

DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF CRIMINAL RECORD

Discussion paper summary

Introduction

Australians who have a criminal record often face significant barriers to full participation in the Australian community. Trying to find a job is one of the areas of greatest difficulty for former offenders.

Discrimination in employment on the basis of criminal record may occur if a person, because of their criminal record, is:

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

The Human Rights and Equal Opportunity Commission (the Commission) has received a significant number of complaints in recent years from people with a criminal record who believe that they have experienced discrimination in employment because of this record.

The Commission has decided that some further research and discussion in this area would be useful.

This research work will examine:

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

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

We are keen to hear from both employers and employees about their experiences in this area. A detailed discussion paper can be found on the Commission's website at www.humanrights.gov.au.

Complaints to the Human Rights and Equal Opportunity Commission

Complaints about discrimination in employment on the basis of criminal record may be made to the Commission. Between 2001 and 2003 the Commission finalised 103 complaints. These complaints have been reviewed as a part of this research project.

Complaints about equal opportunity in employment are made under the *Human Rights and Equal Opportunity Act* (Cth) (HREOC Act). Complaints received under this Act can

be resolved by conciliation between the parties. Conciliation is a process where the Commission brings the parties together – the complainant and the respondent – to try and resolve the matter. Conciliation is a confidential process where both parties are given the opportunity to talk through the issues and reach an agreement. Many complaints are successfully conciliated and this complaint information and complaint handling service is free.

However, if the matter cannot be conciliated, and it is not discontinued for other reasons provided for in the law, then the Commission will present a report to federal Parliament outlining the key issues and recommendations to resolve the complaint. These complaints do not have any enforceable legal remedies.

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

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

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

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

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

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

When might a criminal record be relevant to employment?

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

To avoid discrimination on the basis of criminal record, an employer can only refuse to employ a person if the person's criminal record means that he or she is unable to perform the 'inherent requirements' of the particular job.

This means that it must be essential that a person who does a particular job does not have a certain criminal record before an employer can refuse to employ them for this reason.

However, there can be difficulties in determining what the inherent requirements of a particular job are, and whether a person's particular criminal record will necessarily disqualify him or her from satisfying those requirements.

Some States and Territories have decided that there are particular types of employment, for instance in working with children, where people with a certain criminal record will not be able to be employed. In addition, some professional and occupational licensing bodies have considered the special characteristics of their field and developed licensing and registration rules which address the relevance of a person's criminal record to that profession.

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

However, no matter what the inherent requirements of a position are, and no matter what a person's criminal record, each person's ability to fulfil those requirements should be assessed on a case-by-case basis to avoid discrimination.

What must an applicant or employee disclose about their criminal record?

An applicant or employee is not obliged to voluntarily disclose anything about his or her prior record, if they are not specifically asked to do so. In some cases, however, legislation or licensing rules require disclosure. In other cases, the specific circumstances of the position may require disclosure.

However, an employer can generally ask a person if she or he has a criminal record and may be entitled to refuse to hire a person because he or she failed to answer a reasonable question, or gave a dishonest answer. When an employee does answer a question about criminal record, the response should be honest and fully candid.

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

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

How should employers make decisions about criminal record in employment?

Once an employer has gathered information about a person's criminal history, he or she will engage in a process of making decisions on the basis of that information.

The complaints before the Commission illustrate that there are many instances where recruitment or employment procedures are inadequate to ensure that people with a criminal record are assessed in an appropriate non-discriminatory manner.

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

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

Conclusion

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

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

Questions for discussion

The Commission welcomes your input regarding this issue – the following questions are intended to provide a starting point for any submissions you may wish to make.

- What practical difficulties face people with criminal records who are seeking employment?
- Do you know of any employers with a successful track record of employing people with criminal records?
- What strategies might assist in reducing discrimination in employment on the basis of criminal record?
- Do you have any examples where criminal record checks are conducted unreasonably?
- Is sufficient guidance available to employers to assist them in determining the inherent requirements of a job and in making decisions about particular employees?
- Do you have any examples of possible discrimination on the basis of criminal record?

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