

ON THE RECORD

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

These Key Points are a selective summary of *On the Record – Guidelines for the prevention of discrimination in employment on the basis of criminal record (On the Record)* (on the Commission website at http://www.humanrights.gov.au/human_rights/criminalrecord).

On the Record provides practical guidance on the rights and responsibilities of employers relating to discrimination on the basis of criminal record under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*. The following information is not intended to be (and should not be) relied on for legal advice.

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

There are some legal protections against discrimination on the basis of criminal record. If a person thinks they have been discriminated against in employment on the basis of criminal record, they can make a complaint to the Human Rights and Equal Opportunity Commission under the HREOC Act. The Commission will investigate the complaint, and if appropriate, try to resolve the complaint by conciliation. Conciliation is a process where the Commission brings the two parties together (in this case usually an employer and a person with a criminal record) to try to resolve the matter. This service is free. Many complaints are successfully conciliated, with a final agreement reached between the two parties.

Although the Commission may find that discrimination has occurred, 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.

What is the definition of 'discrimination' under the HREOC Act?

Discrimination in employment or occupation occurs when a *distinction, exclusion or preference made on the basis of criminal record has the effect of nullifying or impairing a person's equality of opportunity or treatment in employment or occupation.*

Examples of discrimination include when a person has been

- refused a job
- dismissed from employment
- denied training opportunities
- denied promotion
- subjected to less favourable working conditions
- harassed at work
- denied an employment-related licence or registration.

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 a criminal record.

What is the definition of 'criminal record' under the HREOC Act?

Under the HREOC Act, there is no definition of what constitutes a '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.

A person can also make a complaint against an employer about discrimination on the basis of 'imputed' criminal record. This is when an employer thinks a person has a criminal record, even if they do not have one, and treats the person unfairly as a result.

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.

What is not discrimination on the basis of criminal record under the HREOC Act?

Under the HREOC Act, it is not discrimination if the job applicant or employee's criminal record means that he or she is unable to perform the **inherent requirements** of the particular job.

That is, it is not discrimination if the criminal record is relevant to the job. For example, fraud convictions may be relevant to a job in financial management.

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.

If a person makes a complaint of discrimination against an employer, and the employer claims that the criminal record is relevant to the job, the Commission will investigate the complaint and make a decision on whether the employer's actions are justified by the inherent requirements exception.

More information about the case law in this area is provided in *On the Record*.

➤ Section 4.3

How do I determine the inherent requirements of a job?

To determine whether a criminal record is relevant to the job, an employer should assess information provided by each job applicant or employee on a case by case basis. A conviction should not generally be an absolute bar to employment.

Step One

Identify the essential tasks, circumstances and requirements of the job.

Step Two

Assess whether criminal records are relevant to these tasks and requirements.

Note: An employer may conclude that a criminal record is irrelevant 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.

Step Three

Assess an *individual* criminal record against the inherent requirements of the job.

In most cases it will be unclear to the employer simply on the basis of a police check alone whether or not the conviction or offence is relevant to the inherent requirements of the job, as police checks include only very basic information. An employer will generally need to provide a job applicant or employee with the opportunity to discuss their criminal record in more detail or to provide further information. More information about how to assess an individual criminal record is provided in *On the Record*.

➤ Section 5.9

An example of a complaint to the Commission

Ms C applied for a job as a bartender at a 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.

Ms C made a complaint to the Commission. The Commission agreed with the casino that it was an inherent requirement of the job that a barperson be of good character and trustworthy. However, it disagreed with the casino that Ms C's criminal record meant that she could not meet these requirements. Many factors were relevant to an assessment of her character 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.

Because Ms C's complaint was unable to be conciliated, in 2002 the Commission made a report to the federal Attorney-General recommending that the casino apologise to her and not exclude her from applying again.

(HREOC Report No 20)

Can I request criminal record information from job applicants?

In some circumstances an employer may be legally obliged to ask a job applicant for criminal record details, for example for jobs working with children.

In other circumstances, generally an employer is free to ask a job applicant if he or she has a criminal record *as long as there is a connection between the inherent requirements of a particular job and a criminal record*. Asking a job applicant irrelevant personal questions could lead to misunderstandings and claims of discrimination.

However, an employer should also be aware that a job applicant does not have to *volunteer* information about their criminal record to an employer unless there is a legal requirement to do so.

Also, if an employer asks a job applicant to disclose their criminal record, he or she may not need to disclose all of their criminal record. If a job applicant has an old conviction which is 'spent', they do not need to disclose the conviction to an employer, even when asked (except for some occupations such as correctional officers - see information below on spent convictions laws). If an employer asks a job applicant to disclose convictions only, a job applicant may not be obliged to disclose findings of guilt without a conviction recorded.

Police checks are the most reliable sources of criminal record information, although not without error. Police services require the written consent of the job applicant before they will release a person's criminal record to an employer. More information on recruitment is provided in *On the Record*. ➤ Section 5.

Other legal obligations

State and territory anti-discrimination laws

Tasmania and the Northern Territory have anti-discrimination laws that make discrimination on the basis of criminal record unlawful. 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 anti-discrimination laws, requesting information on which unlawful discrimination may be based is not permitted.

In WA and the ACT there are laws that prohibit discrimination on the basis of spent convictions.

Spent convictions laws

Spent convictions laws allow the criminal records of offenders to be amended or 'spent' after a certain period of time, usually subject to no future convictions. The laws apply to certain convictions only, mostly offences with short custodial sentences or lesser penalties. Under the laws employees or applicants are not required to disclose information about their spent conviction to anyone, even if asked about it, unless there is a special exemption or requirement under another law. In most cases an employer is also prohibited from taking a spent conviction into account in an employment decision. 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.

There are distinct differences between the spent convictions laws in each jurisdiction, so employers should be aware of which laws apply to them. A breach of the Commonwealth spent convictions law may be an interference with an individual's privacy under the Privacy Act, for which a complaint can be made to the Office of the Privacy Commissioner. There are also penalties for breaches of state and territory spent convictions laws.

Privacy laws

Federal, state and territory privacy laws generally prohibit the collection and use of personal information such as criminal records from job applicants in any unnecessary and excessive way. In certain cases private sector employers may be covered by the Commonwealth *Privacy Act 1988 (Cth)* in relation to job applicants. Complaints are made to the Office of the Privacy Commissioner.

Unfair dismissal laws

State and federal industrial laws may also protect people with a criminal record from unfair treatment at work, specifically from unfair dismissal. However, not all employees are covered by unfair dismissal laws. There have been a few decisions handed down by the Australian Industrial Relations Commission (AIRC) in circumstances where the alleged unfair dismissal was the direct result of an employer finding out about an employee's past criminal record.

Useful contacts

Human Rights and Equal Opportunity Commission

Level 8, Piccadilly Tower
133 Castlereagh Street, Sydney NSW 2000

GPO Box 5218, Sydney NSW 2001

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

Complaints Info line: 1300 656 419 (local call)

Information on criminal record discrimination can be found at:

http://www.humanrights.gov.au/human_rights/criminalrecord

Northern Territory Anti-Discrimination Commission

Level 7 National Mutual Building
9-11 Cavenagh Street Darwin NT 0800

Telephone: (08) 8999 1444

Toll free: 1800 813 846 (Australia wide)

TTY: (08) 8999 1466

Website: <http://www.nt.gov.au/adc/>

Tasmanian Office of the Anti-Discrimination Commissioner

Level 1, 54 Victoria Street
Hobart Tasmania 7000

Telephone: (03) 6233 4841 or
1300 305 062 (Statewide local call)

TTY: (03) 6223 6234

Website: <http://www.antidiscrimination.tas.gov.au>

ACT Human Rights Office

(for discrimination on the basis of spent convictions)

Level 12, 14 Moore Street, Canberra ACT 2601

Telephone: (02) 6207 0576

TTY: (02) 6207 0525

Website: <http://www.hro.act.gov.au>

Western Australia Equal Opportunity Commission

(for discrimination on the basis of spent convictions)

Level 2, 141 St George's Terrace Perth WA 6000

Telephone: (08) 9216 3900

Toll Free: 1800 198 149 (only within WA)

TTY: (08) 9216 3936

Website: <http://www.equalopportunity.wa.gov.au>

Office of the Privacy Commissioner

Level 8, Piccadilly Tower
133 Castlereagh Street, Sydney NSW 2000

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>

For spent convictions information, go to:

<http://www.privacy.gov.au/act/convictions/index.html>

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.