and industries which are regulated in some instances to screen and restrict employment of people with criminal records at the federal and state levels include:

- teaching
- gaming and racing
- nursing
- police
- transport operators
- security officers

[19] *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; http://www.kids.nsw.gov.au; *Commission for Children and Young People Act 2000* (Qld); http://www.childcomm.qld.gov.au. Also, similar laws have been enacted in WA and Victoria.

- taxi driving
- correctional services
- legal profession
- second-hand dealers and pawnbrokers.

Employers, licensing and registration bodies must meet the requirements of these laws. However, employers should be aware of the exact requirements of their legislation, as it may not be immediately clear whether a person can be excluded on the basis of criminal record.

Licensing and registration is discussed in Section 8.

4 Determining the inherent requirements of a job

Under the HREOC Act, an employer can make a distinction against someone with a criminal record if the person's particular criminal record means that they are unable to fulfil the inherent requirements of the job. Another way of putting this is that an employer can make a distinction against someone if the criminal record is relevant to the job. This conduct does not constitute discrimination under the HREOC Act.

The burden of deciding what is an inherent requirement of the job falls on the employer, but it must be able to be justified objectively.

These Guidelines attempt to provide some assistance to employers in determining the inherent requirements. Employers should note, however, that case law in this area is relatively undeveloped. Also, any findings of discrimination rest greatly on the individual circumstances of the case.

4.1 When should an employer determine the inherent requirements of the job?

Determining the inherent requirements of a job should be undertaken *prior* to advertising a job vacancy, as this will determine how a job is advertised and how the job application process will proceed. Deciding the essential or inherent requirements of the job at the start, rather than when a person with a criminal record applies for the job, will help the employer avoid problems and misunderstandings half-way through the recruitment process.

However, under the HREOC Act an employer needs to show not only that they have determined what are the inherent requirements of a job, but also that they have considered whether an *individual* job applicant or employee meets these requirements.

4.2 How do you decide whether a criminal record is relevant to the inherent requirements of the job?

Step One: Identify the essential tasks, circumstances and requirements of the job

A good starting point for identifying the inherent requirements of the job with regard to criminal record is to determine the tasks the employee will be required to perform, the circumstances in which the work is to be carried out and any organisational requirements of the job.

For example, for a job transporting valuable goods, the main task may be:

- Transporting goods from receiving dock to storage centre.

However, the job may also require the employee to:

- Be eligible to hold a current security pass for the storage centre.

These may both be inherent requirements of the job although they may differ in relevance for criminal record. The first task will require skills which may have no connection to a criminal record, for example a truck driver's licence. The second aspect to the job does not require specific skills, but is also essential to the job as a security clearance must be obtained for all those entering the storage centre.

Step Two: Assess whether criminal records are relevant to these tasks and requirements

The next step is to assess whether a certain criminal record may be relevant to the requirements of the job.

The following questions help employers to identify whether a certain criminal record may have an impact on the essential tasks of the job:

- Does legislation require the employer to ensure that the employee meets certain requirements with regard to criminal record? For example it may be illegal to employ people with a certain criminal record in some occupations, such as working with children.

- Is a licence or registration essential to the job? Is a criminal record a barrier to obtaining such a licence or registration?

- Does the job involve one-to-one contact with children or other vulnerable people, such as the mentally ill, as employees, customers or clients? How often?

- Does the job involve any direct responsibility for finance or items of significant value? If so, to what degree? Convictions for what offences would be relevant?

Note: *An employer may conclude that a criminal record is not relevant to the inherent requirements of the job. In that case, it is inappropriate for an employer to consider criminal record in their recruitment process and policies.*

Alternatively, an employer may conclude that only certain types of offences are relevant to the job, and to structure any questions to reflect this.

If an employer decides that a criminal record may be relevant to the inherent requirements of the job, he or she should then follow best practice for conducting criminal checks outlined in Section 5.

The inherent requirements should be reflected in any selection criteria and job information for job applicants. An employer should be clear about what are the essential, as opposed to desirable, criteria and ensure that any essential elements are set out clearly for job applicants. See also the Commission's

best practice guidelines for recruitment and selection of employees at http://www.humanrights.gov.au/info_for_employers/best_practice/recruitment.html.

Example of Commission complaint: inherent requirements

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 claimed 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, for which it was compulsory to 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 employment 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 was an inherent requirement of the position.

Step Three: Assess an individual criminal record against the inherent requirements of the job

If an employer has determined that a criminal record is relevant to the inherent requirements of the job, and has advertised accordingly, an employer needs to assess the applications from people with a criminal record on a case by case basis.

Each job applicant should be assessed firstly on their ability to do the job and then on the relevance of their criminal record to the job applied for. Only short-listed applicants should be asked to disclose their criminal record.

How to assess a job applicant's or employees criminal record against the inherent requirements of the job is discussed more fully in Section 5.9.

4.3 Some key principles in case law for assessing inherent requirements

Since each job and each person's criminal record is different, there is no steadfast rule in determining the inherent requirements of a particular job and whether a person cannot meet these requirements because of their criminal record. The inherent requirements exception has been considered by the

International Labour Organisation, the Australian courts and by the Commission in its consideration of complaints. These cases are not necessarily about criminal record discrimination, as the inherent requirements exception is also relevant for a number of other grounds of discrimination. While the cases do not reveal any simple test, the following principles appear to represent the current state of the law:

1. **An inherent requirement is something that is 'essential' to the position rather than incidental, peripheral or accidental.**[20]

Justice Gaudron of the High Court has stated that

> *[A] practical method of determining whether or not a requirement is an inherent requirement … is to ask whether the position would essentially be the same if that requirement were dispensed with.*[21]

2. **The burden is on the employer to determine the inherent requirements of the *particular* position and consider their application to the *specific* employee before the inherent requirements exception may be invoked.**[22]

Broad general statements about a job's requirements are not clear enough to allow for an assessment of inherent requirements. Further, an employer needs to consider the application of inherent requirements to a specific employee on a case by case basis, rather than trying to draw a connection between the inherent requirements and any presumed characteristics of people with a criminal record.

Case example: *Zraika v Commissioner of Police*[23]

Mr Zraika's application to join the NSW Police was rejected because of his impaired vision in his left eye. Mr Zraika claimed he had been discriminated against on the grounds of disability, while the NSW Police argued that with his visual impairment he would be unable to carry out the duties of police officer with the necessary diligence and safety. However, the Tribunal found that

The respondent has not satisfied us that at the time he rejected Mr Zraika's application that he (the respondent) had identified the inherent requirements of the position of a police officer. The only evidence concerning the respondent's determination of the inherent requirements of a police officer, as at 11 October 2002, was the entries on the medical professional suitability application form which have been reproduced at [16] and [17] above. Those entries are too broad and too general

[20] 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.
[21] Christie's Case, Gaudron J.
[22] 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) NSW ADT 67.
[23] This case illustrates inherent requirements principles, although it did not involve criminal record discrimination.

to be considered an adequate description of the inherent requirements of an operational police officer. They are not capable of being used as any sort of reasonable yardstick against which an applicant with some loss of visual function, such as Mr Zraika can be assessed.[24]

3. **The inherent requirements should be determined by reference to the specific job to be done and the surrounding context of the position, including the nature of the business and the manner in which the business is conducted.**[25]

Case example: Christie's Case

Although the Christie case related to age discrimination, not criminal record discrimination, it established important principles on what are the 'inherent requirements' of a job. Mr Christie claimed he had been discriminated against on the basis of his age when he was terminated from his job as pilot with Qantas, on reaching 60 years of age. Due to international restrictions on the age of pilots, Mr Christie was not able to pilot international flights. The High Court found that Mr Christie could not meet the inherent requirements of the position of pilot because it was an inherent requirement of the job to be able to fly international routes. Although Mr Christie may have been able to perform the specific task of flying (and could do so for Qantas on domestic routes) he was not able to perform the inherent requirement of the 'position' to fly international routes. Hence the 'inherent requirements' included the surrounding context of the job, not merely his physical or mental capacity to perform the task.

4. **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.**[26]

Case example: Christensen's Case

Ms Christensen's application to work as bar attendant at the Adelaide Casino was rejected because of a conviction for stealing two bottles of alcohol from a shop when she was 15 years of age. She complained to the Commission of discrimination on the basis of criminal record. The Casino argued that it was an inherent requirement that bar staff be of good character and trustworthy and that her offence showed that she was not able to fulfil these requirements. The Commission found that there was not a sufficiently close connection between the requirement that the holder of the position of bar attendant be trustworthy and of good character and the rejection of her application based on her criminal record.

[24] *Zraika v Commissioner of Police*, *NSW Police* (2004) NSW ADT 67, at 40.
[25] X's Case at 208, Also Christie's Case, Hall's Case p33, S Selleck p10.
[26] Hall's Case p35-36; S Selleck p13*;Commonwealth v Bradley* (1999) 95 FCR at 237 per Black CJ. See also *Wall v NT Police Services*, Anti-Discrimination Commission, 14 March 2005 (Wall's Case). In this case the Anti-Discrimination Commissioner found that the NT Police had not demonstrated a 'tight correlation' between the purported inherent integrity requirement of the police service and the complainant's spent criminal record, 5.3.5.

There was information available to the respondent regarding Ms Christensen's trustworthiness and ability to perform the inherent requirements of the job. Ms Christensen's conviction occurred some seven or eight years before she made her application for employment with Adelaide Casino. She was about 15 years of age at the time of her conviction. I note there were factors the Casino didn't take into account that would to me seem far more relevant to, and probative of, the question of whether she was trustworthy and of good character, than her criminal record …there has been no suggestion that she has been anything but trustworthy and honest in these [other] positions …I am of the view that in the circumstances of this complaint the connection between the rejection of Ms Christensen's application on the basis of her criminal record and the inherent requirements of trustworthiness and good character is not tight or close … '.[27]

5. The inherent requirements exception will be interpreted strictly so as not to defeat the purpose of the anti-discrimination provisions.[28]

The Full Federal Court of Australia described the purpose and operation of the HREOC Act 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.[29]

4.4 Can occupational health and safety be considered part of the inherent requirements of the job?

It may be an inherent requirement of the job that a person not pose an unacceptable risk to the occupational health and safety of other workers, or to themselves. For example, a job applicant for a bus driver position with a number of serious traffic offences may pose an unacceptable risk to others working on the bus.

Case example: Inherent requirements and health and safety risk to others

[27] Christensen's Case, pp2o—21.
[28] See also Hall's Case p34-5, S Selleck p10, Wall's Case, p18.
[29] *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.

In *X v Commonwealth*[30], the High Court of Australia considered the meaning of inherent requirements with respect to health and safety. X initially made a complaint of disability discrimination to the Human Rights and Equal Opportunity Commission, whose finding was overturned by the Federal Court. The High Court dismissed an appeal by X.

X enlisted as a general enlistee with the army. After he had commenced recruitment training, a blood test revealed he was HIV positive, and as a result he was discharged in accordance with defence policy. The Commonwealth argued that he could not carry out the inherent requirements of the job, not because he was physically incapable, but rather that he posed a risk to other soldiers by reason of his HIV infection. The High Court found that it is permissible to have regard to the health and safety of others when considering the requirements of the employment. Certain issues will ordinarily have to be addressed in this assessment, such as the degree of risk to others, the consequences of the risk being realised, the employer's legal obligations to co-employees and others, the function which the employee performs and the organisation of the work.[31]

However, an employer should be careful not to resort to stereotyping of people with certain types of criminal record. Individual assessment will still be necessary to assess whether or not a person can meet the inherent requirements of the job.

Further, an employer should not use occupational health and safety concerns as an excuse to exclude people with a certain criminal record when these health and safety concerns are peripheral to the job.

4.5 Can it be an inherent requirement of a job that employees be of good character and trustworthy?

It can be an inherent requirement of a job that an employee be of 'good character' and 'trustworthy'. These requirements are common in public sector employment, industries with specific regulation such as racing or gaming, and in the licensing and registration of specific occupations such as nursing.

For example, in a complaint to the Commission (the Christensen's Case), the Commission found that trustworthiness and good character were inherent requirements of the job of bar attendant at the Adelaide Casino. However, the Commission found that the connection between the rejection of Ms Christensen's application on the basis of her criminal record and the inherent requirements of trustworthiness and good character was not tight or close in her case, and hence found that the casino had discriminated against her.

[30] X's Case. Although it illustrates inherent requirements principles, this case did not involve criminal record discrimination.
[31] X's Case, Gleeson C J at 43.

A similar requirement to 'good character' is the requirement to be 'a fit and proper person'.

Case example: Deciding whether a legal practitioner is a 'fit and proper' person[32]

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 in 1998 of aggravated indecent assault of two of his stepdaughters 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 connection 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.[33]

An employer must be wary of making an unwarranted presumption that a person's criminal record determines their character. 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 wrongdoings.[34]

4.6 Workplace or industry-wide requirements

Some employers have identified similar inherent requirements for a number of different jobs across one workplace or industry. In those cases an employer may decide to follow a similar recruitment process. For example, a financial organisation may have a number of different jobs with responsibility for dealing with financial transactions. The employer may decide that offences of

[32] *A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1 (4 February 2004).
[33] *A Solicitor v The Council of the Law Society of New South Wales* (2004) HCA 1 (4 February 2004) at 32.
[34] For example, see *Z v Director General, Department of Transport* [2002] NSW ADT 67 at 30-32.

dishonesty and theft are relevant to all these types of jobs within the organisation and advertise and apply a similar recruitment process with respect to criminal record checks.

Public service employment and licensing and registration bodies also often wish to apply a similar requirement across a range of occupations, such as the requirement to be of good character.

However, it is important to keep in mind that the inherent requirements principle still requires an assessment of a person's individual circumstances to be weighed up against the job being performed. If not, there is a danger that discrimination will occur.

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

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 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.

The respondent argued to the Commission that it was an inherent requirement of a stable hand not to have a criminal record because public confidence is important to the racing industry, and the maintenance of public confidence depends in part upon the honesty and integrity of persons associated with that industry. However, the Commission found that this general statement was not sufficient to establish that a criminal record was relevant to the job of stable hand.

Although it may establish that the inherent requirements of each particular job in the racing industry will include requirements that may be broadly labelled as 'fitness and propriety' requirements, the precise content of those inherent requirements must be considered in respect of each job.

It is quite unsatisfactory to approach this issue in terms of 'industry wide' requirements. This is supported by the ILO Committee of Experts who have indicated that it is reluctant to apply the 'inherent requirement' exception to an entire profession.[35]

[35] International Labour Organisation, *Fundamental rights at work and international labour standards*, Geneva, International Labour Office, 2003. See also Hall's Case.

5 Recruitment

If an employer has a fair and open process of dealing with the disclosure of criminal records at the outset, many complaints of discrimination can be avoided.

On the one hand, most employers feel that a job applicant has the responsibility to disclose their criminal record honestly in response to a request. On the other hand, people with criminal records are acutely aware that they may be judged adversely because of their criminal record, and not given a fair go. They may decide not to disclose for this reason. In such a sensitive area it prevents many problems if employers create an environment which will encourage an honest and open exchange of information.

It is important to remember that for some jobs, a criminal record will be an irrelevant consideration. An employer does not need to request criminal record information from job applicants if it is irrelevant to the inherent requirements of these jobs. Employers are therefore strongly encouraged to read and consider Section 4 on assessing the inherent requirements of the job before requesting information from job applicants.

Guideline 1

Employers should create an environment which will encourage an open and honest exchange of information about a criminal record between an employer and job applicant or employee.

5.1 Can an employer ask for criminal record details from a job applicant?

In some circumstances there is a clear legal requirement that an employee or job applicant should not have a certain criminal record. An employer may be obliged to ask a job applicant for criminal record details in these circumstances. Employers are, however, required to ask an employee to consent to a criminal record check.

See Section 5.5 on when to ask for a criminal record check.

Even where there is no external obligation on an employer to enquire about a person's criminal record, employers may still ask a person if he or she has a criminal record. *However, employers should only ask about a criminal record where there is a connection between the inherent requirements of a particular job and a 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.[36]

Case example: Requesting information on which unlawful discrimination may be based

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.[37]

The position was for a remote area nurse situated in an Aboriginal community. Ms Hosking claimed she was asked to consent to a police history check and that, if she did not, her application would not be put on the database of the agency to be forwarded to the employer. The recruitment agency claimed that it was their role to screen out the criminal, inept and incompetent elements so that they do not manage to gain positions of trust. They claimed that the information requested of applicants was essential in the context of Aboriginal customs and realities that these disadvantaged people face on a daily basis.

Although the agency did send the application on to the employer, the NT Commission found that the evidence presented by the agency that a police check was an inherent requirement of the position was 'unconvincing'.

The Commission stated:

While Mr Fraser's wish to protect Aboriginal communities from unscrupulous persons is admirable, a general requirement for 'police checks' without any reference to the relevance of any check, the relevance of any criminal record and to such matters as spent convictions cannot be considered reasonable. Recruitment forms, and the information they elicit, must be relevant to the duties to be performed, couched in non-discriminatory terms, and based on non-discriminatory practices.

As a result, the NT Commission found that the agency sought unnecessary information on which discrimination may be based, contrary to the NT Anti-Discrimination Act.

In addition, an employer should be aware that federal and state privacy laws specify that personal information may only be collected to the extent necessary for a purpose directly related to a function or activity of the collector. It may be that the collection of a person's entire criminal record is excessive for employment purposes. While there are exceptions to privacy laws, for example for small business, privacy laws generally prohibit the collection and use of personal information such as criminal records from job applicants in any unnecessary and excessive way. See Section 3.3 on privacy laws.

[36] *Anti-Discrimination Act 1992* (NT), s26.
[37] *Hosking v Fraser Central Recruiting* (1996) EOC 92-859.

If an employer asks a job applicant personal questions which are irrelevant to the job, they run the risk of either breaching privacy and anti-discrimination laws, or setting in train misunderstandings which could lead to problems down the track.

Guideline 2

Employers should only ask job applicants and employees to disclose specific criminal record information if they have identified that certain criminal convictions or offences are relevant to the inherent requirements of the job.

5.2 Do job applicants have to disclose their criminal record?

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.[38]

Case example: *Stock v Narrabri Nominees*, WA Industrial Relations Commission

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 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.[39]

The Commissioner found that Mr Stock had been unfairly dismissed.

If there is a requirement under legislation to disclose a criminal record, for example for working with children, then a job applicant must disclose their record. Otherwise, there is no absolute obligation for a job applicant to answer a question about their criminal record even when asked.

[38] *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. However, this conclusion is not entirely free of doubt. Recent developments in the implied duties of good faith and mutual trust and confidence may lead to fresh consideration of this conclusion.

[39] *Stock v Narrabri Nominees*, Western Australian Industrial Relations Commission, No.1122 of 1990, citing *Cambourn v A.E. Leer and B.A. Leer* (1979) AR (NSW) 523.

However, if an employer asks a reasonable question – for example, a specific question about a criminal history relevant to the job - an employer may be entitled to refuse to hire a person on the basis of failure to answer that reasonable question. Even so, this may still give rise to a complaint of imputed discrimination against the employer if a criminal record was irrelevant to the position.

Sometimes a job applicant thinks that there is no link between the position for which they are applying and their criminal record. In principle a person may be entitled to refuse to answer in this situation.[40] However, in practice, it is often difficult to determine whether a particular criminal record is relevant to a particular position.

Example of 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 centre 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, had 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. [41] 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.

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 failure to truthfully answer the question, and in any event, it was an inherent requirement of the particular position to have no criminal record.

As the last example illustrates, some employers decide not to employ an applicant who has failed to disclose a criminal record, not because of the nature of the record, but because an inherent requirement of the job is honesty and trustworthiness, and the failure to make a disclosure is treated as dishonesty. The Commission receives a number of complaints by persons who allege they have been not employed or later dismissed on the basis of criminal record, while the respondent has argued that the reason for the dismissal was dishonesty in failing to disclose the criminal record.

The Commission may decline a complaint if it finds that the employer's conduct was based on dishonesty only, not the actual criminal record.

[40] S Selleck, p4.
[41] A company employing security officers would usually be exempt from spent convictions schemes.

An employer could explain to job applicants, if briefly, why certain convictions are relevant to the job and that a failure to make a full and frank disclosure may be treated as evidence of untrustworthiness. This helps to minimise the possibility of disagreements which could lead to claims of discrimination.

5.3 How much is a job applicant 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 but no conviction is recorded), and depending on what information is requested from the employer, a job applicant may not need to disclose this guilty finding. The situation might change if an employer specifically asks about 'findings of guilt, with or without conviction'.

In addition, in most cases there is no requirement to disclose a spent conviction. However, some kinds of employment, for example employment where people will be working with children, are exempt from spent convictions legislation. Further, there are some offences that never become spent, for example sex offences in some jurisdictions. See Section 3.2 on spent convictions laws.

Guideline 3

Oral and written questions made during the recruitment process should not require a job applicant to disclose their spent convictions unless exemptions to spent convictions laws apply.

5.4 Advertising job vacancies

If an employer decides that a criminal record is relevant to a particular job, an employer should state this requirement clearly in job advertisements, information sent out to job applicants and recruitment briefs to agencies.

Even if a criminal record is relevant, the advertisement and job information should also state, wherever possible, that the employer does not automatically bar people with a criminal record from applying (unless there is a particular requirement to do so under law). This encourages an open exchange of information at the early stages of the recruitment process rather than down the track. It also means that an applicant can decide whether or not to apply for the position.

If an employer provides job information to job applicants, it may be useful for an employer to include a brief explanation of why certain offences may be relevant to the job.

Although the HREOC Act does not specifically prohibit discriminatory advertising with regard to criminal records, it is possible that a complaint of discrimination could be lodged because of a job advertisement. For example, a job advertisement that stated that job applicants, who are otherwise qualified, should not have a criminal record may constitute an impairment of equality of opportunity if it prevented a person from making a job application.

Example of a statement in a job advertisement which notifies job applicants about a requirement for a police check

All final applicants for this position will be asked to consent to a criminal record check. Please note that people with criminal records are not automatically barred from applying for this position. Each application will be considered on its merits.

An advertisement could also state that more information can be sought on a confidential basis. In this case, a separate contact name should be given to ensure confidentiality. This contact person should not be involved in the selection process.

If an employer has an exemption from spent convictions laws, this should also be clearly stated on the advertisement.

Example of a statement in a job advertisement notifying job applicants of spent conviction exclusion

All final applicants for this position will be asked to consent to a criminal record check. Please note that this position is exempt from the operation of spent convictions laws and all offences must be declared. However, all applications will be considered on their merits.

Guideline 4

Advertisements and job information for a vacant position should clearly state whether a criminal record check is a requirement of the position. If so, the material should also state that people with criminal records will not be automatically barred from applying (unless there is a particular requirement under law).

5.5 When to ask for a criminal record check

For most jobs, a criminal record check should be requested only from short-listed applicants or from those invited to interview. This minimises:

- unnecessary and time-consuming administration involved with processing many consent to disclosure forms

- the expense, as police services charge for the police checking service

- the risk of confidential information being disclosed when it is not required.

All applicants should be warned that their employment is dependent on an assessment of the results of their criminal record check. This should be stated clearly on the job application form and explained carefully in interview.

Ideally, an employer should not make a final job offer before receiving the results of a police check. If an employee commences employment and training, and a criminal record comes back with a relevant conviction, it can cause undue distress for employees and wasted employer resources.

However, police checks may take a few days, or even weeks, to return to the employer. This is a problem when a position needs to be filled quickly. As a result, in certain cases an employer may need to start the process of obtaining criminal record information earlier in the process. This would only be the case where there was an urgent need to employ someone.

If an employer decides to hire a person prior to the criminal record check, the employer should take steps to clearly inform the new employee that their employment is conditional. This is the case *even if* the new employee has not disclosed any convictions prior to a police check.

5.6 Police record checks

Australian police services maintain the most comprehensive collection of criminal history information. Each state, territory and federal police service has its own processes for recording details of court convictions and storing this information in its systems. Individuals and organisations who seek national criminal history checks through police services will be provided with a National Police Certificate.

Organisations requiring more than 500 police checks a year can register directly with the Commonwealth agency, CrimTrac, who will search nationally for potential matches against police data and coordinate the processing of criminal history information for these organisations.

National Police Certificates and CrimTrac criminal history information can only be obtained with the *written consent* of the individual concerned. Police will not release the results of a police check without this written permission.

The police service and CrimTrac require certain basic information on a ‘consent to release form’ to be filled out by the job applicant or employee. They may also require forms of identification from the applicants. Some police services have a standard form for consent listed on their website. Contact

details for state, territory and federal police services for criminal checking are provided at the back of these Guidelines.

It is not possible to limit the information requested to specific offences only in a police check. A police check will reveal all disclosable offences, including those which may not be relevant to the job. Only in circumstances prescribed by legislation, for example in the NSW working with children checks, is the result of the criminal record limited to those offences relevant to the job in question.

What is disclosed on a National Police Certificate?

The National Police Certificate will either indicate that no record is held or contain disclosable criminal history details.

A complete criminal record will usually 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.

Traffic infringements (except those of a serious nature), matters under investigation and police intelligence (records of investigation) will not usually be listed. Details of traffic infringements are mostly kept by road and transport authorities.

However, the information that is included on the National Police Certificate varies from jurisdiction to jurisdiction.

Spent convictions will not usually be listed on a police check, unless an exemption applies to a particular occupation. For example, for jobs working with children, or jobs in corrections, most spent convictions will usually be revealed on a check. However, an employer should be aware that the rules regulating what convictions may become spent differ in every jurisdiction.

This means that some old convictions may appear on criminal records. Generally the police service that is managing the check will apply the spent convictions legislation of each state to convictions which occurred within that state in deciding which convictions are disclosable.

An employer should also be aware that mistakes can occur in criminal record checks. For example, there may be a mistake in the identity of the person, or a conviction may be recorded when it should not have been.

Example of error on criminal record

M failed to pay a restaurant bill and was charged with obtaining goods by deception. At the court hearing M specifically addressed the Magistrate on the issue of a non-conviction disposition because he had concerns about the impact of a conviction on his employment prospects. M was found guilty and received a fine without conviction. Unfortunately for M the offence mistakenly appeared as a conviction on a police check undertaken by his employer within three months of the commencement of his employment. M pointed out this error to his employer, but he was not given time to correct the entry. M was dismissed. The Police Service admitted their mistake. The employer refused to withdraw the termination arguing that it was lawful because it fell within the three-month probationary period. M felt that the offence was irrelevant to his employment because it was trivial, irrelevant to his role in the work place and no conviction had been recorded.[42]

It is always best to *double-check* any information on police checks with the job applicant or employee. This includes checking the identity of the person concerned and the offences recorded. Incorrect or irrelevant aspects of a criminal record should be destroyed or omitted.

Employers should ensure that the criminal record information is stored securely and is not disclosed to any other party without the consent of the individual.

Private background checking organisations

There are a number of private background checking organisations which provide employers with criminal record details of individuals for a fee. The information is usually gained from court records or newspaper reports. These organisations are unable to obtain criminal history information through CrimTrac or police services.

Some private background checking organisations operate internet sites, where checks can be requested without the consent of the individual concerned. These organisations are covered by the Privacy Act. As they trade in personal information, they are not likely to be included under the small business exemption (see Section 6D(4)(c) of the Privacy Act. The employee record exemption is also unlikely to apply. Under the National Privacy Principles, organisations generally should not be collecting and disclosing sensitive personal information without the consent of the individual concerned. See Appendix 2.

In contrast, police record checks are conducted by federal, state and territory police services only with the written consent of the individual concerned. They are the most reliable sources of criminal record information, although not without error.

Guideline 5

[42] Fitzroy Legal Service and Job Watch, Submission to Discussion Paper on Discrimination in Employment on the basis of Criminal Record, Submission No. 89, p17.

Criminal record checks should only be conducted with the written consent of the job applicant or current employee.

Guideline 6

Information about a person's criminal record should always be stored in a private and confidential manner and used only for the purpose for which it is intended.

5.7 Requesting information about a person's criminal record prior to a police check

In general, it is not recommended that employers directly request criminal record information from job applicants prior to a police check.

If an employer asks a job applicant to disclose a criminal record in an application form, it means that an employer is collecting sensitive information from people who may or may not be shortlisted for the job, increasing the risk of breaches of privacy, and making them susceptible to complaints of criminal record discrimination. A police check will reveal the person's criminal record more accurately, explaining the criminal record in statutory terms rather than the common language of the applicant.

Of course, some applicants will decide to volunteer their criminal record at an earlier stage of the process.

If an employer does request information about a job applicant's criminal record prior to a police check, an employer should only ask relevant questions, and put in place processes to respect the privacy of the applicant. This encourages a free exchange of information.

For example, when framing questions, an employer should consider the relevance of:

- certain types of offences
- adult and juvenile offences
- spent convictions
- the differences between charges, findings of guilt with no-conviction and convictions.

The job applicant should be asked to submit their criminal record information on a separate sheet of paper to the main part of the job application, to ensure confidentiality. A statement reassuring the applicant about confidentiality should be included.

Examples of questions asking for disclosure from job applicants
Note that these examples have applied Commonwealth spent convictions law, where a conviction can only become spent if the sentence imposed was 30 months of imprisonment or less. These are examples only. Employers should always tailor their questions to meet the specific needs of the particular employment area and position.

General questions asking for disclosure of non-spent convictions only
1.Do you have any convictions which were imposed as an adult and which are less than 10 years old? If yes, please list the offence, date of conviction, and sentence received for each offence.

2.Do you have any convictions which were imposed as a juvenile and which are less than 5 years old? If yes, please list the offence, date of conviction, and sentence received for each offence.

3. Do you have any convictions which are over 10 years old (or 5 years for juvenile convictions), where the sentence imposed was greater than 30 months imprisonment? If yes, provide details.

Question where the employer has a complete exclusion from Commonwealth spent convictions laws
Under Statutory Rule No 227 of 1990, Schedule 4 of the Crimes Regulations, this authority has been granted a complete exclusion from the application of Division 3 of Part VIIC of the *Crimes Act 1914* for the purpose of assessing an applicant's suitability for [*name the relevant position*]. You are therefore required to provide details of all criminal convictions or findings of guilt recorded against you.

Series of structured questions where there is a need to screen for certain convictions only
It is an inherent requirement of the position of financial officer to be responsible for large amounts of money and to administer financial records. All previous convictions involving fraud or dishonesty are considered relevant to the position, although all applications will be assessed on a case-by-case basis.

1.Do you have any convictions for fraud or theft which were imposed as an adult and are less than 10 years old? If yes, provide details.

2.Do you have any juvenile convictions for fraud or theft which are less than 5 years old? If yes, provide details.

3.Do you have any convictions for fraud or theft which are over 10 years old (or 5 years for juvenile convictions), where the sentence imposed was greater than 30 months imprisonment? If yes, provide details.

5.8 Interviews

If a short-listed job applicant has already disclosed a relevant conviction to the employer, the selection interview provides an important opportunity to discuss the details of the person's conviction. However, it is advisable that employers not use the interview process to initiate questions about an applicant's criminal record without prior warning. Applicants should be given the chance

to prepare themselves for questions regarding their criminal history, if the record is considered relevant.

An employer should **not** ask a job applicant a question about a criminal record based on the appearance or other characteristics of the applicant. This could legally expose employers to claims of discrimination on the basis of imputed criminal record, or claims of discrimination on other grounds such as race.

It is possible that a job applicant voluntarily discloses their criminal record for the first time at the interview. In this case, an employer should allow the applicant to explain their offence and the reasons why they are raising it in the interview. An employer may suggest that the applicant return for a second interview when the employer has had a chance to consider the relevance of the criminal record and ask further questions.

Questions about a job applicant's criminal record should not require an applicant to disclose a spent conviction or any conviction or offence which is irrelevant to the job in question. Examples of broad ranging questions which may lead an applicant to reveal an irrelevant piece of information, such as a spent conviction, include

- Have you ever been in trouble with the police?
- Have you ever been to court?
- Have you ever been charged with a criminal offence?

5.9 Assessing a job applicant's criminal record against the inherent requirements of the job

In some cases, the connection between the criminal record and the job will be clear enough for the employer to decide easily on the suitability of the applicant for the job. For example, the employment of a person with a particular criminal record may be prohibited by legislation.

However, *in most cases* it will be unclear to the employer simply on the basis of the results of a police check alone whether or not the conviction or offence is relevant to the inherent requirements of the job. The result of a police check may include information which an employer may not fully understand, and may also include errors. Police checks also only include very basic information and do not include any details about the circumstances of the offence.

An employer will generally need to discuss the relevance of the criminal record with the job applicant, or invite them to provide further information, in order to assess whether the person can meet the inherent requirements of the job.

A discussion with the job applicant may take place in the standard interview process, as discussed above. The employer may also wish to provide the job

applicant with the opportunity to discuss the criminal record with one person only, rather than with an entire interview panel. An employer may also provide the questions he or she wishes to discuss in writing prior to the meeting.

The type of information which an employer may need to consider when assessing the relevance of a person's criminal record includes:

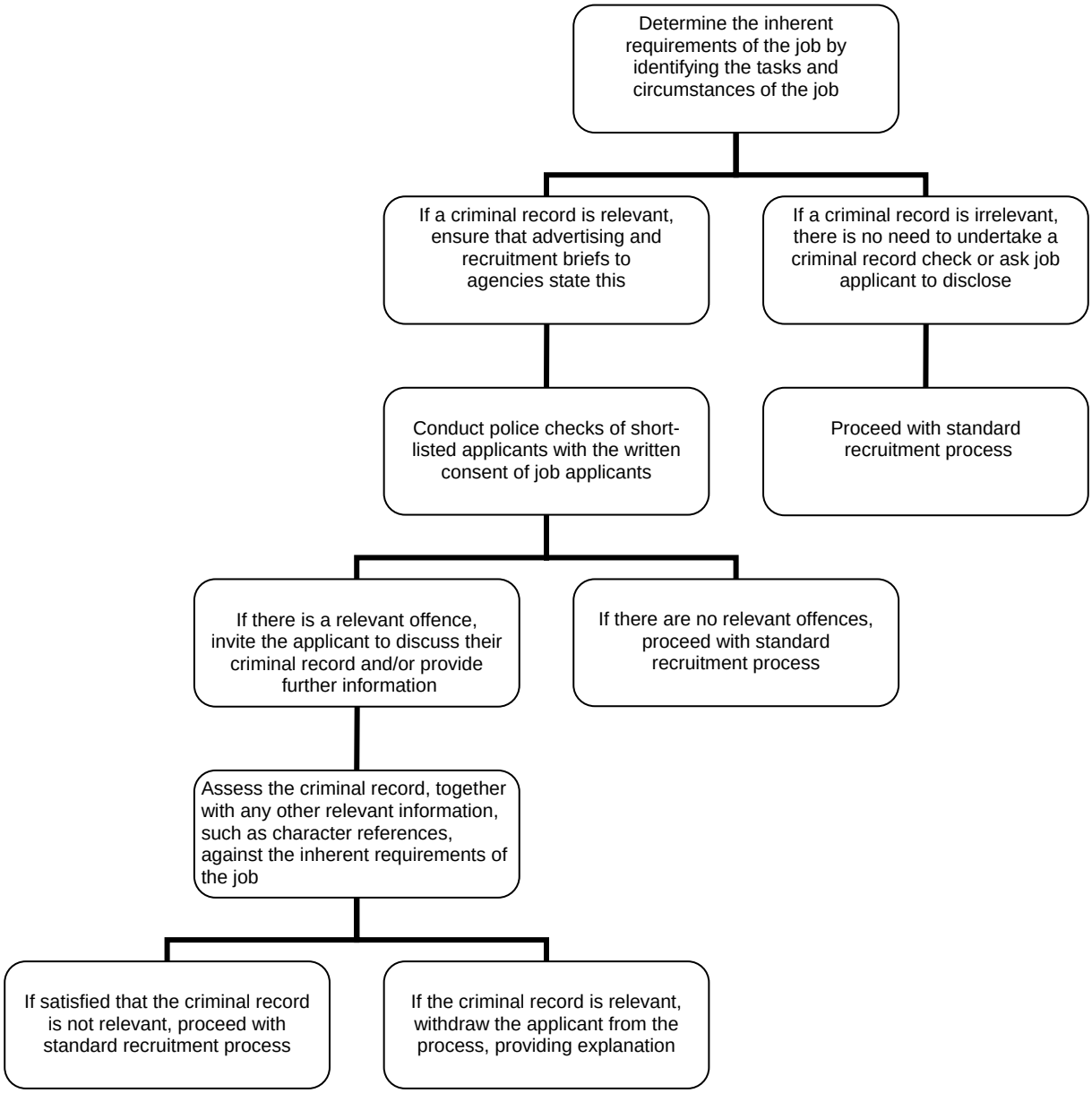
- the seriousness of the conviction or offence and its relevance to the job in question
- whether in relation to the offence there was a finding of guilt but without conviction, which indicates a less serious view of the offence by the courts
- the age of the applicant when the offences occurred
- the length of time since the offence occurred
- whether the applicant has a pattern of offences
- the circumstances in which the offence took place, for example if it was an offence that took place in a work, domestic or personal context
- whether the applicant's circumstances have changed since the offence was committed (for example, past drug use)
- whether the offence has been decriminalised by Parliament or it was an offence overseas but not in Australia
- the attitude of the job applicant to their previous offending behaviour
- references from people who know about the offending history.

This process is also relevant when considering the criminal record of a current employee against the requirements of their current position, promotion or transfer.

The more information available to the employer, the greater the likelihood that an employer can exercise reasonable judgment in assessing the connection between the criminal record and the inherent requirements of the job.

Given the assessment process described above, it is likely that an employer will scrutinise such an applicant more heavily than other applicants. Employers should be aware that this extra scrutiny may place added pressures on such applicants and employers should do their best to make the process as open as possible.

Figure 1: Steps for assessing the inherent requirements of the position against a particular criminal record at the recruitment stage



Guideline 7

The relevance of a job applicant or employee's convictions should be assessed on a case-by-case basis against the inherent requirements of the work he or she would be required to do and the circumstances in which it has to be carried out. A criminal record should not generally be an absolute bar to employment of a person.

Guideline 8

If an employer takes a criminal record into account in making an employment decision, in most cases the employer should give the job applicant or employee a chance to provide further information about their criminal record including, if they wish, details of the conviction or offence, the circumstances surrounding the offence, character references or other information, before determining the appropriate outcome in each case.

5.10 Feedback to job applicants on recruitment decisions

Once an employer has made a decision about a job applicant, an employer should give the person with a criminal record some feedback about the process.

If the job applicant is successful, he or she may be worried about whether the criminal record will be kept confidential. An employer should provide an assurance to the new employee that information about their convictions will not be disclosed to colleagues.

If the job applicant is unsuccessful, the employer should, where possible, explain the reasons for the rejection. Standard letters of rejection, however polite, reinforce the assumption of many people with a criminal record that disclosure leads to adverse consequences.

An employer could explain the following possible factors:

- that he or she was rejected because a conviction was considered relevant, and why
- constructive feedback on the job applicant's handling of the issue in interview
- any other reasons why the applicant was unsuccessful.

Details about the applicant's convictions should be kept only as long as necessary for the selection process.

6 Employment

6.1 Conditions of employment and discrimination on the basis of criminal record

The Commission accepts complaints of discrimination on the basis of criminal record from people who allege that they have been discriminated against in their conditions of employment. For example some people may feel discriminated against because they have been denied promotion or training on the basis of their criminal record. As with recruitment and termination decisions, an employer should only deny a person these benefits and conditions of employment if the criminal record is relevant to the inherent requirements of the job.

An employer should also ensure that the workplace is free from harassment for people with a criminal record. Ongoing harassment of an employee, by either an employer or other work colleagues, on the basis of criminal record, could constitute discrimination under the HREOC Act. It could also expose an employer to allegations of privacy breaches or of failure to ensure occupational health and safety in the workplace. An employer has a responsibility to treat all workers with respect and provide a safe workplace free from harassment.

A common complaint by people with a criminal record is that they are the first to be suspected when something has been stolen at the workplace. An employer should ensure that every person is questioned equally unless there is evidence to the contrary, without resorting to presumptions or stereotypes.

Example of Commission complaint: Harassment on the basis of criminal record

The complainant claimed that his employer insinuated that he was responsible for freight that had gone missing on a number of occasions. The complainant had a criminal record related to entering and stealing, and had gone to prison in 1996.

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 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's made me just want to give up working ever again to avoid the stress, worry, humiliation that I've endured. It's also placed a strain on my home life (complainant's statement on the Commission's complaints form).

Outcome: The matter was conciliated. The employer offered the complainant a redundancy package and the complainant withdrew the complaint.

6.2 Requesting criminal record information from current employees

In general, there is rarely a need for employers to ask current employees for their criminal record details. However, changes in the law or the workplace may have created a new organisational or industry-wide requirement to check the criminal records of some or all employees for relevant convictions. For example, there are new laws requiring background checks for employees working with children.

In these cases, an employer should only ask a current employee for information concerning their criminal record if it is a *specific question* and that question and the criminal record are relevant to the job.

Refer to Section 4.2 which outlines the main principles and processes involved in determining the inherent requirements of a job.

6.3 What happens if an employee failed to disclose their criminal record at the recruitment stage?

Sometimes a previously undisclosed conviction comes to light during the course of employment.

If the criminal record is relevant to the job, and an employee failed to disclose the criminal record at the recruitment stage when asked, an employer may have grounds for dismissing an employee**.**

However, an employer should think very carefully before taking this action.

The employer should consider:

- the relevance of the disclosed conviction to the particular job
- the reasons why the employee did not reveal the criminal record. Remember that there is no universal obligation for an applicant to voluntarily disclose a previous conviction
- the employee's work history with the employer
- any obligations under unfair dismissal laws.

If the offence for which the conviction was received is relevant, the employer may still take some alternative action other than dismissal. The employer could choose to keep the employee but transfer them to another position, or reorganise their duties so that their criminal record is not relevant to the new position. Failure to consider these matters and possible options other than dismissal may lead to a claim of unfair dismissal.

If the criminal record is irrelevant to the job, an employer should not dismiss an employee on the basis of their criminal record. A dismissal in these circumstances could amount to discrimination under the HREOC Act and may lead to a complaint to the Commission.

Dishonesty in the course of recruitment can provide a ground for termination under unfair dismissal laws but has been held to be supportable only where either the criminal record or the fact of dishonesty is relevant to the position.[43] The longer the employee's service with the employer, and the more exemplary the conduct of the employee, the more likely it is that the dismissal will be found to be harsh, unjust or unreasonable by industrial courts.

Employer example

A large insurance company recently introduced a policy for the background checking, including criminal record checking, of job applicants for many positions within the organisation. It found that the criminal records of some current employees were revealed for the first time when they applied for new jobs within the organisation. In one case this led to the dismissal of an employee because the offences and the manner of not disclosing were relevant to the position. However, in many cases of external applicants applying for roles and disclosing criminal conviction, the candidate is still offered the role. For example, one candidate was discovered to have a shoplifting offence, but this was considered in conjunction with other factors, and determined to be irrelevant to the administrative position that had been applied for. It is also company practice to give a job applicant and current employee a chance to have an interview concerning their criminal record before a detrimental decision is made. An employee relations officer from the company told the Human Rights Commissioner in project consultations that:

One of the issues in relation to the introduction of this policy was a concern by managers that we would make knee-jerk decisions and that anyone that had even a minor conviction would be excluded from employment. Many of those fears have been allayed over the period of time that the policy has been in place because they have seen us make mature, appropriate decisions.

[43] See, for example, *The Federated Miscellaneous Workers Union of Australia and Michell Leather [1992] AIRC Print K 1855 (Unreported, Commissioner Simmonds, 17 February 1992) 5; Richard Michael Parody and Australian Correctional Management Pty Ltd [2003] AIRC PR928052, (Unreported, Deputy President McCarthy, 21 February 2003),* S. Selleck, p19, FEDFEA v Shell Refining Co (1989) 31 AILR 430.

7 Dismissal

As discussed in Section 6.3, there may be circumstances where an employer decides to dismiss an employee on the basis of criminal record.

However, this step should never be taken lightly and should constitute a last resort for the employer after a consideration of all the issues. This will involve a consideration of an employer's legal responsibilities under anti-discrimination law and unfair dismissal laws (see Section 3).

An employer should only dismiss an employee on the basis of criminal record if the criminal record or failure to disclose is relevant to the inherent requirements of the job.

Section 4 sets out the factors which should be considered and the steps which should be followed when assessing the inherent requirements of a job and the relevance of an individual's criminal record against those requirements.

In most cases, an employer should not assess a person's criminal record as relevant without considering a range of factors including the nature and background of the offence. In order to assess this accurately, an employer will generally need to provide the employee with an opportunity, prior to a final decision, to discuss the criminal record and provide any material relevant to an assessment of the employee's suitability for the position. A final decision should not take place without providing this opportunity to the employee.

If there are no alternatives to dismissal of an employee, an employer should treat the dismissed employee with dignity and respect their privacy. This may include:

- explaining the reasons for the decision in full
- providing all entitlements on termination to pay and leave as required
- providing references where appropriate
- ensuring that information about the person's criminal record, including information relating to the dismissal, are kept confidential
- ensuring that relevant privacy, anti-discrimination and unfair dismissal laws are complied with.

8 Issues for special organisations

8.1 Licensing and registration organisations

There are an increasing number of professions and occupations which require licensing and registration before employment is possible. Key examples include teaching, nursing, casino workers, taxi drivers and bus drivers. Usually licensing and registration organisations apply specific legislation that requires a criminal check for each individual applicant.

The refusal of a licence or registration by an organisation on the basis of a person's criminal record may constitute discrimination under the HREOC Act. Even though a licensing board may not directly be responsible for employment decisions, it may be involved in making a distinction which has the effect of impairing employment opportunities on the basis of criminal record.

In order to avoid discrimination under the HREOC Act, licensing and registration organisations should ensure there is an opportunity for an individual assessment of a person's particular criminal record and the correlation between the criminal record and the inherent requirements of the job as set out in the licensing or registration regimes. 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.

Licensing body example

The Queensland Nursing Council issues licences for nurses and midwives in Queensland. Under the *Nursing Act 1992*, the Council can take into account a person's criminal history to decide a person's competence and fitness to practise nursing and whether a person is a suitable person to practise nursing or midwifery. Under the Act, a criminal history means every conviction and charge for an offence in Queensland or elsewhere.

However, there is no automatic disqualification from a licence because of a criminal record. If an applicant discloses a criminal record, the Nursing Council seeks a report from the Police to obtain more information. Applicants are encouraged to supply as much information as possible including certificates of conviction, transcripts of evidence and other court documents. The criminal history is then assessed by the Executive Officer to determine if it falls within a category of matters where the criminal history does not raise any concerns about suitability, fitness or competence of the applicant. The criteria for this decision is set out in a criminal history policy and includes such things as whether the conviction was an indictable offence, whether it was a single incident, length of time since the conviction or charge, and satisfactory references and supporting documents. The matter then may be dismissed at this stage. If not, it is referred to the Professional Standards Committee of the Nursing Council which also considers a full range of information and mitigating circumstances. The applicant is invited to make further submissions to the Council. There are a range of possible outcomes including imposition of conditions on the

licence, a further investigation, acceptance of an undertaking, or no further action taken (licence is issued).The applicant then has further appeal rights against a decision.

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.

As discussed in Section 4.5, although a law may provide for a licensing body to exclude an applicant who is not of 'good character', this may not necessarily enable a licensing body to exclude a particular person with a criminal record.

8.2 Employment agencies

Discriminatory practices by employment agencies may give rise to discrimination under the HREOC Act. Employment agencies should not discriminate on the basis of criminal record in their practices even if they are acting on behalf of employers. These Guidelines apply to employment agencies as well as employers.

Should an employment agency request criminal record details from a job applicant?

Whether an employment agency should request criminal record details from a job applicant or not depends on the type of service offered by the agency and its relationship with the employer.

For example, if an employment agency assists job seekers with resumes and interview techniques generally, and there is no relationship with a particular employer, there is no reason why an agency should ask a job applicant to disclose a criminal record. This question can be asked by employers themselves if they consider it necessary.

However, if the job seeker voluntarily discloses details of their criminal record to an agency and asks for assistance with preparing answers to questions about their criminal record, an agency may wish to assist the job seeker with information and guidance. An agency must still be aware of their obligations to maintain the privacy of the job seeker and not disclose any information regarding the criminal record without the consent of the job seeker.

If an employment agency has a closer relationship with employers, that is, it conducts the recruitment process on behalf of employers, the agency may request criminal record details from job applicants in appropriate circumstances. However, this should only occur where:

- there is a specific job in question, and it has been identified that a criminal record is relevant to the inherent requirements of that job. If there is a legislative requirement that certain convictions be disclosed, for example for the purposes of working with children, then it will be relevant to the job and an agency should inform the job applicant that they must disclose their offences

- the job applicant is fully informed of the reasons why a criminal record check might be relevant.

If a job applicant does not provide consent for a criminal record check, then an employment agency should not disqualify a job applicant from being put forward to an employer.[44] Instead, the agency could inform the employer that consent for disclosure has not been obtained. Employers can conduct their own criminal record check if they consider it relevant, having already had an opportunity to asses the merits of the job application.

Does an employment agency have a legal obligation towards an employer when a job applicant discloses a relevant criminal record?

The more extensive the employment agency's involvement in the placement of an employee, the greater the likelihood that the agency will owe some form of duty to the employer to ensure that the selected job applicant is suitable for employment in that particular job. However, this will depend on the particular facts of each case and the precise nature of the relationship between the parties.[45]

If an employment agency has involvement in the placement of an employee, an agency should always advise employers that they should make their own inquiries with respect to recommended applicants.

Can an employment agency apply for police checks with the consent of job applicants?

An employment agency can register with CrimTrac if it processes more than 500 requests for criminal record checks annually. It is still required to provide a consent form from each individual concerned.

Employment agencies can lodge requests for National Police Certificates issued by state, territory and federal police criminal record checking services, as long as they are obtained with the written consent of the individual concerned and are relevant to the inherent requirements of the job.

[44] See *Hosking v Fraser*, NT Anti-Discrimination Commission. See Section 5.1 of Guidelines.
[45] For example, see *Monie v Commonwealth of Australia* (2003) NSWSC 1141. That decision has now been appealed in the NSW Court of Appeal: 2005 [NSWCA] 25(7 April 2005).

9 Policies and procedures for preventing criminal record discrimination

Workplace policies and procedures on employing people with a criminal record can go some way to preventing discrimination. Having a policy and procedure is about creating a workplace environment that promotes fair and lawful treatment of job applicants and employees, rather than reacting, even if appropriately, to a problem when it occurs.

Due to the nature of the work, some employers already have in place comprehensive policies and procedures on employing people with a criminal record. Other employers may feel that criminal record issues are rarely raised in the workplace, and that there is no need to undertake preventative measures.

If an employer has identified that criminal record information is not relevant to the range of jobs in the workplace*, then it may not be necessary to develop a specific policy.*

Nonetheless, to reach that conclusion, each employer, no matter how small, should at least carefully consider the inherent requirements of employment at the workplace and reflect on how they would treat a job applicant or employee with a criminal record if that situation arose.

9.1 A written policy and procedure

If an employer decides that a criminal record is relevant to the positions of a workplace, a written policy can help ensure that all staff have an understanding of the organisation's requirements and the legal obligations of the organisation towards people with a criminal record. A policy and an outline of procedure can be incorporated into other workplace policy on equal opportunity and anti-discrimination if such policy exists.

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Ideally, a policy and procedure would include:

- a statement about the employer's commitment to treating people with a criminal record fairly and in accordance with anti-discrimination, spent conviction and privacy laws

- a brief summary of employee and employer rights and responsibilities under these laws, or inclusion of up-to-date literature which provides this information

- an outline of other relevant legal requirements for the workplace, such as the employer's responsibilities under licensing and registration laws, or working with children laws

- the procedure for assessing the inherent requirements of the position, requesting criminal record information if necessary and assessing individual job applications or employee histories

- information on internal or external complaint or grievance procedures if someone thinks they have been unfairly treated

- designated officers with responsibility for different elements of the procedure.

In order for a policy to gain widespread acceptance, it is vital that staff, workplace representatives and management are involved in the development of the policy.

Developing appropriate policies and procedures does not have to be overly complex or long. However, any policy should be clear, informative and available to all staff and job applicants.

Guideline 9

If criminal record information is considered relevant, an employer should have a written policy and procedure for the employment of people with a criminal record which can be incorporated into any existing equal opportunity employment policy, covering recruitment, employment and termination.

9.2 Training of staff

Staff involved in recruiting and personnel decisions should be especially trained in the policies and procedures of the organisation and any applicable legal requirements.

However, all staff should at least receive a copy of any written policy which outlines the right of employees and job applicants to be treated without discrimination and with respect for their privacy. It may also be useful to circulate the Key Points from these Guidelines to relevant staff.

Guideline 10

If criminal record information is considered relevant, an employer should train all staff involved in recruitment and selection on the workplace policy and procedure when employing someone with a criminal record, including information on relevant anti-discrimination laws.

9.3 Grievance and complaint process

Internal grievance procedures will maximise the possibilities for resolving a complaint within an organisation. This is especially relevant for decisions regarding current employees.

Many licensing and registration organisations also have review mechanisms for decisions to reject or revoke a licence or registration, which provides extra insurance that the organisation has acted fairly and lawfully.

However, in some cases, for example small business, external complaints procedures are more appropriate. Job applicants and employees who feel that they have been discriminated against on the basis of their criminal record should be informed of their right to complain to the Commission or the relevant state and territory equal opportunity body. A person can also complain to these bodies regardless of whether there is an internal grievance procedure in place.

Appendix 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 usually 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 respondent is usually the party who has been alleged to have discriminated. 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.

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 discuss 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 which has not been declined for one of the statutory reasons and 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 issue a notice to 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.

Appendix 2 – Summary of National Privacy Principles relevant to criminal record information

Summary of National Privacy Principles obligations under the Privacy Act relevant to criminal record information.

1. Collection
An organisation covered by the Privacy Act must only collect necessary criminal record information (for example, this should be information relevant to the job in question) and must collect it fairly and lawfully. Where criminal record information is sought, consent from a job applicant should be obtained before collecting the information.

2. Use and disclosure
An organisation covered by the Privacy Act must only use or disclose criminal record information in ways that are related to the primary reason for collecting the information and which individuals would reasonably expect to happen, or with the consent of the individual to the use or disclosure. An employer may use or disclose personal information to protect the health and safety of any person, or if they think that an unlawful activity has occurred, and the use of the disclosure is a necessary part of investigation or reporting the unlawful activity.

3. Data quality
An organisation covered by the Privacy Act must take reasonable steps to check that the criminal record information is of sufficient quality — accurate, complete and up-to-date — for the purpose. For example, this may mean asking the job applicant to verify the details on a police record check.

4. Data security
An organisation covered by the Privacy Act must keep criminal record information safe when it is in use and dispose of it securely when they are finished with it. For example, relevant criminal record information collected from job applicants may need to be disposed of as soon as the job applicant is unsuccessful in gaining the job, unless it is needed for future applications and the job applicant consents to this.

5. Openness
An organisation covered by the Privacy Act must have ready, in a document, some information about the way they handle personal information such as criminal record information in the business and to give more details if asked.

6. Access and correction
An organisation covered by the Privacy Act must give individuals access to all the criminal record information they hold about them unless one of the exceptions under NPP6.1 applies. It should also take steps to correct the information if it is wrong or give the individual reasons why it cannot be corrected. If an individual asks for correction of the information, a statement should be attached saying the individual disagrees with the information.

9. Transborder data flows
Where there may be a need for an organisation covered by the Privacy Act to transfer criminal record information overseas, NPP 9 prevents an organisation from disclosing personal information to someone in a foreign country that is not subject to

a comparable information privacy scheme, except where it has the individual's consent or in some other limited circumstance.

10. Sensitive information
Criminal record information is sensitive information for the purposes of the NPPs. With some specified exemptions under NPP 10.1, such as if required by law, NPP 10 prohibits the collection of sensitive information about an individual unless the individual has consented first.

Useful contacts

Human Rights & Equal Opportunity Commission

Level 8 Piccadilly Tower
133 Castlereagh Street, Sydney NSW 2000
Telephone: (02) 9284 9600
TTY: 1800 620 241 (free call)
Website: http://www.humanrights.gov.au
Complaints Information Web Pages at:
http://www.humanrights.gov.au/complaints_information/index.html
Information on criminal record discrimination can be found at
http://www.humanrights.gov.au/human_rights/criminalrecord.

Complaints Info line: 1300 656 419 (local call)

State and Territory Anti-discrimination and Equal Opportunity Agencies

Privacy

Office of the Privacy Commissioner

GPO Box 5218
Sydney NSW 2001
Telephone: 1300 363 992 (local call cost from anywhere in Australia)
TTY: 1800 620 241
Website: http://www.privacy.gov.au

Police criminal record checking services

Canberra Police Department and Australian Federal Police

Criminal History Branch
Locked Bag No.1
Weston ACT 2611
Telephone: (02) 6256 7777
Website: http://www.afp.gov.au/afp/page/Employment/CrimHistory/crimhterms.htm

New South Wales Police Department

NSW Police Criminal Records Section
Level B3 NSW Police Headquarters
1 Charles St Parramatta
NSW 2150
Postal address: Locked Bag 5102 Parramatta
NSW 2124
Telephone: (02) 8835 7888

Website:
http://www.police.nsw.gov.au/about_us/structure/support_command/forensic_services/related_information/criminal_records_section

Northern Territory Police Criminal History and Warrants Unit

Officer in Charge, Criminal History and Warrant Unit
Peter McAuley Centre
PO Box 39764
Winnellie NT 0821
Telephone: (08) 8922 3723
Website: http://www.nt.gov.au/pfes/police/services/chwu/index.html

Queensland Police Department

Manager, Police Information Centre
GPO Box 1440
Brisbane Qld 4001
Telephone: (07) 3364 6854
Website: http://www.police.qld.gov.au/pr/about/pri_plan.shtml#procedure

South Australia Police Department

Records Release Unit
SA Police
GPO Box 1539
Adelaide SA 5001
Telephone: (08) 8204 2455
Website: http://www.police.sa.gov.au (Click on Site Map, National Police Certificate, Application Form)

Tasmanian Police Department

Criminal History Services
Operations Support
GPO Box 308
Hobart TAS 7001
Telephone: (03) 6230 2928
(03) 6230 2929
Website:http:// www.police.tas.gov.au/permits/criminal-history

Victorian Police Department

Public Enquiry Service
PO Box 418
Melbourne VIC 8005
Telephone: (03) 9247 5907
Website: http://www.police.vic.gov.au/files/documents/515_820Ajun05.pdf

Western Australia Police Department

Manager, Information Release Unit
WA Police
4th Floor Public Trustee Building
565 Hay Street

Perth WA 6000
Telephone: (08) 9268 7661
Website: http://www.police.wa.gov.au/Services/Services.asp
or
http://www.police.wa.gov.au/Services/pdf/Natpolcertappform.pdf (form)

CrimTrac

GPO Box 1573
Canberra City
ACT 2601
Telephone: (02) 6245 7700
Website: http://www.crimtrac.gov.au

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Australian Council of Trade Unions

AMP

Australian Nursing Federation

Correctional Services Employment Pilot Program

Council for Equal Opportunity in Employment Ltd.

CrimTrac

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Motor Trade Association of South Australia Inc.

Able Traffic Management

Public Interest Advocacy Centre

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